

(1929) 02 CAL CK 0061
In the Calcutta High Court

In Re: "Rabenfels" (Stoomvart Maatschappij Nedarlands)

Date of Decision : 28-02-1929

Acts Referred:

Maritime Conventions Act, 1911 — Section 1

Citation : AIR 1930 Cal 97 : 121 Ind. Cas. 312

Hon'ble Judges : Page, J

Bench : Division Bench

Judgement

Page, J.—On 29th August 1927 at about 12-42 p.m. the S.S. "Calcutta" collided with the S.S. "Rabenfels" in the Fulta Bight on the river Hooghly. The "Calcutta" was proceeding up river a flood tide nearing high water and on running at about four knots an hour, and the Rabenfels was coming down the river from Calcutta. Both vessels laden with merchandise were being navigated by pilots, Smythe being the pilot on the "Calcutta" and Bacon on the "Rabenfels." At the time of the collision the water in the river had risen about 18 feet, the weather was fine, and the visibility good. Owing to the shifting sand the navigation of the narrow reaches of the Hooghly needs skilled seamanship as the width of the navigable channel constantly changes, the width of the channel in the Fulta Bight between the creek cask buoy and about 1500 below the centre Fulta sand buoy varying from 650 to 900 feet. A further difficulty that pilots have to face is caused by the set of the flood time as it rounds Fulta point to the south of the Bight. As the Fulta sands become submerged the tide is deflected in a northerly direction, and eventually strikes the eastern bank near Fisherman's Point, causing a back water ebb which, passing down the river and meeting the flood time, creates a whirl between the Fulta Point and the lower Fulta Sand buoy known as the Fulta Point eddy. The effect of this eddy is that a ship moving up stream on the flood tide has a tendency to go to starboard, and requires a starboard helm to keep her steady on her course. When the vessels sighted each other as the "Calcutta" was rounding Fulta point it may be taken that they were about a mile and a half apart, and both of them had their ball up denoting that they were proceeding at full speed, the "Calcutta." moving at 10-12 knots, the "Rabenfels" at 8-9 knots over the ground. Taking their combined speed at 20 knots the vessels normally

would meet in rather less than 3 minutes. Now under Article 25, Collision Rules:

in narrow channels every steam vessel shall when it is safe and practicable keep to that side of the fairway or mid channel which lies on the starboard side of such vessel.

and it was common ground at the trial that the "Calcutta", proceeding up river on a flood time, had the right of way, and that it was customary and except in an emergency imperative, for deposits to pass each other port to port in the Fulta Bight. The dimensions of the Calcutta were length 429 feet, beam 56 feet, tonnage 5541 gross, 3537 nett, her draught being 24 feet 10 inches; those of the Rabenfels length 464 feet, beam 57 1/4 feet, draught 27 feet 7 inches, tonnage 8563 gross and 5310 nett.

2. Shortly after sighting each other and in answer to a signal from the Rabenfels, Smythe on the Calcutta blew two short blasts which indicated that he was directing his course to port (see Article 28) and put the helm hard a starboard. On hearing the two blasts from the Calcutta, Bacon on the Rabenfels replied with two short blasts, and starboarded his helm. Immediately after he had blown two short blasts, or at any rate within a few seconds thereafter, Smythe, as he admitted in the witness box, realizing that he had made a mistake blew one short blast, and put his helm hard a port. Bacon, whether or not he heard the one blast from the Calcutta, observed the Calcutta paying off quickly to starboard, and realizing that a collision was inevitable blew three short blasts and reversed his engines, at the same time putting his helm hard a port; both operations tending to throw the head of the Rabenfels to starboard. Smythe also blew three short blasts and when full astern; but within a few seconds a collision took place, the Rabenfels striking the Calcutta with the bluff of her port bow just forward of the bridge at an angle of 45 degrees. At the time of the collision the Calcutta was heading towards the east bank at an angle of between 30 and 45 degrees. The effect of the blow upon the Calcutta was that she became dead and drifted on to the eastern bank of the river a little south of the line of the centre Fulta buoy. With the ebb of the time in the afternoon she drifted back across "the river, and grounded on the sand below the centre Fulta buoy on the western side of the channel. About 11 p.m. she broke in half, and became a total loss. When the Rabenfels struck the Calcutta her stem was bent to starboard, and as she slid along the port side of the Calcutta her anchor became entangled in one of the davits of the Calcutta; the anchor chain ran out and broke away from the Rabenfels, and, the anchor remaining fast, the Calcutta carried away the anchor with the chain attached to it and lying in the water. Meanwhile the Rabenfels having got clear was taken downstream about 1 1/2 miles and then put about and returned to Calcutta. On her way back as she passed the Calcutta about 2 p.m. lying athwart of the centre Fulta buoy. The Rabenfels when returning went to the westward of the centre Fulta buoy having the Calcutta on the starboard bow, and reached Calcutta without further mishap.

3. Now the question that arises is what was the cause of the loss and damage

that resulted from the collision? Was it due to the fault of the Rabenfels or of the Calcutta or to the fault of both vessels, and if both vessels were at fault to what extent was the loss caused by the fault of each of them?

4. The law by which the rights of the parties in this case are to be determined has long been well settled, and in *Nani Bala Sen Vs. Auckland Jute Co. Ltd.*, I endeavour to restate the general principles as follows:

Where the negligence of the plaintiff or that of the defendant is the sole cause of the accident the matter is free from doubt. But difficulty may arise where the accident is caused partly by the negligence of the plaintiff, and partly by that of the defendant. In such circumstances it becomes the duty of the Court to endeavour to ascertain whether the negligent act or omission of the plaintiff, or that of the defendant was the cause of the accident. If the Court finds itself unable to discover to what extent the negligence of the plaintiff or that of the defendant contributed to bring about the accident, the defendant is entitled to succeed, for in *pari delicto potior est conditio defendantis*. On the other hand though the plaintiff may have been guilty of negligence and although that negligence may, in fact, have contributed to the accident yet if the defendant could in the result by the exercise of ordinary care and diligence, have avoided the mischief which happened the plaintiff's negligence will not excuse him. (Per Lord Penzance, *Radley v. L. & N. W. Ry. Co.* [1876] 1 A.C. 754.

5. In like manner,

although there may have been negligence on the part of the plaintiff, yet unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover. If by ordinary care he might have avoided them, he is the author of his own wrong. Per Baron Parke in *Bridge v. The Grand Junction Ry. Co.* [1838] 3 M. & W. 224.

6. In every case:

the issue which the Court is called upon to determine is whether the negligence of the defendant was the cause of the accident.

7. In my opinion, the investigating tribunal is:

well-advised to view the circumstances of the particular case broadly in the light of the principles which I have restated and not to indulge in verbal refinements which are not only unprofitable, but tend to befog the clear issue to be decided.

8. I should add:

that a man may not do the right thing nay, may even do the wrong thing, and yet not be guilty of the neglect of his duty which is not absolutely to do right at all events but only to take reasonable care and use reasonable skill and I agree that when a man is suddenly and without warning thrown into a critical position due allowance should be made for this, but not too much. Per Lord Blackburn *Stoomvaart Maatschappij Nedarlands v. Peninsular & Oriental Steam Navigation*

Co. [1880] 5 A.C. 876, , Jones v. Boyce [1876] 1 Sta 493. The Bywell Castle [1879] 4 P.D. 219. The Meannatchy [1867] A.C. 351. The Admiralty Commr. v. S.S. Volute [1922] 1 A.C. 129.

9. Further, if the cause of the damage is the combined operation of more acts than one, such acts need not be synchronous, for in order to establish that the damage was caused by more acts than one it is essential to prove not that the damage was the result of two or more simultaneous acts, but that it was the effect of the concurrent operation of those acts which in combination were the cause of it. The Margaret [1881] 6 P.D. 75, Admiralty Commrs. v. S.S. Volute [1922] 1 A.C. 129. In this connexion I pray in aid and make my own the following observations of Wright, J., in a lecture delivered on 26th May 1927 at the London School of Economics on the doctrine of proximate cause.

Lord Bacon quoting the maxim *in jure causa proxima non remota spectatur* thus adds : It were infinite for the law to consider the causes of things and their impulsion one on the other; it contenteth itself with the immediate cause, and judgeth of each by that without looking to any further degree certain questions are involved. Does it mean nearest in time? Does it exclude the concurrent operation of more than one cause? I venture to think both questions must be answered in the negative. Other synonyms have been suggested, such as *causa causans* (really a mere tautology), immediate, direct, dominant or efficient cause. In truth, the awkward epithet could almost be dispensed with, because, in marine insurance as in other spheres of law, it is in general causation pure and simple which has to be ascertained.

Indeed, I question, if, properly understood, the epithet indicates principles different in any way from those applied in other branches of law whenever it becomes necessary to consider the sequence of events, and the relationship of cause and effect. In law we are in the range of common sense conceptions of fact and crude and imperfect logic. I question if any lawyer would now boast that the law is the embodiment of human reason. The growth of scientific methods, of historical research, and of economic studies, has made thinking people realise that legal and judicial methods have ample scope, if the debates of lawyers and conclusions of Judges are more modest in their ambition and are aimed not at the discovery of absolute truth, but at the more practical end of solving practical difficulties in a manner more akin to the methods adopted by men of affairs in settling the grave issues of practical life. The aim of law is to do what is just and right by such methods, and it is a noble aim. But the material with which it works is on the level of every day ideas, and its principles are not principles of exact thought.

Cause, from this standpoint, means a material event from which another material event follows; and we have then cause and effect, not merely because of precedence in time, but because by long experience humanity has seen the former followed by the latter, whence we deduce a causal connexion.

10. In every collision case, whether it occurs on land or at sea, the same tests are to be applied for the purpose of ascertaining the cause of the accident, and there is no justification for the contention

that any authorities shew that the rules of the Court of admiralty and the rules of a Court of law as to what amounts to being a fault occasioning an accident differ in the slightest degree per Lord Blackburn in *Gayzer v. Carron Co.* [1884] 9 A.C. 873

although no doubt, where the Court is of opinion that, the damage was caused by the fault of two or more vessels the rule in admiralty for assessing liability is different, for the Court in that event must allocate the liability to make good the loss or damage

in proportion to the degree in which each was in fault. Maritime Conventions Act, 1911, Section 1.

11. In *Cayzer's* case [1884] 9 A.C. 873 Lord Blackburn added that

the nature of the thing, of course, requires that in applying those rules you should look to what the nature of the accident is, and to what the neglect is, and investigating the cause of an accident, specially in a case like the present one where the collision already has been the subject of several enquiries, and much argument and examination has been expended upon alleged discrepancies in the testimony of witnesses - the Court must be careful to keep the material incidents in their true perspective, and not to attach undue importance to the particular times and exact situations to which the witnesses on various occasions have deposed.

12. That was the reason, I think, why Lord Birkenhead in the *S.S. Volute* case [1922] 1 A.C. 129 observed that the

question of contributory negligence must be dealt with somewhat broadly and upon common sense principles as a jury would probably deal with it : *S.S. Volute* case [1922] 1 A.C. 129 at p. 144,

for, as Lord Selborne pointed out in *Spaight v. Tedcastle* [1881] 6 A.C. 217 at p. 219:

great injustice might be done, if in applying the doctrine of contributory negligence to a case of this sort the maxim *causa proximo non remota* spectator were lost sight of. When the direct and immediate cause of damage is clearly proved to be the fault of the defendant, contributory negligence by the plaintiffs cannot be established merely by shewing that if those in charge of the ship had in some earlier state of navigation taken a course, or exercised a control over the course taken by the tug, which they did not actually take or exercise, a different situation would have resulted, in which the same danger might not have occurred. Such an omission ought not to be regarded as contributory negligence if it might in the circumstances which actually happened have been unattended

with danger but for the defendant's fault, and if it had no proper connexion as a cause with the damage which followed as its effect.

13. Now, applying these principles to the facts disclosed in the evidence the solution of the problem in suit, to my mind is free from difficulty, and I am of opinion that this is a very plain case. I have had the advantage of the advice of two senior branch pilots of the Bengal pilot service as nautical assessors on matters relating to navigation and seamanship, and I have to state that the conclusions that I have formed and expressed on such matters coincide with the advice that the assessors have given me. Indeed, it is a source of satisfaction that I have found myself in entire agreement with the assessors on all the matters in connexion with which they have special knowledge and experience, and on which I have sought their advice.

14. I should add that after the conclusion of the hearing the parties took steps to enable me to visit the locale, and I thought it well to avail myself of the opportunity thus afforded to enable me more clearly to visualise, so to say, the setting of the incidents leading up to the collision, as to which I had already formed a clear opinion after hearing the evidence and arguments at the trial.

15. Now, the material incidents in connexion with the collision took place within about three minutes from the time when the vessels first sighted each other as the Calcutta was rounding Fulta Point; but in order to view the situation in its true perspective it must be borne in mind, as I have stated, that at that time, having regard to the combined speed at which the vessels were approaching each other, the Rabenfels and the Calcutta were between 1 1/4 and 1 1/2 miles apart. I also find upon the evidence that if after the vessels first sighted each other they had been properly navigated they could have passed each other safely either port to port or starboard to starboard.

16. The normal practice - and except in an emergency the imperative duty - of a pilot placed in a situation such as that in which Smythe found himself after rounding Fulta Point, and who had the right of way, would be to keep the Calcutta on her starboard side of the channel and pass the Rabenfels port to port. Nevertheless, on hearing a signal from the Rabenfels (I will discuss later whether the pilot Bacon on the Rabenfels blew one or two short blasts), Smythe on the Calcutta blew two short blasts, and put the helm hard a starboard. In the circumstances, as he had the right of way and it was for him to dictate the course of navigation, such a signal would indicate that he was directing his course to port with the intention of passing starboard to starboard. Bacon replied with two blasts and put his helm hard a starboard as he was bound to conform to the course dictated by the Calcutta, and after considering the evidence on the one side and on the other I am satisfied and find that if Smythe had continued on a starboard helm the vessels could, and in all probability would, have passed each other safely starboard to starboard.

17. But in the circumstances that was not a correct manoeuvre for Smythe to

initiate and he admitted in the witness box that in giving the order for two short blasts he had made a mistake; and promptly realizing that he had given a wrong order immediately or after a few seconds endeavoured to correct his mistake by ordering one short blast to be blown. It was impossible, however, for him then to give any order that could have prevented a collision which had become inevitable. Now, if the order for two blasts was a mistake, a fortiori the succeeding order for one blast was a fatal blunder, and I have no doubt or hesitation in finding that the cause of the collision was the action of Smythe in giving these two orders.

18. The next question that arises is whether in so acting Smythe was guilty of negligence.

19. Now, what was the narrative of the events leading upto the conclusion as presented on behalf of the Calcutta.

20. According to Smythe the Calcutta rounded the Fulta Point in a normal sweep, and when she was clear of the eddy at the point marked green X on the composite plan he took stock of the situation, and as he observed the Rabenfels at the point green X (not green Y) on the composite plan below the Creek Cash buoy between the figures 25 and 26 heading towards the eastern bank at a bad angle and showing her starboard side, he determined to go nearer to the eastern bank than usually he did in order to give the Rabenfels more room to pass port to port. He added that the Rabenfels was under the influence of an eddy or current coming from the creek opposite the red cask buoy which would have a tendency to sot her head still more towards the eastern bank. Upon the evidence, however, I am not satisfied that there was any eddy or current in the vicinity of the creek which would affect appreciably the navigation of the Rabenfels. Smythe further stated that when the Calcutta was at green D, and the Rabenfels at green D the Rabenfels sounded two short blasts, and that he replied with two short blasts and put his helm hard a starboard as the only possible chance of escaping a collision which then appeared to be inevitable, The course that Smythe indicated at the trial did not substantially differ from that of Baker, the master of the Calcutta, although it would appear from Smythe's course that the Calcutta was hugging more closely the eastern bank. But at the tidal Smythe placed the vessels much nearer each other when the first blast was blown by the Rabenfels than he had done at the Marine Enquiry, and also closer together than Baker put the vessels at the trial, (blue C and R). Both Smythe and Baker insisted that after the time when the Calcutta came out of the eddy neither the Calcutta nor the Rabenfels changed her course until immediately before the collision, and that there was no room for a mistake on their part with respect to the first signal blown by the Rabenfels, for they both distinctly heard two short blasts from the Rabenfels. Rappange, the Chief Officer and Greenandaal the Third Officer of the Calcutta gave evidence to the same effect. The narrative of the accident as told by Smythe and Baker to my mind is incredible, and I do not believe it. In order to test the truth of their story I will assume that the Calcutta at all material times

was on her starboard side of the channel, and that the Rabenfels from and after the time when she was at the point green X (Y) or blue E was at a bad angle heading towards the eastern bank and showing her starboard bow, and I will also assume, as Smythe and Baker stated, that she continued on her course without any change of helm. If that were so, it necessarily would follow that the Rabenfels would have struck the eastern bank before she reached the date column, and the collision would not have taken place. Again, in such circumstances why should Bacon have sounded two short blasts indicating that he was directing; his course to port, thereby accentuating, the danger of the course that he was taking?

21. I asked witness after witness if he could suggest any reason why Bacon should have given such an order, except that he suddenly had become bereft of his senses. No other reason was assigned, or, in my opinion, could be suggested for giving an order so dangerous and senseless. If, however, Smythe had seen the Rabenfels continuing to head across the channel to the east without changing her course in the way that he stated, I am of opinion and the nautical assessors agree with me that he ought to have endeavoured to breach his ship on the eastern bank. That was the course adopted I venture to think rightly by the pilot on the Clan Mackellar which was following the Calcutta when, on rounding Fulta Point he observed the Calcutta and the Rabenfels three-quarters of mile ahead close together abreast of the centre Fulta sand buoy.

22. Apart from the inherent improbability of the allegation that the Rabenfels did not alter her course but continued steadily heading towards the east bank, the falsity of the story became further apparent during the cross-examination of Smythe. He was asked to mark on Ex. 2 the position of the Rabenfels in the channel after passing the Red Cask Buoy. He was then asked to mark the position of the Rabenfels in the channel at D1 here Smythe had stated that the Rabenfels blew the first blast. It at once became obvious that the Rabenfels could not have reached the position in the channel at D1 where Smythe had placed her unless she had ported her helm and gone to starboard after she had left the earlier position that Smythe had marked on Ex. 2. Smythe was asked the following questions:

Q. 426. - To me it appears as though it would be perfectly impossible for this blue vessel up above here to get to the spot. D1 without alteration of her helm? Yes, she must alter it.

Q. 427. - I should have thought that she would have to port fairly considerably? Not fairly considerably, but she would have to go on porting all the time taking the bend.

Q. 428. - Do you think that is what the Rabenfels did? I don't know.

Q. 429. - Unless she was a crab how else can you explain her getting there? She must have used her helm to get there.

Q. 430. - Could you possibly place the Rabenfels" position at D1 showing how she was angled across the stream? Witness does so.

Q.431. - I suggest to you that from the position of the blue vessel at the north in order to get the position of the other vessel it must have ported round the edge of the sand, and then for some reason or other she must have star-boarded violently? May have done so.

Q. 432. - That is the only result of this map? I would not say that for certain.

Q. 433. - I suggest to you that that is the only conclusion that you could draw from this map? That is the conclusion I can draw from seeing her starboard side when she was at that angle.

Q. 434. - Looking at this map the only conclusion I can draw is that this vessel must have gone porting round the edge of that sand and then starboarded her helm violently? Don't know what he did.

Q. 435. - Do you agree with that? No, I don't agree. I don't know what he did with his helm.

Q. 436. - Have you got any other theory which will put this blue vessel into the position of the vessel at D1? I have no other theory I have no theories.

23. Baker exercising, I think, a wise discretion, refused to mark on the chart the position of the Rabenfels in the channel as Smythe had done:

Q. 317. - You say that the Rabenfels was in the stream at a wrong angle? Yes, heading to the east side of the channel.

Q. 318. - You have already refused to put the vessel on the chart to show how she was heading? Yes.

Q. 319. - And you will continue to refuse? Yes.

Q. 320. - Will you tell me what portion of the stream she was in whether the east bank or the west bank? About the middle of the river.

Q. 321. - Facing some angle or other to the east bank? Yes.

Q. 322. - Did you ever see her alter -her head? At the last moment.

Q. 323. - Can you explain why she did not go ashore? I do not know. I cannot.

24. A number of other witnesses gave evidence as to the course taken by the Rabenfels, but the only witnesses to whose evidence I propose to refer in this connexion are Scoby the pilot Good-son Smyth the Master, and Wood the second officer of the S.S. Ninkfield which had been overtaken by the Rabenfels in the vicinity of the Fulta Mat Buoy, and was following down the channel in the wake of the Rabenfels. The evidence of these witnesses was not in any way shaken in cross-examination and the effect of it was that the Rabenfels was on the western side of the channel hugging the line of buoys, and using such port helm as was

necessary to enable her to do. Scoby gave his evidence in a blunt and frank manner; I was particularly impressed by his demeanour in the witness-box, and I am prepared to accept his evidence as that of a witness of truth. A number of witnesses on the one side and on the other-were called also in connexion with the question as to whether the Rabenfels in the first instance blew one or two short blasts. I do not propose to burden my judgment with a detailed discussion of this evidence but I have taken it into consideration and the conclusion at which I have arrived on these points is that the Rabenfels in the first instance blew only one short blast, and proceeded downstream after passing the Fulta Plat Buoy in the middle or on the western side of the navigable channel, and never came right over to the eastern side as stated by the witnesses on behalf of the Calcutta. For these reasons the narrative of the events leading up to the accident as related by Smythe and Baker, in my opinion, is incredible and I do not believe it. The truth of the matter appears to me to be that the Calcutta was rounding Fulta Point in a wider sweep than pilots normally take "making an Admiral's sweep of it" as Good-son Smyth the master of the Winkfield put it; that when Smyth e steadied his vessel coming out of the eddy and was still in a position in which it was practicable for him to pass the Rabenfels either port to port or starboard to starboard he foolishly and improperly decided to keep to the western bank and pass starboard to starboard; and in answer to the Rabenfels" one short blast blew two short blasts to indicate to Bacon what his intention was. Realizing almost immediately that he had made a mistake he endeavoured when it was too late to rectify his blunder by blowing one short blast and porting his helm; but by that time an accident had become inevitable, and very shortly afterwards the collision took place. Even assuming (although, in my opinion, it is not proved), that the Rabenfels came down the Fulta Bight "a little out of position" as Smythe had stated at the Marine Enquiry, I am clearly of opinion that at the time when Smythe made up his mind to blow two short blasts and to pass starboard to starboard no emergency had arisen through any fault on the part of the Rabenfels or otherwise which would justify the application of what is known as the Bywell Castle rule to free him from responsibility on the ground that in the circumstances negligence was not to be imputed to him for the wrong and improper order that he gave, and I hold that the cause of the collision and of the loss and damage that resulted therefrom was the negligence of Smythe for whose acts the owners of the Calcutta were responsible.

25. The next question that arises is whether the fault of the Calcutta was the sole cause of damage, or whether it was caused by the combined action of the Calcutta and the Rabenfels. Now, in considering the action of those on board the Rabenfels I feel bound to say that that whereas Bacon gays his evidence frankly and with calmness Smythe appeared to me to be determined to uphold his theory of the cause of the accident in every detail even on points where it was apparent that it could not be accepted, and in giving his evidence at times he seemed to me to be following his bias rather than his memory. Having seen them both in the witness-box I feel it incumbent upon me to say that if I had to rely

upon the uncorroborated evidence of one or the other of them I should prefer to accept the testi-money of Bacon. In this case, however, a number of witnesses were called on both sides and the substance of Bacon's narrative of the facts leading up to the collision was corroborated not only by Winters, the Master of the Rabenfels, but also by those on the board the Wink-field. I was impressed by the way in which both Winters and Scoby gave their evidence; they appeared to me to be free from bias and anxious to tell the truth, and I am prepared to place reliance upon their testimony. Bacon's version of the material events is summed up in his answers to the following questions:

Q. 72. - As you went down lower you met a vessel, I believe? Yes, the Sirdhana.

Q. 73. - That is the vessel you told me you have seen at Fisherman's Point? Yes, I presumed so.

Q. 74. - Which side of the channel was she and which side were you when you passed her? She was on the eastern side and I was on the western side.

Q. 75. - That is normal? Yes.

Q. 76. - Had you any trouble in passing her at all? None.

Q. 77. - Had it any effect upon your subsequent manoeuvres? None that I know of.

Q. 78. - Whereabouts was she when you passed the Sirdhana? Above the Fulta Creek buoy.

Q.79. - Having passed her did you take a normal course through the Bight; I more or less remained over to the western side of the centre of the channel.

Q. 80. - As you were passing down the Bight did you see the Calcutta? Yes.

Q. 81. - When did you first sight her? When I was below the Creek Cash buoy.

Q. 82. - Where was the Calcutta then? Below the Fulta Point buoy.

Q. 83. - What course did you take down the Bight? I proceeded down the western side of mid-channel.

Q. 84. - What course did the Calcutta take round Fulta Point? She appeared to be fairly wide.

Q 85. - At some point coming down that Bight you blew one blast to the Calcutta? Yes.

Q. 86. - What did you do when you did that? I ported my helm and went to starboard.

Q. 87. - Had your head on to anything? I got her head on to the Centro Fulta Sand buoy.

Q. 88. - At the time when you blew that one blast where was the Calcutta?

She was on my starboard bow showing me her starboard side.

Q. 89. - That is pretty wide coming round that corner? Fairly wide as she was showing me her starboard side at that time.

Q. 90. - The object of blowing one blast is to give information to the vessel coming as to what you are doing? Yes.

Q. 91. - Had you any other object in blowing this blast except telling him that? To get a reply blast from him which would indicate to me what he wanted to do.

Q. 92. - Had you at that time in mind what course he would take? I cannot say that I definitely had.

Q. 93. - Thinking of it now had he an alternative? He could have gone to the other side so far as I know.

Q. 94. - Which ship had the right of way? Tho Calcutta had.

Q. 95. - Why? Because she was coming up with the flood.

Q. 96. - You are bound to manoeuvre as she answers you, she having the right of way? I had to manoeuvre my ship to try and coincide with his movements to carry out his action.

Q. 97. - I think you said that you blow one blast and ported over so as to got that buoy ahead? Eight ahead.

Q. 98. - Would it have been a possible manoeuvre for you to have gone to the west of that buoy, outside of it? Yes.

Q. 99. - It would have been a very close fit? It required skill navigation.

Q. 104. - Did you in fact that morning ever go outside that buoy? That afternoon I did.

Q. 105. - When? On my return to Calcutta I went westward of the buoy.

Q. 127. - You remember you said that you passed the Sirdhana in the Bight port to port? Is that the normal vary you pass there? Yes.

Q. 128. - When you first sighted the Calcutta how did you think that she was going to pass? Port to port.

Q. 129. - When you gave this one short blast did you get any answering signal to it? Yes.

Q. 130. - What was it? Two blasts from Calcutta.

Q. 131. - What did that indicate to you? That he was going to port. That ho was going to starboard his helm and going to port.

Q. 132. - On that what would be the proper manoeuvre for you to carry out? The same starboard helm and go to port.

Q. 133. - Did you do so? I gave him two blasts seeking to tell him that I was going to do so, and I endeavoured to do so.

Q. 134. - Did you continue that course? No, because I saw him shortly after that swinging very quickly to starboard across my bow.

Q. 135. - Then what manoeuvre was left for you to carry out? To go full astern.

Q. 136. - Did you do so? Yes.

Q. 137. - What happened? We came into collision.

Q. 138. - Where did you hit him? On the port side forward of the bridge.

Q. 139. - In what position in the channel so far you could gauge? On the western side of mid-channel.

Q. 140. - Do you remember the time when you blew one short blast and slightly ported? Yes.

Q. 141. - Supposing at that time the Calcutta had ported her helm would there have been any collision in your opinion? No.

Q. 142. - Take another possibility; at the time when the Calcutta blew two short blasts; if she continued to carry out that manoeuvre and you had blown your two short blasts and carried out that manoeuvre there would have been no collision? No.

Q. 143. - At the time when you blew this one short blast there was time for you to carry out the manoeuvre of either going to the eastern bank or keeping along the western bank and avoid a collision according as he manoeuvred? If he let me know what he was going to do, Yes.

Q. 144. - You said that after he blew two short blasts and you answered with your two short blasts that you saw his head paying off or swinging to starboard? Yes.

Q. 145. - That would indicate I take it that he was on port helm? That is what you would suppose.

Q. 146. - Did you hear any signal from him indicating that he was proceeding on port helm? No.

Q. 147. - Do you think that it is at all possible that this would happen, that he gave two blasts and you answered with two blasts and while you were giving your blasts, he gave one blast which you did not hear? Yes, quite.

Q. 148. - You said that you answered his two short blasts with two short blasts, and you said that that was the proper thing to do in your opinion, and that if he had carried it out there would have been no collision? Yes.

Q. 149. - Once he altered his mind and did not carry it out was a collision

avoidable? No, I don't think so then.

Q. 150 - Could you have done anything else except to go astern in those circumstances? No.

Q. 151. - What is the effect of going astern? It pulls her head to starboard. It really pushed my stem to port; that action is bigger than pushing my head to starboard.

26. Now, although I am not satisfied that the Calcutta when rounding the Fulta Bight took quite as wide a sweep as that indicated by Bacon on the composite plan (marked in black), I find that in substance the narrative of the accident as told by Bacon is correct. To my mind it is inconceivable that Smythe having the right of way should have sounded two short blasts (whether or not he was under the impression that Bacon had sounded two short blasts) unless he was well over on the western side of the channel and had decided to pass the Rabenfels starboard to starboard. I have held that the order for two short blasts was erroneous and improper, and upon no other hypothesis, as it seems to me, could such an order have been given by a pilot so experienced as Smythe undoubtedly was.

27. In my opinion, and on this matter I find myself in agreement with the advice that the assessors have given to me, Smythe had ample time in which to make up his mind what he would do, and how he would pass the Rabenfels before he gave the order for two short blasts, and there is no ground for the contention that he gave the order in the agony of an emergency created by the action of the Rabenfels.

28. What then, is the negligence on the part of Bacon which it is contended was the cause of the collision? It was at one time suggested in the course of the trial that because Bacon had not noticed the Calcutta near Hooghly Point when the Rabenfels was at Fisherman's Point there was not a proper look out kept on the Rabenfels. But what had that to do with the accident, unless it were to be held that on sighting the Calcutta from Fisherman's point the Rabenfels ought not to have entered the Fulta Reach till the Calcutta had passed her, and, therefore, in some way or other the failure to sight the Calcutta was the cause of the accident.

29. Inasmuch, however, as it is not open to doubt or controversy, in my opinion, that when the Calcutta and the Rebenfels first sighted each other in the Bight as the Calcutta was rounding Fulta point there was no difficulty or danger in the situation, and the vessels under proper navigation could have passed each other either port to port or starboard to starboard, I am not disposed to labour this part of the case that was presented on behalf of the Calcutta, for applying the principles of law that I have restated the failure of the Rabenfels to sight the Calcutta from Fisherman's Point was no more the cause of the collision than the failure of the Rabenfels to remain in her moorings at Calcutta. I arrive at the same conclusion for the same, among other reasons with regard to the contention that if the Rabenfels had not overtaken the Winkfield at or about Fulta

Flat buoy or passed the Sirdhana above the Creek Cask buoy she would not have been "at a bad angle" and the collision would not have taken place. Further, I am not satisfied upon the evidence that the Rabenfels committed a breach of Chap. 11, Rule 5 of the Hooghly Rules by overtaking the Winkfield in the Fulta Bight, although no doubt she overtook her somewhere in the vicinity of the Fulta fat buoy.

30. Again, I am not satisfied that the Rabenfels in passing the Sirdhana in the Fulta Bight was acting in contravention of any warning against passing vessels in the Fulta Bight that was then in operation. It appears that towards, the end of 1926 the sand had shifted in the Bight, and had lessened the width of the navigable channel, and that a warning against passing vessels in the Bight had been posted on the notice board in the Port Office in December 1926. The warning notice was not produced, and its exact terms were not proved, but in any case I am satisfied that in August 1927 it had become a dead letter, for the navigable channel by that time again had been restored to the width prevailing before December 1926, and all the pilots who were called as witnesses agreed that before August 1927 it was the universal practice of pilots to pass though not to overtake vessels in the Fulta Bight. In my opinion the action of Bacon in overtaking the Winkfield and in passing the Sirdhana, which operations he carried out in a proper and seamanlike manner, in no way caused the collision that took place between the Calcutta and the Rabenfels. What then is the alleged negligence on the part of Bacon after the two vessels had first sighted each other in Bight that it is contended was the cause of the collision?

31. It was urged by learned Counsel on behalf of the Calcutta that if the collision took place at the point marked green C as stated by Smythe, the Rabenfels must have been on the wrong side of the channel, and must have run down the Calcutta who had chance of escape thus causing the collision. "She pushed me ashore, broad side" Smythe said. Now, in considering what was the position of the vessels in the stream when the impact took place somewhere in the navigable channel in the vicinity of a line between the Centre Fulta buoy and the figure 61 it must be borne in mind that at this point the channel was not more than 650 feet wide, and with the Calcutta heading an angle of 30-45 degrees towards the east bank, and the Rabenfels striking her at an angle of 45 degrees it is apparent that the vessels were straggled across the stream at the time when the collision occurred, and in such circumstances it would not be easy to estimate exactly where the vessels were in relation to the east bank and the Centre Fulta buoy. Paterson Smith the master of the Clan Mackellor hearing the anchor cable running out looked ahead, and in his opinion the vessels at that time were about 100 feet from the eastern bank, but he could not say whereabouts in the channel the actual collision had taken place. The witnesses from the Winkfield, Scoby, Goodson, Smith, and Wood all stated that the impact took place in midstream and after considering all the evidence adduced on this point I find that the collision took place in the middle of the navigable channel somewhere in the vicinity of the Centre Fulta buoy, and I am satisfied that the

Rabenfels was never right over on the eastern side as stated by Smythe. In my opinion the Calcutta, which had way on when the Rabenfels struck her, continued to move with her own momentum towards the eastern bank after the collision, and struck that bank at about the figure 61.

32. It was next contended that the Rabenfels, being at a bad angle after passing the Winkfield and the Sirdhana, blew two short blasts in order to pass the Calcutta starboard to starboard, but I find that the Rabenfels kept a normal course coming round into the Bight, and was not at a bad angle as stated by Smythe and as I also hold that Bacon in the first instance blew only one short blast I am of opinion that this contention on behalf of the Calcutta is ill-founded. I go further, for in my opinion even if the Rabenfels was "a little out of position" that cannot be regarded as in any way the cause of the collision. Such a contention cannot be upheld, in my opinion, taking into account Smythe's evidence alone.

Q. 315. - What happened after this? I was out of the eddy and saw the Rabenfels' starboard side a little out of position, but I still thought, to my mind, that she could pass me port to port. You remember saying that? Yes, that is my story, that is the truth.

Q. 316. - Then you remember saying : "What happened then? When I got a little closer I heard two blasts from the Rabenfels"? Yes.

Q. 317. - May I take it, therefore, when you steadied out of this eddy you were under the impression that the Rabenfels and you could pass port to port? Yes.

Q. 318. - And you say she was a little out of position? Yes.

Q. 319. - Can you remember which side of the river she was? No, I could not. She was out of position as regards her angle. That is what I want you to get at.

Q. 320. - Was there anything to prevent her going over on to her starboard side of the channel? Not if she had her helm hard-a-port, as I stated before.

Q. 321. - In the position in which you were if she had given one short blast and ported her helm and proceeded, there would have been no collision? I could not tell you.

Q. 322. - Provided that you went up on the eastern bank? Yes and she answered her helm. Don't forget that.

Q. 323. - Do you suggest that she did not answer her helm? I could not; she did not appear to me to change her line of direction. I always saw her starboard side. That was just my own impression at the time.

Q. 324 - Court : - You did not notice her change her line at all? No.

Q. 325. - If she had ported her helm you thought you could pass port to port? When we were in this position.

Q. 326. - At that time provided both ships were properly navigated there was no danger of collision? No, that is my impression.

Q. 327. - The correct thing for the Calcutta to do was to proceed along the eastern bank of the river? Yes.

Q. 328. - And the correct thing for the Rabenfels to do was to proceed along the western bank? Yes.

Q. 329. - You are not able to assist us at all in saying how far off the western bank the Rabenfels was at that time? No.

33. The last contention on behalf of the Calcutta was that the Rabenfels ought to have slowed down her speed or stopped in order to have allowed the Calcutta to pass her either (1) when she first sighted the Calcutta, or (2) after Bacon had sounded his first signal of one short blast; or (3) after he had sounded his second signal of two short blasts.

34. In my opinion none of these contentions can be upheld. As to (1) it is enough to say that it was not really a matter of dispute at the trial that at that stage the vessels were in a position in which they would pass each other safely if they were navigated in a normal and skilful manner, and there was no reasonable ground to induce Bacon to cease his engines or to proceed otherwise than in the usual way with his ball up; or, indeed, to justify him in so doing. As to (2) it was urged that as the Calcutta had the right of way it was improper for Bacon to have given any signal, and that he blew his whistle because he must have known that there was danger, and ought to have eased on stopped. I am clearly of opinion that in giving a signal to indicate that he was pursuing a normal course to his starboard side of the channel Bacon in the circumstances was acting in a proper and seamanlike manner. When he saw the Calcutta rounding the Fulta point in a rather wider sweep than vessels usually take in my opinion it was reasonable and prudent for him to indicate that he would be following a normal course unless the Calcutta directed some other course. Bacon in cross-examination was asked:

Q. 601. - Before you blew your first blast your idea was that the "Calcutta" was in difficulty with the tide? I do not know that I thought of it in that light. I did not know what she was going to do or what she was capable of doing.

Q. 602. - Then when she started drifting northwards you thought that something unusual was happening? At what time?

Q. 603. - Shortly before you blew your first blast? I thought that she was taking a peculiar course round there. And I would exactly indicate to her what I was going to do.

Q. 604. - Did you at that time think that she was possibly going to take western course? I did not know what she was going to do.

Q. 605. - Did you think that? I was prepared for him to do anything so long as he gave me an indication as what he was going to do.

Q. 606 - Did you think that something had gone wrong with the Calcutta? After giving my one blast I thought that something might possibly have gone wrong.

Q. 607. - Which may have been due to the current in the eddy? No, because if he had been in that eddy he would have swung to his starboard side.

Q. 608. - Didn't you think that his steering gear might have broken than, or his vessel might have got into the eddy? I am afraid I cannot say exactly what might have happened, or might have been wrong.

Q. 609 - Before your first blast did you not expect him possibly to keep to the western side? He might have done that seeing his peculiar position.

Q. 610. - That was the reason why you gave your first blast according to you? I gave that blast to indicate to him that I was directing my course to starboard.

Q. 611. - Is it true that you gave the first blast because you thought that she was going to the western side, and you wanted information? I gave the first blast to indicate that I was directing my course to starboard, and with the hope that he would give me some reply or indication as to what direction he was going to take.

35. See the Uskmoor [1902] P. 250 the Corinthian [1909] P. 260 and the Megantic [1915] 31 T.L.R. 190. But there is a further answer to this contention. Assuming, as I have found to be the fact, that when the vessels first sighted each other in the Bight there was no reason for Bacon to suppose that the Calcutta could not and would not pass the Rabenfels in the normal way, it was clearly established by the evidence and I find that vessels answer the helm better and are more easily controlled when proceeding at some speed than when going slow, and that it would have been a bad manoeuvre on the part of Bacon to have eased or stopped his engines until Smythe had indicated what course he was proposing to take. Indeed, Smythe agreed with Bacon and Winters that to have slowed down would have been bad seamanship on the part of Bacon. Smythe was asked:

Q. 506. I just want to remind you of the statement you made in Alipore Court. You said there that it would have been a bad manoeuvre for Mr. Bacon to slow down? No, I do not remember what I said there, If you show it to me under my signature I might be able to say. (Then says). Yes, I remember it now. That was on the question of his unskilfulness.

Q. 507. - Do you agree that it would be a bad manoeuvre? Yes.

36. Upon this matter I sought the advice of the nautical assessors, and they entirely agreed with me that it would have been bad seamanship on the part of Bacon if he had slowed up or stopped before he heard the two short blasts from the Calcutta. As to (3) in my opinion, and the advice of the assessors is in accordance with my view, after Smythe had sounded two short blasts followed by one short blast the collision was inevitable, and that, although Bacon did all that

he could to avoid and minimise the severity of the impact, at that stage nothing could be done to avoid the collision taking place.

37. After considering the evidence as a whole I am of opinion that the Rabenfels at all material times was navigated in a skilful and proper manner; that Bacon was not in any way guilty of negligence and that the collision was not caused by any act or omission on the part of those on board the Rabenfels. In my opinion, the solo cause of the collision and of the loss that resulted therefrom was the improper and negligent navigation of the Calcutta by Smythe, and I hold that the loss and damage was caused solely by the fault of the Calcutta.

38. This case has been fully and skilfully presented and argued on both sides, and learned Counsel on behalf of the Calcutta in his final address, if I may be allowed to say so, properly and handsomely expressed regret for what he regarded as the ill-advised step of putting Bacon on his trial for his action in connexion with this accident. I desire to endorse and associate myself with these observations of Mr. Chaudhri. The duty of navigating deepships in the Hooghly is never an easy one, and the pilots are always subjected to strain and anxiety. Pilots, of course, are required to exercise skill and foresight, but they are not expected to be infallible, whether or not it is necessary or expedient to institute proceedings under Act 12 of 1859 must depend upon the particular facts of each case. In the present instance no misconduct or moral delinquency was to be imputed to Bacon in connexion with this collision, and, having regard to the evidence before the Marine Court of enquiry, and to the findings of the Marine Court, among others, that the proximate cause of the accident was the blameworthy action of Smythe and that on certain important and material issues the evidence of Smythe would not be accepted, I am bound to say that I do not find it easy to understand why it was deemed necessary or reasonable to put Bacon alone on his trial, and thus compel him to suffer the anxiety, humiliation, and expense that such a prosecution must entail.

39. If I have spoken strongly on this matter (although I hope not in unmeasured terms), it is because I feel strongly that the circumstances attending a collision should thoroughly be examined; and that great care should be exercised by the authorities concerned before a prosecution in respect of it is launched against a pilot under this Act. It will be a source of satisfaction to all those concerned in and with the navigation of the Hooghly that, notwithstanding what has taken place in connexion with this collision, Bacon's character remains unblemished, and that the reputation which after 24 years' service he has gained as an experienced and efficient pilot has now been vindicated. The result is that the suit is dismissed with costs, including the costs of the two commissions and reserved costs (if any), on scale No. 2.