Marsden and Gault

on Collisions at Sea

Sweet & Maxwell

Summary of Contents

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THE COLLISION REGULATIONS ANNOTATED

where more than one vessel was at fault has varied over this period. Secondly, the duty for ships in collision to stand by and exchange particulars after the collision has evolved in parallel to the evolution of the Collision Regulations.[10]

III. PERIOD I—RULES BEFORE 1840

§ 6:3 Generally

Many years before the rule of the road at sea was regulated by Act of Parliament, the practice of seamen had established rules to enable approaching ships to keep clear of each other. These rules, which are the foundation of those now in force, were well established by custom, and formed part of the general maritime law recognised and enforced by the Admiralty Court.

§ 6:4 Leeward vessel becomes stand-on vessel

In "A Book of Orders for the War both by Sea and Land", written by Thomas Audley at the command of King Henry VIII in about 1530,[1] an article directs that no captain shall take the wind of an admiral except by necessity, and the Earl of Warwick's Sailing Instructions of 1645,[2] and the Duke of York's Sailing Instructions of about 1670 both contain an article to similar effect. The rule that a ship with the wind free must give way to a ship close-hauled appears to have been first recognised by the courts in Lord Erskine's time, "in a case tried at Guildhall before Mr Justice Buller". In 1815, the rule was held to be that:

> The law imposes on the vessel having the wind free, the obligation of taking proper measures to get out of the way of a vessel that is close hauled, and of shewing that it has done so, if not, the owners of it are responsible for the loss which ensues.[3]

The rule was justified on the relative convenience of the windward vessel taking avoiding action, as against the leeward vessel losing ground. In 1828, the rule was stated:

> The ship which has the wind at large may go either to leeward or to windward but, as a general rule, she ought to expect that the ship which is

[10]Merchant Shipping Act Amendment Act 1862 s.33; Merchant Shipping Act 1871 s.9. Merchant Shipping Act 1873 s.16; Merchant Shipping Act 1894 s.422; Merchant Shipping Act 1995 s.92.

[Section 6:4]

[1]Harl. MSS. 309, f.10, in Hodges and Hughes, Select Naval Documents (Cambridge University Press, 1922).

[2]Ad. Ct. Ree Miscell. bundle 56.

[3]*The Woodrop-Sims* (1815) 2 Dods 83 at [86]–[87].

close-hauled will keep to windward, and therefore she ought to go to leeward, unless it is quite clear that she can go to windward with safety.[4]

In *Jamieson v Drinkald*,[5] expert evidence as to the custom was heard. The judge had "the assistance of two Brethren of the Trinity House, to explain the duties of the masters of both ships"; the custom was evidently recognised by the elder brethren.

§ 6:5 Port tack rule not recognised

Neither in Audley's "Book of Orders", nor the Earl of Warwick's or the Duke of York's Sailing Instructions, nor in any of the pleadings or sentences of the seventeenth centuries, is there any trace of the "port tack" rule. The earliest reported reference appears in submissions in *The Resolution*[1] decided in 1789. The "rule" that a vessel on the port tack should keep out of the way of another on the starboard tack was said to have been framed by Lord Howe in America seven or eight years previously. However, the Trinity Masters declined to recognise it as a rule of navigation and it was not then a generally recognised custom. The rule was later relied on by the claimant owners of *The Susan* in *"The Chester"*,[2] but the case was instead decided on the basis: (i) that *The Chester* admitted she had had the wind free, and was accordingly obliged to keep clear of *The Susan* which had been close-hauled; and (ii) that she had kept an improper look-out. Accordingly, it was irrelevant which tack *The Susan* had been on, the material fact was that she had been close-hauled. Although the port tack rule was stated in at least one contemporary instruction book for sailors as being general practice,[3] it is unclear whether the rule was judicially approved before the Trinity House Sailing Regulations of 1840. The cases reported before 1840 where sailing vessels were on opposite tacks all appear to have been decided either on the basis that one vessel had had the wind free, or there had been a negligent look-out; this indicates that the port tack rule had not then been recognised.

[4]*Handaysyde v Wilson* (1828) 3 C. & P. 528.

[5]*Jamieson v Drinkald* (1826) 5 L.J.C.P. (O.S.) 30.

[Section 6:5]

[1]*The Resolution*, Mars. Ad. Cas. 332.

[2]*"The Chester"* (1836) 3 Hagg. 316.

[3]R.H. Dana, The Seaman's Manual (Moxton 1841), p.211.

IV. PERIOD II—1840 TO 1846

§ 6:6 Generally

In 1840 the London Trinity House promulgated regulations[1] setting out recognised rules based on existing practice for sailing vessels and two new rules for steamships. The provisions for steamships were as follows:

> When steam vessels on different courses must unavoidably or necessarily cross so near that by continuing their respective courses there would be a risk of coming into collision, each vessel shall put her helm to port,[2] so as always to pass on the larboard side of each other.
>
> . . .
>
> A steam vessel passing another in a narrow channel must always leave the vessel she is passing on the larboard hand.

The regulations for sailing ships included the rule that a vessel on the port tack give way to a vessel on starboard, where both were close-hauled. Additionally, a rule stipulated that where two sailing vessels both having the wind free appeared at risk of collision, both would put their helms to port.

These regulations had no statutory authority, nor were they rules of law, but were recognised and enforced by the Admiralty Court.[3] They were authoritative evidence of what seamen ought to do in circumstances in which the regulations were applicable,[4] but the primary rule was to avoid a collision, if it could be done with safety.[5] During this period the result of disregarding the regulations on the rights and liabilities of shipowners depended on principles of law unmodified by legislative enactment.

V. PERIOD III—1846 TO 1851

§ 6:7 Early penalties for infringements

Section 9 of the Steam Navigation Act 1846 enacted the substance of

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[Section 6:6]

[1]See 1 Wm. Rob. 488 for text.

[2]Old helm orders result: the vessel would go to starboard.

[3]Other bodies, such as port authorities, also made regulations for collisions, e.g. Liverpool, where the locally applicable regulation was a steamship at risk of collision to starboard her helm, the opposite of the Trinity House regulations. This divergent practice was the cause of several casualties. See "Report of Select Committee on Shipwrecks" 1843, House of Commons. However, the Admiralty Court enforced the Trinity House regulations.

[4]*The Duke of Sussex* (1841) 1 Wm. Rob. 274; *The Unity* (1856) Sw. 101; *The Hope* (1840) 1 Wm. Rob. 154; *The Immaganda Sara Clasina (1850) 7 Not. of Cas. 582*, 8 Moo P.C. 85; *The Friends* (1843) 1 Wm. Rob. 484; 4 Moo. P.C. (1844) c.314.

[5]*The Test* (1847) 5 Not. of Cas. 276.

the new Trinity House rules for steamships, with some elaborations. They were made statutory obligations and a penalty was imposed on masters who disobeyed them. In this statute the starboard side of narrow channels rule appears specifically for the first time.

Under the statute the Admiralty Regulations of 1848[1] as to lights were promulgated. Observance of the Admiralty Regulations was enforced by a penalty on masters and by a provision[2] that the owner of a vessel in breach of them in rivers or narrow channels, or in the sea within 20 miles of Great Britain, should not be entitled to recover any damages which might be sustained by such vessel in consequence of any other vessel running foul of her at night. In other respects during this period the rights and liabilities of shipowners remained unaltered if negligence caused damage by collision, liability and a corresponding right to recover arose.

VI. PERIOD IV—1851 TO 1863

§ 6:8 Penalties for infringements enlarged

By the Steam Navigation Act 1851, the statutory rules for steamships enacted in the Act of 1846 were repealed, but, in substance, re-enacted in different terms, and continued in force until repealed by the Merchant Shipping Repeal Act 1854,[1] and replaced by the rules enacted in the Merchant Shipping Act 1854,[2] under which the port to port rule was applied to all ships, steam and sailing, but the starboard side of narrow channels rule was continued in force for steamships only. In each of these Acts, powers to make regulations were conferred, and under them Admiralty Regulations respecting lights for both steamships and sailing vessels under way were issued in 1852,[3] and 1858,[4] and in the latter year regulations respecting fog signals, lights for pilot vessels and vessels at anchor were added. As in the last period, there appears to have been no direct statutory injunction to obey the regulations. During this period the liabilities of owners for breaches of regulations remained as before, but their rights were curtailed by sections enacted both in the Steam Navigation Act 1851, and the Merchant Shipping Act 1854, to the effect that if a collision was occasioned by the non-observance of any of

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[Section 6:7]

[1]Under powers given in Admiralty Regulations 1848 s.10; *The London Gazette* 11 July 1848, 29 May 1849. These rules ordered masthead and red and green port and starboard lights for steamships, and are substantially similar to those now in force.

[2]Admiralty Regulations 1848 s.12.

[Section 6:8]

[1]Merchant Shipping Repeal Act 1854 s.3 and Sch.

[2]Merchant Shipping Act 1854 ss.3, 4, 296, 297.

[3]*The London Gazette*, 4 May 1852 S.App. p.i.

[4]*The London Gazette*, 24 February 1858 S.App. p.vi.

the rules as to lights or navigation contained in or made under those Acts, the owner of the ship by which the rule was infringed should recover no damages for injury to his ship, unless it was proved that the departure from the rule was necessary.

Section 28 of the Steam Navigation Act 1851, provided:

> If in any case of collision between two or more vessels it appear that such collision was occasioned by the non-observance of either of the foregoing rules with respect to the passing of steamers, or [the rule as to ships' lights made under the powers of the Act] . . . the owner of the vessel by which any such rule has been infringed, shall not be entitled to recover any recompense whatever for any damage sustained by such vessel in such collision, unless it appears to the court before which the case is tried that the circumstances of the case were such as to justify a departure from the rule, [etc.].

Section 298 of the Merchant Shipping Act 1854, provided:

> If in any case of collision it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any rule, [etc.] the owner of the ship by which such rule has been infringed shall not be entitled to recover any recompense whatever for any damage sustained by such ship in such collision, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary.[5]

The effect of these enactments was to abrogate the Admiralty Court rule, that a wrongdoing vessel should recover half her loss if the other ship was also in fault, in the case of a vessel which had unnecessarily infringed the statutory rules. This effect was probably not appreciated by the legislature.[6] In each case the question had to be tried whether the infringement was negligence contributing to the collision, and if it was so held, the infringing vessel was liable to the other, but could herself recover none of her damage where the other vessel was also to blame.

Tuff v Warman[7] was an action at common law, against a Trinity House pilot for negligence in navigating a steam vessel, *The Celt*, which was in collision in the Thames with the plaintiff's sailing barge. It was heard before Willes J and a jury. It was held in this and other cases,[8] upon the construction of these enactments, that though the claimant had infringed the regulations, and by his negligence had brought the ships into danger, yet if the defendant could by reasonable care have avoided the collision, the claimant could recover, as under such circumstances the collision was not "occasioned" by the non-observance of the rule. Where one ship,

[5] *The Juliana* (1857) Sw. 20.

[6] *The Swanland* (1855) 2 Ecc. & Ad. 107 at 110.

[7] *Tuff v Warman* (1857) 2 C.B. (N.S.) 740 on appeal (1858) 5 C.B. (N.S.) 573.

[8] *Morrison v General Steam Navigation Co* (1853) 8 Ex. 733; *The Vivid* (1856) Sw. 88, affirmed 10 Moo. P.C. 472, Cas; *The Aliwal* (1854) 18 Jur. 296; *The Telegraph*, *Valentine v Cleogh* (1854) 1 Sp. 427; *The Juliana* (1857) Sw. 20; *The Fairy* (1855) Sp. 298; *The Wansfell* (1855) 1 Sp. 271.

A, was in fault as a matter of seamanship for not keeping a look-out, and the other, B, was in fault for infringing the statutory rule, it was held that A could recover half her loss under the Admiralty rule of equal division of loss then in force[9] and that B could recover nothing.[10] But it was held that s.298 of the 1854 Act did not prevent the owner of cargo on board a ship infringing the statutory rule from recovering half his loss.[11]

The regulations in the Merchant Shipping Act 1854 did not apply to all collisions involving foreign vessels, and where they did not apply, the Admiralty Court applied the "law of nations" to judge whether there had been negligence in navigation. Hence in 1861, the Privy Council described the rules for sailing ships where the regulations did not apply to be:

> . . . when two vessels are approaching each other nearly on the same course, and both have the wind free, each vessel is bound to port her helm and run to starboard of the other, but when one vessel is close-hauled, the running ship, that is the ship that has the wind free, is bound to make way for the close-hauled ship.[12]

In substance, this statement followed the rules stated in the 1854 Act, and effectively, this allowed a wider application of the Act to situations where statute might not apply.

VII. PERIOD V—1863 TO 1873

§ 6:9 Statutory presumptions of fault

By the Merchant Shipping Act Amendment Act 1862,[1] the whole of the existing regulations, including such of the Trinity House Regulations as had not already been superseded, were expressly or impliedly repealed, and one complete code, as amended by the Order in Council,[2] of 9 January 1863,[3] was substituted from 1 June 1863. This enactment placed all the regulations on the same footing and made it a distinct breach of duty to disobey any one of them. This, it is submitted, made a material difference in the legal effect of disobedience to the regulations of 1863 from that which had followed from disobedience to earlier regulations, certainly in the case of the Trinity House Regulations, probably in the case of the Admiralty Regulations as to lights, etc, and possibly even of the rules enacted in previous statutes.

[9] See above.

[10] *The Aurora* (1860) Lush. 327.

[11] *The Milan* (1861) Lush. 388.

[12] *Williams v Gutch "The Chancellor and the Egyptian"* (1861) 15 E.R. 281; XIV Moore 202 at 207.

[Section 6:9]

[1] Merchant Shipping Act Amendment Act 1862 s.25 and Schs A and C.

[2] *The London Gazette*, 13 January 1863; Lush. App. pp.i and LXX ii.

[3] Made under Merchant Shipping Act Amendment Act 1862 s.25.

Section 298 of the Merchant Shipping Act 1854 was repealed, and thereby the Admiralty rule as to the division of damages where both ships were to blame was restored in the case of a vessel guilty of an infringement of the regulations. In lieu of the penalty imposed by that section it was enacted by s.29 of the Merchant Shipping Act Amendment Act 1862 that:

> If in any case of collision it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any regulation made by or in pursuance of this Act, the ship by which such regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made a departure from the rule necessary.[4]

It is desirable in considering the Merchant Shipping Act Amendment Act 1862 s.29 and its equivalents in later legislation, to bear in mind the "Proviso to save special cases" contained in art.19 of the regulations of 1863, and the corresponding provisions,[5] which are in approximately similar terms, in subsequent regulations.[6] The terms of art.19 were as follows:

> In obeying and construing these rules, due regard must be had to all dangers of navigation: and due regard must also be had to any special circumstances which may exist in any particular case rendering a departure from the above rules necessary in order to avoid immediate danger.

The rights of owners were restored by the Merchant Shipping Act Amendment Act 1862 s.29 to what they had been before 1851, but their liabilities were for the first time increased by legislation. How far these liabilities were increased is somewhat uncertain, for the question as to whether the infringement was negligence contributing to the collision had still to be tried, and until that question was decided adversely to the infringer, no presumption of fault arose.[7]

In *The Fenham*[8] a steamer sighted a sailing vessel on a misty evening after sunset, the sailing vessel carried no lights and the steamer was in fault for various reasons for the collision which ensued. At first instance, the sailing ship had been held not to blame, because with ordinary care the steamer might have avoided the collision. However, in the Privy

[4]The wording in this section seems to have been suggested by a passage in the judgment of Cockburn CL in *Tuff v Warman* (1857) 2 C.B. (N.S.) 740 on appeal (1858) 5 C.B. (N.S.) 573. Under this Act the following cases were decided: *The Fenham* (1870) 6 Moo. P.C. (N.S.) 501; L.R. 3 P.C. 212; *The Bougainville and James C. Stevenson* (1873) L.R. 5 P.C. 316; *The Palestine* (1865) 3 W.R. 111; *The Pennsylvania* (1870) 23 L.T. 55.

[5]"Articles" up to 1 January 1954, "rules" in the Regulations for Preventing Collisions at Sea which came into force on that date and subsequently.

[6]*The Memnon* (1889) 6 Asp. M.C. 488; 62 L.T. 84 at para.5-035 (r.2(b) of the present Collision Regulations).

[7]*The Voorwaarts and the Khedive* (1880) 5 App. Cas. 876 at 892, per Lord Blackburn.

[8]*The Fenham* (1870) 6 Moo. P.C. (N.S.) 501; L.R. 3 P.C. 212.

Council this decision was reversed on the ground that when it was proved that a vessel had not shown proper lights, the onus lay on her to show that the non-compliance with the regulations was not the cause of the collision, and this the sailing vessel had failed to do.

It is not apparent from the reports whether this decision proceeded on the ground that proof of the breach of the statutory duty to exhibit lights cast on the vessel, by which the regulation had been infringed, the onus of proving that the absence of lights had not contributed to the collision, or on the ground that the presumption of fault enacted by the Merchant Shipping Act Amendment Act 1862 s.29 caused the onus to shift. It is submitted[9] that the former is the ground of the decision, because the presumption of fault under s.29 only arose after it had been proved that the collision had been occasioned by the infringement. But even if this is so, the decision cannot now be regarded as of authority since *The Aeneas*,[10] in which *The Fenham*[11] was followed, was overruled by the House of Lords in *The Heranger*.[12] It would seem that the application of the doctrine in *Tuff v Warman*[13] as to the construction of the word "occasioned", used in the enactments in force in this and the previous period, prevented s.29 from having the effect which those who framed it wished, and that for this and other reasons, s.17 of the Merchant Shipping Act 1873,[14] which will be considered later,[15] was passed.

§ 6:10 Failure to stand by

By s.33 of the Merchant Shipping Act Amendment Act 1862, "standing by" was made a statutory duty for the first time and a penalty[1] was imposed by the section:

> In every case of collision between two ships it shall be the duty of the person in charge of each ship, if and so far as he can do so without danger to his own ship and crew, to render to the other ship, her master, crew, and passengers (if any), such assistance as may be practicable and as may be necessary in order to save them from any danger caused by the collision: In case he fails so to do, and no reasonable excuse for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect or default.

[9]With some hesitation in view of what Lord Blackburn said in *Voorwaarts and the Khedive* (1880) 5 App. Cas. 892 at 893.

[10]*The Aeneas* [1935] P. 128.

[11]*The Fenham* (1870) 6 Moo. P.C. (N.S.) 501; L.R. 3 P.C. 212.

[12]*The Heranger* [1939] A.C. 94.

[13]*Tuff v Warman* (1857) 2 C.B. (N.S.) 740, affirmed (1858) 5 C.B. (N.S.) 573.

[14]*The Voorwaarts and the Khedive* (1880) 5 App. Cas. 893, per Lord Blackburn.

[15]See Period VI at §§ 5:15 to 5:26.

[Section 6:10]

[1]Provision was also made for cancellation of certificates.

This provision was introduced into the statute by Lord Kingsdown in consequence of a case which came before him in the Privy Council; one ship, after a collision, had sailed away and left the other to perish.[2] Previous to the Act, however, the duty to render assistance, and the temptation to run away in the hope of escaping detection, were distinctly recognised in the Admiralty Court. Defaulting vessels, though free from blame in other respects and successful in the suit, were ordered to pay the costs of the suit.[3]

The "person in charge" intended by the Merchant Shipping Act Amendment Act 1862 s.33 was held to be the master, although a compulsory pilot was on board.[4] If the master was below, the duty to stand by lay on the mate or other person in charge of the deck, until the master came on deck. If life or property was still in danger, the duty was then transferred to the master.[5] Where a collision occurred between a ship in tow and a third ship, it was said by Sir R. Phillimore that the law required the tug to stand by the ships in collision.[6] The section was also held to apply in the case of a collision with an open fishing boat.[7] It was held that a tug, whose tow was damaged in collision with a third ship for which the latter was in fault, was not precluded by the section from claiming salvage.[8]

§ 6:11 Failure to exchange particulars

By s.9 of the Merchant Shipping Act 1871, a duty was imposed upon the masters of vessels after collision, of exchanging names of vessels, port of registry or port or place to which each vessel belonged, and ports and places from which and to which each was bound. The same consequences as followed a failure to render assistance were to apply in the event of a breach of this duty.

VIII. PERIOD VI—1873 TO 1911

§ 6:12 Amendments to the statutory presumptions of fault

During this period the power to make regulations for the prevention of collisions at sea was enacted by s.418(1) of the Merchant Shipping Act

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[2]*The Hannibal and the Queen* (1867) L.R. 2 A. & E. 53 at 56; 1868, Hansard's Parl. Debates, 281.

[3]*The Celt* (1837) 3 Hag. Ad. 321.

[4]*The Queen and the Lord John Russell* (1869) L.R. 2 A. & E. 354.

[5]*Ex p. Ferguson and Hutchinson* (1871) L.R. 6 Q.B. 280.

[6]*The Hannibal and the Queen* (1867) L.R. 2 A. & E. 53.

[7]*Ex p. Ferguson and Hutchinson* (1871) L.R. 6 Q.B. 280.

[8]*The Hannibal and the Queen* (1867) L.R. 2 A. & E. 53, approved in *Owners of SS Melanie v Owners of SS San Onofre* [1925] A.C. 246 at 262. Other cases under s.33 are *The Lucia Jantina v The Mexican* (1864) Holt 130; *The Queen of the Orwell* (1863) 7 L.T. 839; *The Eliga and the Orinoco* (1864) Holt Adm. 98.

1894. The obligation to observe all the regulations imposed by s.27 of the Merchant Shipping Act Amendment Act 1862 was re-enacted in s.419(1) of the Merchant Shipping Act 1894, and remained the same as in the last period, and the rights of owners were not directly affected by legislation. Section 17 of the Merchant Shipping Act 1873,[1] however, which was in effect re-enacted by s.419(4) of the Merchant Shipping Act 1894, materially altered their liabilities. Section 419(4) was in the following terms:

> Where, in a case of collision, it is proved to the court before which the case is tried that any of the collision regulations have been infringed, the ship by which the regulation has been infringed shall be deemed to be in fault, unless it is shown to the satisfaction of the court that the circumstances of the case made departure from the regulation necessary.

The change in the language of this enactment was made with the following objects: first, to disapply the ratio decidendi in *Tuff v Warman*; secondly, to render it unnecessary to have resort to an artificial rule as to the inference to be drawn from evidence[2]; thirdly, to enable the courts to adjudicate upon collision cases without the necessity of determining upon conflicting evidence the question of fact of whether or not an infringement of a regulation, applicable to the case, and that might possibly have contributed to the collision, did, in fact, contribute to the collision[3] and, lastly, to increase the stringency of the regulations.[4] The statute imposed on a vessel that had infringed a regulation which was prima facie applicable to the case, the burden of showing affirmatively that such infringement was necessary or could not possibly have contributed to the collision.[5] The court had to inquire into the facts in order to ascertain whether the infringement could possibly have contributed to the collision, for it was not sufficient to find that it did not contribute.

This arbitrary rule of law, in force between 1873 and 1911, required

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[Section 6:12]

[1]A Queen's ship was held in fault under this section in *The Hoching and the Lapwing* (1881) 7 App. Cas. 512 but it is clear that s.419(c) did not apply to HM Ships: *The HMS Sans Pareil* [1900] P. 267. Quaere as to foreign sovereigns: *The Astrakhan* [1910] P. 172.

[2]As in *The Fenham* (1870) 6 Moo. P.C. (N.S.) 501; L.R. 3 P.C. 212. These two reasons for the alteration in the law are given by Lord Blackburn in *The Voorwaarts and the Khedive* (1888) 5 App. Cas. 893.

[3]*The Fanny M. Carvill* (1875) 13 App. Cas. 455; 2 Asp. M.C. 565, in court below *The Fanny M Curvill* (1872-75) L.R. 4 A. & E. 417 at 422 cited by Lord Blackburn in *The Voorwaarts and the Khedive* (1888) 5 App. Cas. 876 at 893, approved and followed by the Privy Council in *The Lapwing* (1881) 7 App. Cas. 512; *The Hibernia* (1874) 2 Asp. M.C. 454; *The Rondane* (1900) Asp. M.C. 106 (a steamship held in fault for not stopping and reversing, though whether the collision would have been avoided by her doing so was conjectural).

[4]*The Voorwaarts and the Khedive* (1888) 5 App. Cas. 876 at 901, per Lord Watson.

[5]*The Anselm* [1907] P. 151; 10 Asp. 438; *The Duke of Buccleuch* (1890) 15 P.D. 86, on appeal [1891] A.C. 310; *The Bellanoch* [1907] A.C. 269; *The Corinthian* [1909] P. 260.

the courts to hold a ship in fault for a collision, although no negligence in the ordinary sense was proved. And it will be seen below that this rule applied, not only where negligence was not proved but where it did not exist, and where those in charge of the ship were, as regards negligence, absolutely free from blame. Evidence directed to show that the infringement did not in fact contribute to the collision was excluded, and consideration of actual negligence was unnecessary.

Where a regulation which was material to the case was proved to have been infringed, as, for example, where one of the lights of the sued ship, which was open to the other ship, was proved to have been insufficient to satisfy the statute,[6] the onus was on the ship carrying the improper light to show, if she could, that the departure from the regulations was necessary,[7] or could not possibly have contributed to the collision.

In *The Englishman*,[8] a trawler had a light at the mast-head, but no side lights, as she ought to have had. She was not seen by anyone on board the other ship before the collision. The latter was held alone in fault upon the ground that there was no look-out, and that therefore the absence of the side lights on the trawler could not possibly have contributed to the collision.

Where a vessel failed to adduce such proof she was within the penalty of the Merchant Shipping Act 1873 s.17.[9] If she alleged the other ship to be also in fault, it lay on her to prove, if she could, that it was not her fault alone that caused the collision.[10]

In *The Love Bird*[11] a vessel which sailed from Dieppe some days before the regulations of 1880 came into force was held in fault for a collision which occurred after the regulations had come into force because she was not sounding and was not provided with a mechanical fog-horn. There was no proof that a mechanical horn could not have been procured at the port from which she sailed.

In *The Calypso and the Mississippi*,[12] however, a foreign ship came into the Mersey without having on board a second riding light, as required by the Mersey Rules. A collision occurred before the master,

[6] *The Duke of Buccleugh* (1890) 15 P.D. 86.

[7] *The Memnon* (1889) 6 Asp. M.C. 488; 62 L.T. 84, see per Lord Herschell at 85, § 5:19.

[8] *The Englishman* (1877) 3 P.D. 18. See also *The Chusan* (1885) 5 Asp. M.C. 476 and *The Argo* (1900) 9 Asp. M.C. 74.

[9] *The Hibernia* (1874) 2 Asp. M.C. 454; *The Arklow, Emery v Chichero* (1883) 9 App. Cas. 136; *The Vera Cruz (No.1)* (1884) 9 P.D. 88; *The Fenham* (1870) 6 Moo. P.C. (N.S.) 501; L.R. 3 P.C. 212 is a similar case under the Merchant Shipping Act Amendment Act 1862 s.29.

[10] *The Arklow* (1883) 9 App. Cas. 136.

[11] *The Love Bird* (1881) 6 P.D. 80.

[12] *The Calypso and the Mississippi* (1878) Ad. Ct. March 7 at 8, 9; cf. *The Chilian* (1881) 4 Asp. M.C. 473 where the use of a mouth fog-horn was excused.

who had gone ashore to get one, had returned to the ship. It was held that the circumstances made a departure from the regulations necessary within the meaning of s.17 of the Merchant Shipping Act 1873.

§ 6:13 The regulation infringed had to be one material to the case

The words of the Merchant Shipping Act 1894 s.419(4): "any of the collision regulations" were not construed literally. It was not an infringement of any regulation that brought the section into operation, but only an infringement of a regulation: "which was in the circumstances applicable".[1]

In *The Fanny M. Carvill*[2] it was held that the *Peru* was not in fault because her screens were seven inches short of the statutory length (three feet), it being clear that her lights were not in fact seen across her bow.

§ 6:14 A regulation was not infringed until there was an opportunity of complying with it

A regulation was not infringed, within the meaning of the statute, if those in charge of the vessel did not in fact know, and could not, with ordinary care, have known, that the regulation had come into operation.[1]

§ 6:15 Penalty strictly enforced if infringement proved

Although the literal interpretation of the statute was departed from in determining what was an infringement of the regulations within its meaning, the penalty was strictly enforced when infringement was proved. In *The Voorwaarts and the Khedive*[1] the House of Lords held that there might be an infringement of the regulations, although those in charge of the ship did all that could be expected of seamen of ordinary skill and nerve, and although they were guilty of no act which at common law, and apart from the statute, would amount to negligence.

In *The Voorwaarts and the Khedive*, steamships of 3,000 and 3,740 tons respectively were approaching each other at night north of Penang Island without risk of collision on nearly opposite and parallel courses,

[Section 6:13]

[1] *The Voorwaarts and the Khedive* (1880) 5 App. Cas. 876 at 901, per Lord Watson. See §§ 5:22, 5:23.

[2] *The Fanny M Curvill* (1872-75) L.R. 4 A. & E. 417; cf. *The Acasta* (1925) 23 Ll. L. Rep. 25.

[Section 6:14]

[1] *The Voorwaarts and the Khedive* (1880) 5 App. Cas. 876 at 894, per Lord Blackburn.

[Section 6:15]

[1] *The Voorwaarts and the Khedive* (1880) 5 App. Cas. 876.

the green light of each being visible to the other on her starboard bow. At this time both vessels were going at full speed. When the vessels where somewhat less than a mile apart the *Voorwaarts* put her wheel hard-a-starboard and opened her red light to the *Khedive*. This was a wrong manoeuvre and caused risk of collision. Thereupon the captain of the *Khedive*, without easing his engines, put his wheel hard-a-port, and at the same moment gave the order to stand by the engines. One-and-a-half minutes afterwards he put his engines full speed astern. The collision occurred one-and-a-half minutes after this. The engines at the moment of the collision were going full speed astern. They ought to have been stopped and reversed, under the art.16 then in force,[2] as soon as the red light of the *Voorwaarts* appeared, at the moment when the order to put the *Khedive's* wheel hard-a-port was given. The absolutely right manoeuvre was therefore not adopted by the *Khedive*, and it was held by the House of Lords that, the "stop and reverse" rule having been departed from without the necessity provided for by art.19 of the 1863 Regulations, the *Khedive* was in fault under the statute. In the Court of Appeal it had been held that though the captain of the *Khedive* was wrong in not stopping and reversing at the moment when the *Voorwaarts*' red light was seen, yet that his error did not prove him to be deficient in ordinary care, skill or nerve, and that, therefore, the collision not having been caused by negligence of those on board the *Khedive*, the owners of the *Voorwaarts* were alone liable.

In the House of Lords it was held that the *Khedive*, having been within the operation of art.16, and there being no special circumstances (art.19) to justify a departure from the regulations in order to avoid immediate danger, she was by the words of the statute to be deemed in fault, and that the question whether or not her captain had been in fact guilty of negligence was immaterial. The *Voorwaarts*, which by her bad look-out and by putting her wheel to starboard had brought about risk of collision in the first instance, and had kept her engines going at full speed up to the moment of collision, was held in fault both in the Court of Appeal and the House of Lords. In final result, the judgment of the Admiralty Court was restored and the rule of equal division of loss applied.

From this case it seems clear that the House of Lords considered that the purpose of the legislature was to substitute a rigid adherence to the regulations for the discretion which a seaman was, under the previous law, at liberty to exercise and that a justification for the harshness of the new enactment was to be found in the number of collisions which would be avoided if a rigid and almost mechanical adherence to the

[2]"Every steamship when approaching another ship, so as to involve risk of collision shall slacken her speed or, if necessary, stop and reverse."

regulations was substituted for the uncertainty which is inseparable from an application depending upon the discretion of seamen.[3]

§ 6:16 Penalty inapplicable in special circumstances

The facts of *The Voorwaarts and the Khedive* did not call for a decision as to the effect of the statute, where the infringement of the regulations was, though unsuccessful as regards averting collision, not only not negligent but the only or the best chance of escaping collision.

In *The Benares*[1] the Court of Appeal was called upon to decide this point. It was held that in such a case *The Voorwaarts and the Khedive* did not apply, and that a ship was not to be held in fault under the statute because her captain did not comply with the letter of the regulations, if such non-compliance was the only chance of escaping collision. In such a case the court held that departure from the rules was "necessary in order to avoid immediate danger", within the meaning of art.23 of 1880,[2] and that therefore the penal clause of the statute did not apply.

In *The Benares*,[3] the steamship *Gerarda* observed a green light distant about three-quarters of a mile and bearing about a point on the port bow. Her wheel was put to port, to pass green to green. Very shortly afterwards the unlighted port side of the sailing ship *Benares* was observed. The wheel of the *Gerarda* was put hard-a-port and her engines were kept full speed ahead, but the *Benares* struck the starboard side of the *Gerarda* doing damage. It is clear[4] that the vessels had in fact been approaching port to port, that the green light of the *Benares* could be seen to port, and that she was without a red light. The following passage is from the judgment of Brett MR[5]:

> When the *Benares*' green light and the green light alone was seen the *Gerarda* did no wrong by [porting her wheel], for it was impossible as it was then disclosed to her for her to see how immediate was the then danger of collision. The vessels however eventually came so close to each other that the actual position of things was discovered, the port side of the *Benares* without a red light becoming visible to those on the *Gerarda*. Under these

[3]Whether it was desirable or possible by Act of Parliament to fetter the exercise of a seaman's discretion in the throes of a collision has been questioned see *The Memnon* (1889) 59 L.T. at 291; (1889) 6 Asp. M.C. 488, per Lindley LJ.

[Section 6:16]

[1]*The Benares* (1883) 9 P.D. 16; 5 Asp. M.C. 171. See below for facts and excerpts from judgments. *The Benares* was followed in *The Sapphire and the Girdleness*, Ad. Ct., 27 February 1884.

[2]Cf. art.19 of the 1863 Regulations (para.5-018).

[3]*The Benares* (1883) 9 P.D. 16 5 Asp. M.C. 171.

[4]*The Benares* (1883) 5 Asp. M.C. 171 at 172.

[5]*The Benares* (1883) 9 P.D. 16 at 17.

circumstances what was the master of the *Gerarda* to do? By article 18[8] 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[7] is as much to be observed as article 18. The navigation of vessels is to be conducted with a regard to both of them. As I understand one part of *The Khedive*, if the *Benares* had put the *Gerarda's* officer in such a position that every reasonable man would have done what the officer of the *Gerarda* did, yet if the court could not come to the conclusion that the case was brought within article 23, the *Gerarda* would be held likewise to blame. But in this case the question is whether it is brought within article 23 and taken out of article 18? Was the necessity of the case such, and were the circumstances so special, that they rendered a departure from article 18 necessary? We are advised that these vessels were so placed that at the time when under ordinary circumstances article 18 would have been applicable the position was such that the only chance of escape was for the *Gerarda* to [port her wheel] and continue full speed ahead. There was therefore a necessity, within the meaning of article 23, for a departure from the rule laid down in article 18, and the facts take the case out of article 18. But then it has been argued that the danger referred to in article 23 is not the danger to either of the vessels approaching each other but to [sic] some outside danger. The decision of the House of Lords in *The Khedive* gives no countenance to any such contention as this, and there is nothing in that case to show that the present case is not within the meaning of article 23.

Bowen LJ, after disagreeing with the argument of counsel that the danger referred to in art.23 (of the 1880 Regulations) was "a risk other than that of collision alone, some peril by sea or from the land", said:

> In truth, unless some reasonable force is given to article 23, and to the exception it contains, a captain will have to sail with his eyes open into the jaws of death. If he obeys article 18, let us assume that it is certain death for his passengers and crew, that he has only one chance still open to him, and that by disobeying the particular rule. Such a case would surely be one in which a departure from the rules becomes necessary, otherwise a captain's duty would be to obey article 18 and go cheerfully to the bottom of the sea with his ship and all on board sooner than take the one chance of safety still remaining to him. Such an interpretation of the regulations was never in my opinion intended by the House of Lords. I am of opinion that a departure from article 18 is justified when such departure is the one chance still left of avoiding danger which otherwise was inevitable.

In *The Memnon*,[8] on the other hand, it was held that necessity for departure from the rules had not been established and the principle which should guide the court in determining whether in any case the evidence establishes such necessity was clearly stated.

In The *Memnon*, a steamship of that name sighted, off the coast of Brazil, the mast-head and green lights of the steamship *San Salvador*,

[6]Cf. the regulations of 1880 and art.16 of the 1863 Regulations.

[7]Cf. art.19 of the 1863 Regulations and r.2(b) of the present Collision Regulations.

[8]*The Memnon* (1889) 6 Asp. M.C. 488; 62 L.T. 84.

distant about three miles and bearing about two-and-a-half points on the port bow. The *Memnon* kept her course and speed until the other vessel got within about three ships' lengths and was bearing about four points on the port bow. The *San Salvador* then suddenly ported her wheel, the *Memnon*'s engines were immediately stopped, and the collision occurred. The *San Salvador* was held to blame. It was also held in the Court of Appeal that the best and most seamanlike course for the *Memnon* was to continue ahead, for had the *San Salvador* not ported her wheel she would have cleared by one-and-a-half lengths. But risk of collision was held to have arisen before the wrong helm action and therefore the Court of Appeal, affirming the judgment of Butt J, held that the *Memnon* was, under the statutory presumption of fault, also to blame for not stopping sooner in compliance with the regulation,[9] on the ground that the officer in charge of her was not justified in assuming, under the circumstances, that "the *San Salvador* would do what was right".

This decision was, in turn, affirmed by the House of Lords. Lord Herschell, in addressing the House, said[10]:

> When once it is shown that it was brought home, or ought to have been brought home, to the mind of the master of a vessel, that the courses upon which the ships were approaching, and the circumstances, involved risk of collision, the onus is thrown upon him of justifying his not doing that which the rule prescribes . . . The question whether a departure was necessary or not must no doubt be determined by the court but it must be determined upon the point being raised, and upon some evidence being tendered to the court to show that to have followed the rule would have either created that very risk of collision which it was the purpose of the rule to avoid, or have increased instead of diminished the risk of collision.

This case must be distinguished from *The Otto and the Thorsa*,[11] where it was held that the one ship was justified in expecting the other to do the right thing (putting her wheel to starboard or ceasing to go to port), and therefore in not stopping and reversing, under the regulations then in force, until the collision had, in fact, become inevitable.

§ 6:17 Breaking down of fog-horn

In *The Chilian*,[1] the breaking down of a mechanical fog-horn was held to make a departure from the regulations necessary, and a ship sounding a mouth-horn under such circumstances was held not to be presumed in fault under the statute.

[9]Article 18: "Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed, or stop and reverse if necessary."

[10]*The Memnon* (1889) 6 Asp. M.C. 488; 62 L.T. 84 at 490.

[11]*Wilson, Sons & Co v Currie (The Otto and the Thorsa)* [1894] A.C. 116.

[Section 6:17]

[1]*The Chilian* (1881) 4 Asp. M.C. 473.

§ 6:18 Ships' lights: reasonable compliance with the regulations sufficient

It appears that what the law required in respect of the fixing and mechanical details of ships' lights was a reasonable compliance with the regulations. A very small departure from the letter of the regulations on these points was not an infringement within the meaning of the statute so as to bring the presumption into operation. This was the view taken by the court in the following case.

In *The Fire Queen*,[1] an obscuration by the starboard cathead of the green light to the extent at the distance in question of an arc of 212 or 3 degrees was held not to be an infringement: "What we must look to", said Butt J, "is whether there is a reasonable compliance with the regulations". The learned judge held also that the obscuration did not and could not have contributed to the collision but the value of the decision upon the first point is not, it is submitted, thereby lessened.

Having regard to the class of people for whose guidance the regulations were framed, and by whom they were worked, and also to the circumstances under which they were worked, it is difficult to suppose that the legislature could have intended anything more than a reasonable compliance with the regulations as to lights and sound signals.

In *The Glamorganshire*,[2] it was held that carrying the sidelights in the rigging, where it was impossible for them to be fixed with mathematical accuracy, did not bring the ship within the penalty of the statute.

So where lights had to be shifted from riding, towing, or fishing to under-way lights or vice versa, a ship would, probably, not have been held in fault under the statute because the change of lights was not instantaneous. As regards the steering and sailing rules, the decision in *The Voorwaarts and the Khedive*[3] shows that a stricter view was taken.

§ 6:19 Whether the presumption of fault applied where the collision was from the first inevitable

The regulations in force during this period, as at present, were "for preventing collisions at sea", and it would seem that, if that were their only object, where a collision was from the first inevitable, the regulations did not apply, and therefore could not be infringed. The point arose

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[Section 6:18]

[1]*The Fire Queen* (1887) 12 P.D. 147; cf. *The General Birch* 6 Quebec L.R. 300, as to shape of lantern, *The HMS Sans Pareil* [1900] P. 267 at 276; *The Acasta* (1925) 23 Ll. L. Rep. 25.

[2]*The Glamorganshire* (1888) 13 App. Cas. 454; *The Gannet* [1900] A.C. 234; and *The Philadelphian* [1900] P. 262 are also decisions as to the position of lights.

[3]See § 5:16.

in *The Buckhurst*,[1] but the facts of that case made a decision of the point unnecessary. It seems, however, to have been the opinion of Sir R. Phillimore that the statute might apply, though the collision was inevitable. In *The Voorwaarts and the Khedive*, the opinions of the majority of the learned lords and the judgments of the Court of Appeal and Admiralty Division assume that the collision was not inevitable when the *Voorwaarts* first showed her red light. But Lord Blackburn[2] appears to have been of the opinion that the collision was then inevitable, and that the manoeuvre of the *Khedive*, though well adapted to lessen the force of the collision, being contrary to the regulations, placed her in the wrong under the statute. As pointed out above, there is some difficulty in supporting this view of the effect of the statute, if the only object of the regulations was the prevention of collisions. But in *The Voorwaarts and the Khedive* Lord Watson stated that the object of the "stop and reverse" rule was "to obviate the risk and minimise the results of collision".[3] A regulation having this object might well be infringed, where the collision, but not the damage, was from the first inevitable.

§ 6:20 Whether presumption applied where the infringement was in the agony of the collision

In *The Voorwaarts and the Khedive*, the captain of the *Khedive* deliberately elected to depart from the regulations. It is submitted that the decision of the House of Lords is not authority for the proposition that a ship would have been held in fault for a step taken in the agony of a collision and due entirely to the imminence of the danger. In the case, for example, of a sailing ship going about—"altering her course"—under the bows of a steamship, where the latter had approached her so close as to frighten her into doing something, the question arises, whether the sailing ship was to be held in fault under the statute? If she did not alter her course until the collision was inevitable it would seem that the statute did not apply at all.[1] If she stood on until the risk was so great that human nature could go no further, and then bore up or went about, it would seem reasonable to hold that her change of course at such a moment was not an infringement of the regulations, but rather an act caused by the imminence of the peril and the fault of the other ship.

[Section 6:19]

[1]*The Buckhurst* (1881) 6 P.D. 152.

[2]*The Voorwaarts and the Khedive* (1880) 5 App. Cas. 895.

[3]*The Voorwaarts and the Khedive* (1880) 5 App. Cas. 903 at 904. And see *Maclaren v Compagnie Francaise de Navigation a Vapeur* (1883) 9 App. Cas. 640 at 651 and 652.

[Section 6:20]

[1]See paras 4-081 et seq.