

Tuesday, May 23.

FIRST DIVISION.

[Lord Low, Ordinary
WINDRAM AND OTHERS (OWNERS
OF "BUCCLEUCH") v. ROBERTSON
(OWNER OF "KYANITE").

*Ship — Collision — Damages — Liability —
Wrong Manœuvre by One Vessel — Fault
on the Part of the Other, but not Directly
Leading to Wrong Manœuvre — Regulations
for Preventing Collisions at Sea.*

Owing to the defective lights of a sailing ship a steamer did not see it until there was risk of collision. The steamer did not stop or reverse, as required by the Regulations for preventing collisions at sea, but endeavoured to avoid a collision by starboarding her helm in order to turn away from the sailing ship and continuing to go full speed ahead. A collision took place two or three minutes after the sailing ship had been sighted. *Held* that the steamer was in fault, in respect that in the short interval of time after the sailing ship was sighted she had failed to stop or reverse, as required by article 23 of the Regulations of 1897, and had failed to discharge the onus, which lay on her, of showing that her failure to obey the Regulation was excusable by proving either that non-compliance with the Regulation was the only chance of escaping a collision, or that the risk of collision would have been increased by following the Regulation. The "*Khedive*," 1880, L.R., 5 A.C., 876; the "*Benares*," 1883, L.R., 9 P. Div. 16; the "*Memnon*," 1889, 6 Asp. Mar. Cas. 488; the "*Bywell Castle*," 1879, L.R., 4 P. Div. 219, *commented on and explained*.

The Merchant Shipping Act 1894 (57 and 58 Vict. c. 60), sec. 418 (1), enacts — "Her Majesty may, on the joint recommendation of the Admiralty and the Board of Trade, by Order in Council make regulations for the prevention of collisions at sea." . . .

The Regulations of 1897, made by Order in Council of 27th November 1896, provide— "Art. 20—When a steam vessel and a sailing vessel are proceeding in such directions as to involve risk of collision, the steam vessel shall keep out of the way of the sailing vessel. Art. 21—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. Art. 22—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. Art. 23—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."

On the 19th November 1903 George Windram, 12 Drury Lane, Liverpool, and others,

the owners of the sailing ship "Buccleuch," raised an action against William Robertson, 15 Gordon Street, Glasgow, owner of the steamship "Kyanite," in which they sought to recover damages for injuries received by their vessel in a collision with the defenders' vessel. On 4th December 1903 Robertson raised a cross-action. The owners of the "Buccleuch" based their action upon averments (1) that there had been no proper lookout on board the "Kyanite," and (2) that the manœuvre adopted by the "Kyanite" was wrong. The owner of the "Kyanite" based his action upon averments of defective lights on the "Buccleuch." The "Kyanite" was at the time of the collision in charge of the mate, Fife, and the "Buccleuch" was being overhauled on the side away from the "Kyanite" by the steamship "Ness," which was holding the same course as the "Buccleuch." The facts appear in the opinion of the Lord Ordinary.

On 12th July 1904 the Lord Ordinary (Low) issued an interlocutor, wherein he found that the collision was caused by fault on the part of those in charge of both vessels.

Opinion.—"On the evening of the 17th October 1903 the sailing ship 'Buccleuch' and the s.s. 'Kyanite' came into collision in the English Channel between Folkestone and Dover.

"The owners of these ships have brought cross actions of damages, each alleging that the collision was caused by the fault of the other. It is said on the one hand that the lights of the 'Buccleuch' (or at all events her port light) were so defective that they could not be seen by those on board the 'Kyanite' in time to prevent a collision, while upon the other hand it is said that no proper lookout was being kept on board the 'Kyanite,' and that when risk of a collision became serious the manœuvre which she adopted was wrong and unjustifiable.

"I shall first consider the question of the sufficiency of the lights of the 'Buccleuch' —[*His Lordship reviewed the evidence on this question*].

"That, I think, is the whole material evidence in regard to the condition of the 'Buccleuch's' lights, and it is plain that the question whether they were or were not sufficient at the time of the collision is very narrow and perplexing. I have, however, come to the conclusion that in fact they were not sufficient. . . .

"I am therefore of opinion that the 'Buccleuch' was in fault, and the next question is whether the 'Kyanite' was not also in fault.

"It is said that there was no proper watch being kept on board the 'Kyanite.' There is one very strong ground for supposing that that was the case, and that is that the mate and lookout never noticed the lights of the 'Ness.' They frankly admitted that that was the case, and said they could not account for it. The mate was extremely honest in his evidence upon the point, because when it was suggested that the lights of the 'Kyanite' might have been hidden

by the 'Buccleuch' as they were both sailing the same course he replied, 'If he had seen us we were bound to see him.'

"Notwithstanding that answer, however, I think that at times, and especially when the vessels were nearing each other, the 'Ness' may have been shut out of view of the 'Kyanite,' and that the fact that neither Fife nor M'Allister saw the lights of the 'Ness' does not necessarily lead to the conclusion that they were not looking out at all. I think, however, that the inference is that they were not keeping so constant or keen a watch as they ought to have done, especially in the busy waters of the Channel. Further, my impression is that if the 'Ness' had been seen by the 'Kyanite' the collision would have been avoided. I take it that it would have been the duty of the 'Kyanite' to keep clear of the 'Ness,' and if she had done so she would probably have also kept clear of the 'Buccleuch.' That, however, is by no means clear upon the evidence, and I need not consider the point further, because, in my opinion, the 'Kyanite' was otherwise plainly in fault. I refer to the manoeuvre which she adopted when she sighted the 'Buccleuch.'

"Fife then put his helm to starboard and continued to go at full speed ahead. That, as it happened, was the very worst thing which he could have done, because it took him right across the bows of the 'Buccleuch.' Captain Cowie, a gentleman of great experience, said that it would have been a proper thing for Fife to port his helm. That opinion, I think, was given in view of the fact that the 'Kyanite' and the 'Buccleuch' were crossing ships, and that it was the duty of the former to give way. But at the time Fife did not know that the 'Buccleuch' was a crossing ship. He had no idea in what direction she was sailing. All that he knew was that a ship under sail was in dangerously close proximity. In such circumstances I think that his duty was to stop and reverse. That was the one course which I think he could not have been wrong in following. What he did do was fatal if, as it turned out, the 'Buccleuch' was a crossing ship.

"Fife said that to have stopped and reversed would not have avoided the collision, because there was not time for the change in the motion of the engines to take effect. Whether that opinion is well founded or not depends upon how far the 'Buccleuch' was distant when Fife sighted her. He says that only half a minute elapsed before the collision. I think that that is an under estimate. After Fife sighted the 'Buccleuch' her master burned a blue light. The master says that the light had burned out some time before the collision, and other members of the crew say the same thing. The master of the 'Ness,' however, says that it was still burning when the collision occurred. I think that the inference from the whole evidence is that the light had very nearly, but not quite, burned out at the time of the collision. Now it appears that a blue light of the kind burns for several minutes, and accordingly I do not think that less than two or three minutes

could have elapsed between the time when Fife sighted the 'Buccleuch' and the collision. Now, Captain Cowie says that a steamer can be stopped from full speed ahead in less than one minute, and therefore, if the order to stop and reverse had been given immediately the 'Buccleuch' was sighted, not only might the way of the 'Kyanite' have been stopped before the time when the collision took place, but the reverse action of the engines might have come into operation. Further, the master of the 'Buccleuch' had very properly thrown his ship's head up into the wind, which stopped her way, and, if Fife had stopped and reversed, the probabilities are, so far as I can judge, that the collision would not have taken place.

"I am therefore of opinion that the 'Kyanite,' as well as the 'Buccleuch,' was in fault."

The owners of the "Buccleuch" reclaimed, and on the question of the manoeuvre adopted by the "Kyanite" argued—The Lord Ordinary was right in finding that there had been fault on the part of the "Kyanite." Her proper handling was to have stopped or reversed in accordance with article 23 of the regulations. These regulations were absolute, and must be observed wherever applicable—The "*Khedive*," 1880, L.R. 5 A.C. 876. The only excuse for non-observance would have been that there was no time to decide the applicability of the regulation, the ships being already in the agony of collision, or that the non-observance did not matter having in no way contributed to the collision. Neither of these could be advanced here.

Argued by the owners of the "Kyanite" on this question—The Lord Ordinary had erred in finding that there had been fault on the part of the "Kyanite" because of her handling. She was not bound to observe article 23 of the regulations, because owing to the fault in the matter of lights on the part of the "Buccleuch" the ships were already in the agony of collision, and those in charge of the "Kyanite" were entitled to do whatever seemed most likely to avert the collision. What she did do was the most likely thing to have averted the collision, and as a matter of fact very nearly did so—*Baker and Others v. Owners of the "Theodore H. Rand,"* 1887, L.R. 12 A.C. 247; The "*Benares*," 1883, L.R. 9 Prob. Div. 16; The "*Bywell Castle*," 1879, L.R. 4 Prob. Div. 219; The "*Memnon*," 1889, 6 Ap. Mar. Cases 488; Marsden on Collisions at Sea, 4th ed., chap. ii, p. 45; *Hine Brothers v. Trustees of the Clyde Navigation*, March 7, 1888, 15 R. 498, 25 S.L.R. 364; *Hock Van Holland Maatschappij v. Clyde Shipping Company, Limited (Owners of the "Arranmore")*, December 11, 1902, 5 F. 227, 40 S.L.R. 194.

At advising—

LORD PRESIDENT—This is an important case, and it has been very well argued before your Lordships. I do not think I need to recapitulate the circumstances of the case, because being fresh in your Lordships' memory, as far as you are concerned,

they are for others exceedingly well contained in the very careful judgment of the Lord Ordinary, which is the subject of this reclaiming note. That reclaiming note, presented by the owners of the "Buccleuch" has been taken advantage of by the owners of the "Kyanite," so that your Lordships have to consider the question of whether either or both of these vessels was in fault. Now, so far as the manœuvre is concerned, I do not think there has been any doubt—it is not contested even in the speeches of counsel—that so far as the "Buccleuch" was concerned, she is not to blame. The "Buccleuch" was a sailing ship, and as such she was entitled under the regulations to have steamers keep out of her way, and upon the approach of any steamer her proper proceeding was to hold her course. She did hold her course, and although at the very last moment she did execute the manœuvre of turning her head into the wind, she being at that time sailing very close to the wind, with the view of stopping, nobody says that she was not perfectly right in doing so; indeed, it did not alter her holding her course. But then there is the question of whether she on that night was sufficiently provided with lights so as to allow a steamer which was meeting her to see her in time to get out of her way. [His Lordship then reviewed the evidence on the question of lights.]

I do not know that I need to say any more upon this question of the lights. I have gone somewhat minutely into the circumstances to show that they have not been overlooked. I have admitted to your Lordships that I do not think that the matter is an easy one, but on the whole I think that the view the Lord Ordinary has taken in his very careful interlocutor is a perfectly sound view. I have therefore come to the conclusion that the lights on the "Buccleuch" on that occasion were not lights that were in accordance with the requirements of the collision regulations, and that in that matter the "Buccleuch" was in fault. Now, of course, if that is so, that prevents the "Buccleuch" recovering against the "Kyanite."

We have now to consider the question of the "Kyanite." On this branch of the case I am bound to say I have not personally felt any difficulty. I think the Lord Ordinary is clearly right, although I am not inclined to put much stress on what he alludes to in part of his judgment—I mean the supposed error in crossing the other ship's course. If we start with the assumption of the facts which I hold to be proved, namely, that the other ship had not adequate lights, although she had lights, the "Kyanite" found herself in dangerous proximity to something ahead, without being able to tell what the course of that something was. Of course we know the fact now, which is that the "Kyanite" did cross the course of the "Buccleuch," which in itself would be an improper manœuvre, but I do not think that she can be charged with any breach of the regulations, because, as has been often said in such cases, and indeed is quite obvious, you cannot in the

proper sense of the word break a regulation unless you know to what the regulation applies. I do not think those on the "Kyanite" knew what the other vessel's course was, or could know. The regulation which I think was contravened was article 23 for not stopping and reversing.

There was cited a good deal of authority upon this matter, and I am bound to say that I think the authority as determined by the judgment of the House of Lords is perfectly clear. The leading case is undoubtedly the case of the "*Khedive*," L.R., 5 App. Cas. 876, and the subsequent cases of the "*Benares*," L.R., 9 P.D. 16, and "*Memnon*," 6 Asp., M.C. 488, are not at variance with that authority. The "*Benares*" was not in a Court which could overrule the House of Lords. The "*Memnon*" was in the House of Lords, which does not overrule its own judgments. I think the two cases are perfectly in accordance with the case of the "*Khedive*." The judgment in that case was a very important one. Lord Blackburn in delivering the leading opinion in the House of Lords says, as plainly as he can say, that so far from the manœuvre in the case of the "*Khedive*" being a bad manœuvre, it probably was the best thing that could be done, and as matter of fact probably saved great loss of life, because he came to the conclusion that the manœuvre which was performed had the effect of bringing about a collision between the two ships side to side, whereas, if that manœuvre had not been performed, one ship would have sent the other to the bottom, and he held that as a seaman the unfortunate captain could not have done anything better than he did. Lord Blackburn felt it necessary to lay down as the law that the real meaning of these Rules of Collision at Sea was not that they were hints to people as to what they had best do in a certain condition of circumstances, but that they were absolute rules to be disregarded at the peril of those disregarding them, and the breach of which was only to be excused if a case of absolute necessity was made out. Now there were cited some authorities both in the English courts and in this Court before the "*Khedive*." I cannot help thinking that the mistake, which is a very common mistake, is that a generality is taken, and that the generality is too widely expressed; because there is nothing I think in the actual decisions of those earlier cases which seems to me inconsistent with the "*Khedive*." I think I cannot do better, to illustrate what I mean, than by taking the case of *Hine Brothers* in this Court, in 15 Rettie, p. 498, where the dictum of Lord Justice James in the "*Bywell Castle*," L.R., 4 P.D. 219, is quoted with approval. Let me remind your Lordships of the circumstances in the case of *Hine*, which were these. A large steamer called the "*Horatio*" was proceeding in the river Clyde on the wrong side of the river. It met a barge going in the opposite direction, which barge was upon the same side of the river, and therefore of course its right side. The barge, seeing that this large steamer

was coming right down upon it, and reflecting that in the impending collision the damage to it would be very much worse if it were to go straight on, crossed to the other or wrong side. Almost at the same moment the "Horatio" changed its course, and went over to its own right side of the river, with the result that a collision happened. It was maintained by the "Horatio" that the barge could not recover against the "Horatio," because the barge was at the time of the collision admittedly transgressing the rule by going to the wrong side. It was held, and I think perfectly rightly, that it was not in the mouth of the "Horatio" to say that, because it was the "Horatio's" own mistake that had caused the barge to go there. The general proposition which Lord Justice James in somewhat similar circumstances laid down in the case of the "*Bywell Castle*" was quoted with approval by the Lord Justice-Clerk in this case. His Lordship said "I desire to add my opinion that a ship has no right by its own misconduct to put another ship into circumstances of extreme peril and then charge that other ship with misconduct." That seems to me to be too absolute a proposition. Where your own misconduct leads directly to the breaking of a rule—it is true. But otherwise the true position is well laid down in the case of the "*Khedive*." These rules are things which cannot be broken except at your own peril. With regard to the "*Benares*," the facts of that case may be taken from the rubric—"A steamer, the G., saw a green light at some distance and starboarded her helm. Soon after the port side of the B., without a red light, came into view so close that the only chance of avoiding a collision was for the G. to continue at full speed a-head and starboard her helm, which she did. The B. struck the G. on her starboard side. Held that the B. was alone to blame for the collision, and that article 18 of the regulations did not apply under the circumstances to the G., and that article 23 was applicable." Now the Master of the Rolls (Brett) in deciding that case dealt with the question whether there had not been a breach of the regulations, and said—"By article 18 if there was nothing else in the circumstances he ought to have stopped and reversed. But the rules of navigation are contained not in one article but in all the articles, and article 23 is as much to be observed as article 18." One must construe that sentence by getting hold of the rules that were then in operation, which were not the rules we are dealing with now, so that numbers are misleading if taken without considering the rules to which they apply. Article 18 of those days is article 23 now-a-days. Article 23 which the Master of the Rolls (Brett) mentions is not article 23 now—[reads rule]. In the case of the "*Benares*" it was held to be made out on the facts that continuing full speed ahead and starboarding the helm was a necessary manœuvre to take—the only chance of escape. That is not inconsistent with the judgment in the "*Khedive*" case. That

judgment summarised is this—In impending danger of any sort you are entitled to a moment's hesitation in order that you may bring to your mind whether the rules apply or whether they do not, but once having that moment of hesitation, you are then bound to follow the rule. If you do not follow the rule you neglect it at your own peril. You may be able, as a matter of proof, the onus being upon you, to show that, following the rule, you would have increased the risk of collision, and that I think is the sentence that is quoted from the Lord Chancellor's judgment to us in the case of the "*Memnon*." The onus is upon you, and if you do not discharge it then you cannot be excused if you have not followed the rule. That is surely not only common sense but is very much accentuated when you have the state of the facts such as we find them in this case. I can understand that when a man is in a position where he sees that there is a chance of safety, it may be right that in what has been called the agony of the collision you are not to hold him too hard because he did his best. Although even there, in the light of the authorities that I have quoted, I think he would need to show not only that he did what he thought was best, but what other seaman would think was best, for the purpose of avoiding a collision. But if a person through no fault of his own is in a state from the circumstances of the case in which he cannot tell what is the right and proper manœuvre, then more than ever it seems to me he is absolutely bound to stick to the rules and to leave them at his own peril.

Now, applying these rules to this case, I do not think there is much doubt. Of course it is impossible to be very precise as to what distance off the "*Kyanite*" saw or ought to have seen the "*Bucleuch*" on the view that I have submitted to your Lordships that the "*Bucleuch*" had a light although a bad one. Then there is also the question of the time that was taken to burn the blue flare. I do not think it is necessary to go through evidence particularly upon that, but undoubtedly a blue flare did begin to burn before the collision. There was a small space of time given to the captain or the mate of the "*Kyanite*" in which to act. I may remind your Lordships of how extraordinarily small the time was that was given in the case of the "*Khedive*"—it was only from a minute to a minute and a-half—and yet there the captain was found to have been wrong in leaving the rules. In this case I cannot doubt that there was a small space of time in which to act, and that the person in charge had no certainty that any manœuvre would lead him to safety. The manœuvre that he took had this in its favour, that he saw something on the starboard bow, and that consequently he starboarded his helm, sending his ship to port, which of course would turn away from the object he saw, but which had the effect of making him cross the bows of the other vessel. But it is not on the question of his helm that I think he is liable or

wrong; it is entirely on the question of not stopping and reversing his engines. The learned counsel tried very hard to show that he was right in not doing so, because the effect of a right-handed screw on reversing the engines is to incline the vessel's head to starboard, and that was the quarter in which the danger appeared. But I have two observations to make on that point. Upon the expert evidence I do not think that that proposition is at all made out for the "Kyanite"; and secondly—and that is enough for me—it falls enormously short of proving that proposition, the onus of which is upon the "Kyanite"—I mean the proposition that is put by the Lord Chancellor in the case of the "*Memnon*," and which I think was held affirmatively in the case of the "*Benares*." The evidence on that matter stands thus—The expert for the "Buccleuch" states that the proper thing was to have reversed, and being crossed this point is put against him by the other side—"(Q) Assuming that the light on the sailing vessel is so bad that she is very close on the starboard bow of the steamer before she is visible, and that it is impossible in the dark to tell what course the sailing vessel is on, is it not a seaman-like course to keep full speed ahead on a hard-a-starboard helm?—(A) No, his duty was to put his engines full speed astern, and indicate by signal what he was doing." That is the evidence of the pursuer's expert. With regard to their own expert—Mr Dick, when examined in chief, says—"Supposing the ship's sails loomed up at a distance of about 700 feet suddenly on the starboard bow of a steamship, in my opinion a reasonable course for the man in charge of the steamship to pursue would be to turn away from it by starboarding," and in cross-examination he is asked—"Would it not be the proper thing for a prudent seaman to do, just because he did not know what was the course of the other boat, to stop and reverse?—(A) That would be the one course, but I think the other was a perfectly good course." So that it seems absolutely impossible on that evidence to hold that the onus, which on this matter I hold in accordance with the authorities was on the "Kyanite," has been in the slightest degree discharged. For these reasons I have come to the conclusion that on the second branch of the case the Lord Ordinary is right, and I think your Lordships should adhere to his interlocutor.

LORD ADAM—[*After dealing with the question of the "Buccleuch's" lights, in which he agreed with the Lord President*]—On the question as to whether the "Kyanite" was in fault, I agree with your Lordship in thinking that the captain acted without any sufficient justification and in contravention of article 23 in not stopping and reversing his engines.

On these grounds I agree with your Lordship in thinking that the Lord Ordinary's interlocutor should be adhered to.

LORD M'LAREN—[*After dealing with the question of the "Buccleuch's" lights, in which he concurred*]—On the question of

the liability of the "Kyanite" I agree with your Lordships that the fault of the "Kyanite" consisted in not stopping and reversing. I do not think they have been successful in establishing that they come within the very narrow margin of exceptions; that is permissible in applying that rule as interpreted by the judgment of the House of Lords in the case of the "Khedive." The only reason suggested for treating the case as exceptional is that the "Kyanite" was a single screw vessel, and with a single screw when the engines are reversed there is a tendency—I do not think it is put more strongly than that—there is a tendency for the ship's head to turn in one direction or the other according as the pitch of the screw is what is termed right-hand or left-hand. Now, these regulations are framed by experts and under the Board of Trade. They are authorised by Parliament and have the force of an Act of Parliament, and I think they were designed upon the view that those who framed those rules were perfectly aware that there were such things as single screws as well as double screws, depending upon the size of the vessel, and if they had thought that the rule did not apply to the single screw vessels they would have said so. I agree with an observation made by your Lordship in the chair that this tendency, as long as the ship was making forward way, could always be counteracted by the helm. After she ceases to be under way, the object of the manœuvre has been attained, because the vessel is then at a standstill, and a collision is either averted, or at all events it is diminished as much as possible. I therefore agree that the neglect to stop and reverse the engines was an error of judgment on the part of the mate which, although possibly in a question of his being tried for mismanagement would be a good defence, is not a defence which will exempt the owners from liability for negligence.

LORD KINNEAR concurred.

The Court adhered.

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Counsel for Robertson (Owners of the "Kyanite")—Aitken, K.C.—Spens. Agents—J. & J. Ross, W.S.