THE BYFOGED CHRISTENSEN : Owners of the Byfoged Christensen v Owners of the William Frederick

Privy Council

Sir James Colvile, Sir Robert Phillimore, Sir Barnes Peacock and Sir Robert Collier.

19 June 1879

Shipping — sailing rules — when discretion to ignore.

A collision occurred between two sailing ships. Each had kept its course almost up to the last moment. The main argument was on fact, but the cross-appeal raised the question whether the William Frederick was guilty of contributory negligence in not manoeuvring to avoid the collision, although she had right of way.

Held: Masters of ships have a discretion to depart from the sailing rules only in cases of very clear necessity.

Note. In England, the matter is now governed by the Collision Regulations (Ships and Seaplanes on the Water) and Signals of Distress (Ships) Order (S.I. 1965 No. 1525), which applies the International Regulations for Preventing Collisions at Sea 1960, but this does not appear to extend or to have been applied to Gibraltar.

Case referred to in the judgment.

The Commerce, (1850) 3 Wm. Rob. 287.

Appeal

The Byfoged Christensen appealed against the finding of the Vice-Admiralty Court that it was her duty to keep out of the way of the other ship, and the William Frederick cross-appealed against a finding that she had been guilty of contributory negligence.

C.P. Butt, Q.C., Stubbs and Dr. Phillimore for the appellants.

Milward, Q.C., and Clarkson for the respondents.

Judgment delivered by Sir James Colvile —

The collision out of which these appeals have arisen took place a few miles from Cape Spartel on 26 August 1878, about five o'clock in the afternoon. The colliding vessels were the Byfoged Christensen, a Norwegian barque, and the William Frederick, an American three-masted schooner. The former vessel was bound on a voyage from Majorca to New York, and was therefore coming out of the Mediterranean. The other vessel was bound on a voyage from New York to Venice, and was therefore entering the Mediterranean. They were sailing and crossing vessels, and the sailing rules applicable to the case are the 12th and the 18th.

Both parties are agreed that the American vessel was on the port tack and had the wind on the port side, whatever was the precise direction from which the wind was coming. Hence the appellants have correctly contended that it was only in case the Christensen, which had the wind on her starboard side, was free that it would be her duty to keep out of her way; and that, if she were not free, it would be the duty of the American ship to keep out of her way.

The case is peculiar, because each vessel seems, up to the moment of collision, or at least up to the time when the collision became inevitable, to have kept its course, and to have acted as if it were the duty of the other vessel to keep out of its way. The question which of the vessels was right in throwing that obligation on the other depends upon the question what was the real direction of the wind. The Christensen contends that the wind varied from north and by west to north; the other vessel says that it was from north-north-east to north, and by east. The difference between them is not less than one, or more than three points of the compass. Their Lordships have no difficulty in coming to the conclusion that if the direction of the wind was north and by east, or north-north-east, or anywhere between those two points, the Christensen would have been free within the meaning of the 12th rule. The learned judge of the court below has, upon very conflicting evidence,—each crew swearing pretty consistently to the direction for which each contended,—found that the wind was to the east of north, and their Lordships would not, without having strong grounds for coming to a contrary conclusion, be disposed to interfere with that finding of fact. An argument on the part of the appellants was founded on the following passage in the judgment under appeal. The learned judge there says: "I feel therefore compelled, but after much hesitation, to decide that the Byfoged Christensen had the wind, if not altogether free, at all events some points more in her favour than the William Frederick, and that according to the 12th rule of the road she ought to have given way to the

William Frederick." Upon this passage it was argued by Mr. Stubbs that it is consistent with the hypothesis that both vessels were close-hauled vessels, in which case it would be the duty of the vessel which had the wind on the port side to give way. There may be some ambiguity in the first part of the sentence; but taking the whole sentence together, their Lordships cannot but think that it amounts to a finding that the Christensen was a free vessel within the meaning of the 12th rule of the road; and even if there had been greater ambiguity in the expression of the learned judge's judgment than their Lordships think there is, they would still think that if the direction of the wind was properly found to be what he found it to be, the Christensen would have been a free vessel, and in that opinion they are confirmed by their nautical assessors.

The next question is whether the finding as to the direction of the wind was justified by the evidence. It seems to their Lordships that it was so. The most plausible point made against that finding was the argument of Mr. Butt as to the position of the vessels at the time of the collision. He contended, that had the wind not been as it was stated by those on board the Christensen, to be, that is, varying from north to north and by west, the vessel would not, according to the ordinary course of navigation, have been so near Cape Spartel as she was when the collision took place. But on consultation with the sailing-masters, their Lordships find that she was upon the course which a vessel bound to New York, and getting out of the Mediterranean, would naturally have taken, and that her position at the time of the collision was by no means inconsistent with the fact that the wind was in the quarter in which the American vessel and its crew say that it was.

That being so, their Lordships have no difficulty in affirming the decision that it was the duty of the Christensen, according to the rule of the road, to keep out of the way of the other vessel, and that she failed to do so.

The question raised by the cross-appeal arises upon the finding of the learned judge that both vessels were to blame, on the ground that although the duty of keeping out of the way lay upon the Christensen, those on board the William Frederick, when they found that the other vessel was not going to perform its duty, ought not to have pertinaciously adhered to the 18th rule of the road by keeping on their course, but should have adopted some manoeuvre in order to avoid the collision which afterwards took place. The learned judge in so deciding, relied on the case of *The Commerce* [1], before Dr. Lushington. Their Lordships desire to remark that though the principle involved in that case may be in itself a sound one, it is one which should be applied very cautiously, and only where the circumstances are clearly exceptional. They conceive that to leave to masters of vessels a discretion as to obeying or departing from the sailing rules is dangerous to the public; and that to require them to exercise such discretion, except in a very clear case of necessity, is hard upon the masters themselves, inasmuch as the slightest departure from these rules is almost invariably relied upon as constituting a case of at least contributory negligence. In the present case, their Lordships

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[1] (1850) 3 Wm. Rob. 287.

think that the principle of the decision in the case of *The Commerce* is not applicable. There is no constat at what particular time the master of the William Frederick ought to have come to so distinct a conclusion that the other vessel was not about to obey the rule as to justify his departure from what was his prima facie duty. Their Lordships cannot infer from the facts proved in the case that he was bound to come to such a conclusion before the moment at which it appears he luffed up in the wind; and after consulting with the sailing-masters, they have come to the conclusion that that was the best thing which, under the circumstances, he could have done; that if he had tried by any other manoeuvre actively to get out of the way of the other vessel, there would still have been a collision, and that the consequences of that collision might have been aggravated owing to the greater way which his vessel would have had upon it. Their Lordships therefore think that no case of contributory negligence has been made out against the William Frederick, and they must humbly advise Her Majesty to allow the cross-appeal, to reverse the decision of the court below, to pronounce that the Byfoged Christensen was alone to blame for the collision, to dismiss the suit of the owners of that vessel, and to condemn them to bear and pay the whole amount of the damages sustained by the William Frederick, and further to pay the costs of both suits in the court below, and also the costs of these appeals.