[HIGH COURT OF AUSTRALIA.]

THE UNION STEAMSHIP COMPANY OF NEW ZEALAND LIMITED . . . . } PLAINTIFF;

AND

THE SHIP *CARADALE* . . . . . DEFENDANT.

H. C. OF A. 1937.

MELBOURNE, *June* 21-25, 28, 29; *July* 1, 26; *Aug.* 25; *Sept.* 8.

Dixon J.

Shipping—Navigation—Negligence—Collision—Open waters near mouth of river—One ship having emerged from river—Other ship about to enter river—Wrong order leading to collision—Insufficient look out.

The steamships *Kakariki* and *Caradale* collided at night-time in Hobson's Bay about a mile and a half from the mouth of the river Yarra. The *Caradale* attempted to pass the *Kakariki* port to port. When the *Caradale* went to starboard to accomplish this, the *Kakariki* went to port. The *Caradale* had no look-out on the forecastle head. The owner of the *Kakariki* brought an action against the *Caradale* to determine the responsibility for the loss suffered in the collision.

Held:—

(1) That the place where the collision took place was open waters and not a narrow channel and, therefore, that the rules as to passing in narrow channels did not apply.

(2) That it was the starboarding of the *Caradale* that created the risk and her further starboarding that led to the actual collision.

(3) That the collision rules then applied, and the *Caradale* having the *Kakariki* on her starboard side was in the position of a give-way ship.

(4) That the order to starboard arose out of some failure in vigilance occurring on the navigation bridge.

(5) That, though it was not possible to say whether, if a look-out had been posted on the forecastle head, he would have given warning in time or at all, in the absence of a look-out there it could not be right for the same man to undertake the navigation of the ship and, at any rate in those waters, the duties of a look-out on the bridge.

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(6) That the *Caradale* was solely to blame for the collision and a decree should be pronounced accordingly.

(7) That, in order that the decree should not appear to impute personal fault or privity to the owners of the *Caradale* which would deprive them of their right to limit liability, the decree should pronounce that the collision was occasioned by the fault of the master and crew or some or one of them and not of the owners, master and crew &c.

TRIAL of action.

This was an action brought in the admiralty jurisdiction of the High Court by the Union Steamship Co. of New Zealand Ltd., the owner of the s.s. *Kakariki*, against the s.s. *Caradale* to determine the responsibility for the loss suffered in a collision between the two vessels which occurred in Hobson's Bay near the mouth of the river Yarra shortly after eleven o'clock on the night of 29th January 1937.

The facts are stated in the judgment hereunder.

Wilbur Ham K.C. and *Evans*, for the plaintiff.

Gorman K.C., *Fullagar* K.C. and *Reynolds*, for the defendant.

Cur. adv. vult.

July 26.

DIXON J. delivered the following written judgment :—

The purpose of this suit, which was brought in the admiralty jurisdiction of the court, is to determine the responsibility for the loss suffered in a collision between two vessels which occurred in Hobson's Bay on the night of 29th January 1937. At eleven or eleven and a half minutes past eleven on that night the stem of the steamship *Caradale* struck the starboard side of the steamship *Kakariki* almost at right angles. She struck the *Kakariki* forward just abaft of the forecastle about opposite the hatch. The starboard side of the *Kakariki* was stove in, and the stem of the *Caradale* penetrated almost as far as the port coamings. The *Kakariki* immediately sank, and five lives were lost. Her hull lies in thirty-six feet of water, heading, along her fore-and-aft line, N. 10° W. true. Her position is 3,250 feet from the Gellibrand pile light on a bearing of S. 13° 36′ W. When the collision occurred the *Caradale* was outward bound and was on her way down to the South Channel, having come out of the river.

The *Kakariki* was inward bound from Strahan in Tasmania and was making her way from the West Channel to the river. She was a small ship of 417 tons net register, 192 feet in length and 32 feet across the beam. She was laden with pyrites and general cargo. The *Caradale* is a larger ship, being 937 tons net register and in length 290 feet.

The course from the West Channel pile light up to the Gellibrand light is commonly taken to be N. 22° E. true and the distance twenty miles. The bearing from the Gellibrand pile light to the Hovell light, which marks the South Channel, is nearly due south true, about S. 2° W. The variation in Port Phillip Bay between true north and magnetic is 8° 10′ E.

There can be no doubt that the wreck marks within a very short distance indeed the place where the collision occurred, and it is natural to ask how it comes about that ships which ought to have been proceeding on such respective courses met at a point lying S. 13° 36′ W. from the Gellibrand light. That light lies S. 14° W. or a little less from the Williamstown buoy.

On the part of the *Caradale*, her presence in the vicinity is explained on the ground that in waters approaching the river, which is a narrow channel, it is a well-recognized usage for outgoing vessels to keep to the starboard or west and for incoming vessels to keep to their starboard or east, so that the latter may enter the river on their right hand or proper side without interference near the mouth from the former. Her master says that, accordingly, on rounding the Williamstown buoy he steadied his vessel on a course of S. $\frac{1}{4}$ E. magnetic, which is a little more than S. 5° W. true, a course which would have taken him within a cable and a half of the Gellibrand light, whence he would set his course to the Hovell light. But, according to him, after a few minutes, as he had sighted on rounding the buoy the lights of the *Kakariki*, then about three miles down the bay, he took his ship further west and steadied on a course three-quarters of a point over, viz., S. $\frac{1}{2}$ W. This course, he says, brought him close to the light and into the area where, owing, as he maintains, to the movements of the *Kakariki*, the ships came into collision.

On the part of the *Kakariki* it is said that there is no uniformity in the way in which vessels approach the waters at the mouth of

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the river. The narrow channel admittedly ends in fact at the flashing buoy at Williamstown. They are open waters south of that point, and it is said that, even if it be true that nearing the mouth of the river vessels commonly keep or are expected to keep to their respective starboard sides, yet this cannot extend south of the Gellibrand light, which is about 5,575 feet from the Williamstown flashing buoy. To account for the *Kakariki* being in the neighbourhood of the point where the collision actually took place, it is enough for her master to point to the course which, he claims, he was making. Her course of N. 22° E. true, if set from two cables off, that is, east of, the West Channel pile light and maintained, should, it is said, have brought her out two cables off Gellibrand. If the customary rule which is set up on behalf of the *Caradale* prevailed and applied so far south, it may be that the *Kakariki* would be expected to go further to the east, but, unless she did so, her course would be expected to bring her within a cable and a half of the point of collision. It is true that, according to a calculation made or caused to be made by the plaintiff's counsel, the exact bearing of the Gellibrand light from the West Channel pile light is N. 21° 11′ E., and, according to another stated by the defendant's counsel, a variation of a degree in a course of twenty miles exactly maintained means a difference of four cables or 2,400 feet in the ship's position after accomplishing that distance. Neither of these calculations was proved in evidence, although no doubt the second is the result somewhat overstated of an ordinary trigonometrical ratio. It would mean that, if the *Kakariki* accurately laid and kept a course of N. 22° E. true, she would have passed some cables further east of the point of collision. Her master says that, seeing the outgoing *Caradale* and in view of her movements, he gave a helm order to port at a point which on his estimate would be about nine cables to a mile from the Gellibrand light. This order and, perhaps, a subsequent order, hard-a-port, given at a late stage, brought his vessel to the point where it was struck.

A very general view of the nature of the case suggests that the collision was brought about by an attempt on the part of one vessel, the *Caradale*, to pass red to red combined with an intention, if not an attempt, on the part of the other, the *Kakariki*, to pass green to green. But this gives no more than a reason why the casualty

occurred; it does not explain by what relative movements of the vessels they were brought into collision or in which of them the fault lay.

As to the alleged custom, usage or practice, in spite of the widely differing opinions expressed in the witness-box by expert mariners and pilots, I think that the position is reasonably clear. The topographical features of Hobson's Bay make it natural that an incoming vessel will keep more to the east than a direct course even from the Hovell light renders necessary. She must enter the river on the eastern side. There is a deep dredged channel from the Port Melbourne channel to the entrance of the river. Some ships going up the river may be of such draught that they use it. It leads up to the Williamstown buoy, on the north-eastern side of which an incoming ship must pass. Outgoing vessels must keep on the other side of the buoy. Many of them will go down to the Gellibrand light for the purpose of proceeding to the west channel; others, those going to the south channel, find it convenient to set their course to the Hovell light by reference to the Gellibrand light and at the same time to keep to the west of incoming ships. As ingoing and outgoing vessels may readily find themselves meeting end on or nearly end on and, therefore, obliged to keep to starboard, it is better to keep over to begin with. As a consequence, more often than not outgoing ships are found keeping a little west and incoming ships a little east, with the result that for the most part vessels in those waters pass red to red. But there is no uniformity, no usage departure from which is regarded as a clear breach of proper seamanship. The waters up to the Williamstown buoy are clearly open, and the ordinary rules for the prevention of collisions at sea apply to them, and not art. 25. No one believes that the waters outside the Gellibrand light are a narrow channel. Apparently some believe that the waters down to the Gellibrand light constitute a narrow channel. But I do not think the belief is widespread. It may be based on the idea that it is better to keep to the right as if it were a narrow channel or it may be a confusion due to analogy with the Port Melbourne channel, which is a dredged narrow channel extending up to the piers and marked by beacons.

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The evidence relating to what was seen from and done by each of the colliding ships was in conflict, and much of the conflict appears to me to be irreconcilable. The conclusions which I have reached as to the actual movements of the respective ships are based upon many considerations arising from an examination of the record of the oral evidence and a comparison of times, distances, speeds, courses and bearings as well as an attempt to estimate the reliability of the witnesses. I shall state with respect to each vessel in turn what, according to my findings, occurred. I shall begin with the *Caradale*.

She left the wharf at Victoria Dock at 10.17 p.m. At 10.50 her engineer was given full speed ahead, before she had actually reached the river mouth marked by the red and green lights. She reached the Williamstown flashing buoy probably at eleven or slightly before. She proceeded thence for six to seven minutes at a speed which I estimate at something over eight knots, but probably not more than eight and a half knots. The engine-room was then given the all-clear signal, and she increased her speed by at least a knot, attaining in the next four minutes something approaching ten knots. On passing the Williamstown flashing buoy her course was not definitely set in terms of a compass bearing, but she was brought round to and steadied upon a course which, according to the helmsman, was shown by the compass to be S. $\frac{1}{4}$ E. magnetic. No doubt in coming round before she steadied she would go somewhat east of a north-and-south line from the buoy. At all events, I think she did adopt a course bringing her about two cables or a little more to the east of the Gellibrand pile light, and, if she steadied on that course, well east of the north-and-south line of the buoy, that would be S. $\frac{1}{4}$ E. magnetic, or perhaps 5° W. true. Notwithstanding the evidence that she held this course for a very short time, I think it was maintained until she was nearly abreast of the Gellibrand light.

During this time the *Kakariki* was visible on the *Caradale's* starboard, not her port, bow. At an early stage she had displayed her red light to the *Caradale*, but later her green light also came into view. When she was drawing abreast of the Gellibrand pile, the *Caradale* was put to starboard some degrees under a point. The purpose was to pass the *Kakariki* red to red. I am inclined to

think that not only had the latter's green and red lights then been in view, but the red light had been lost. Her bearing was something over a point on the *Caradale's* starboard bow. The alteration in the *Caradale's* course was again not made in terms of a compass bearing, and I think that she steadied upon it for a very short time. Probably the compass showed the quartermaster S. $\frac{1}{2}$ W. The alteration was not sufficient to put the *Kakariki* on the *Caradale's* port bow. But it was, in my opinion, not intended as a steady course, and the *Kakariki* appeared a long distance away and was expected to starboard. In fact she was about a mile and a half away. This starboard movement of the *Caradale* took place just before 11.6 p.m. At that time, the engine-room was given all clear and the speed was brought up. Notwithstanding the statements to the contrary, I think the *Caradale* made a still greater movement to starboard before the helm was put hard over in the manner I am about to describe. It is not easy to say how far, but I think that the purpose of passing the *Kakariki* red to red was pursued. No helm signal was given. The *Caradale* had no look-out on the forecastle head. On the bridge with the helmsman was the master and the third officer, who coming down the river had been stationed forward. After the all-clear signal had been given, he went into the chart room behind the wheel-house. He went there in order to look at the course down the bay that had been logged on the previous voyage out. The master said that he directed him to do so as a young officer for his edification or instruction. The master stood, I think, on the port side of the wheel-house. For some reason he did not see what I think probably occurred on the first starboard movement of his own ship, namely, that the *Kakariki* had gone to port. The helmsman was steering by compass and had not noticed it. The joint speed of the ships was eighteen knots or perhaps more, and a short time made a great difference in their positions. When the third officer returned and reported what was logged as the previous course both heard a sound-signal from the *Kakariki*. They looked up and saw that the green light only of the *Kakariki* was showing and that she had gone to port and not, as was expected, to starboard. In fact the sound-signal was two blasts, and, if they had been fully attentive and had had no preconceived idea that

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both ships were about to pass red to red, I think they could have had no doubt of its significance. To what degree there was a genuine question whether it was one or two blasts I am unable to say. I am inclined to think that the master was taken by surprise and that whatever question he cried out to the third officer and helmsman amounted to nothing but an ejaculation instinctively placing on the other ship responsibility for some misconduct or fault in the matter. He put the helm hard-a-starboard and by so doing brought the ship to the point of collision. He rang full astern, but I think there was enough interval between either the giving or the execution of this order and the collision for the ship to go round, from whatever point her stem was upon, a great many degrees to the west. For I do not think that the *Kakariki's* head was at the moment of impact so very far, if at all, west of the point to which it now lies directed, and I think that, at or after the collision and before the *Caradale* drew away, her starboard light was visible along a line from the point of collision carried through or very close to the Gellibrand light. As she struck the *Kakariki* her fore-and-aft line was not quite at right angles with that of the latter ship. The greater angle was, I think, that made with the fore part of the *Kakariki*. That ship had still some, although not much, way on, but she may have brought the *Caradale's* head round to some extent. The visibility of her green light from behind Gellibrand light does not, therefore, necessarily mean that at the moment of impact she had gone round fully to west magnetic.

The reduction of speed in the *Caradale* in consequence of her engines being put astern is a matter difficult to estimate. But I am inclined to think that she was making ten knots or thereabouts when they were reversed and that a full minute did not then elapse before she struck the *Kakariki*. The impact occurred, I believe, about eleven minutes past eleven.

It is now necessary to state the movements and actions of the *Kakariki*. Her course had been set from abreast of the West Channel pile light, which probably she passed at about two cables distance. The time was five minutes to nine or thereabouts. The course was set as N. 12° E. by her standard compass. The compass on her lower or ordinary navigation bridge, where at that time her helmsman steered her, varied from the standard compass on the

upper bridge. I believe that the ship was steadied on the course according to the standard compass. But it is uncertain what on the voyage up Port Phillip Bay was the precise deviation of that compass from north magnetic. On the whole, I think the proper conclusion is that it was between one and two degrees east. Probably little attention was paid to the exact deviation when 12° E. was set, that being regarded as an ample allowance. In Port Phillip Bay N. 14° E. magnetic is the approximate equivalent of N. 22° E. true.

She was steered by the lower bridge compass until about half-past ten, when the helmsman and the master went to the upper bridge, which was used in taking the ship through the approaches to port. At some time between that hour and eleven o'clock the helmsman ceased to steer by the compass, the light of which he covered or obscured, and steered by some shore light or lights. The third officer was upon the lower bridge, where the telegraph was situated. At ten minutes to eleven he gave the time to the engine-room and said that they would reach Gellibrand light in another twenty minutes. The engineer then made her engine ready for manœuvring. The ship maintained a speed of about 8½ knots. It is likely that, while steering by a light or lights, the helmsman had brought the ship a little to port, but I think that at eleven o'clock she was not more than about half a point off the course represented by N. 12° E. on her standard compass. It is not, of course, possible to fix her position at that time with exactness, but my opinion is that at eleven o'clock she was about two miles between S. 13° W. and 15° W. true from the Gellibrand light and that she was on a course which was between N. 16° E. and N. 22° E. true. I am inclined to think that it was at this time nearer 16° E. than 22° E. If so, she maintained that course until about six minutes past eleven, when she altered her course to port. She did so because she saw the *Caradale* come to starboard. At the same time she gave two blasts. The point where that was done I fix at between six and seven cables from the place of collision. The ships were separated by double that distance, and I do not think that these sound-signals were heard upon the *Caradale*. When the *Caradale's* next movement to starboard was seen, the *Kakariki* was put hard-a-port. The *Caradale's*

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red light had not then come into view. Two blasts were sounded by the *Kakariki* and, I believe, distinctly sounded. When this was done full astern was rung and she was at once put full astern, the readiness of the engine allowing it to be done with greater quickness. I think her head went round to port, but how many degrees I am unable to say. The two movements to port brought her fore-and-aft line at the moment of collision at an angle with the *Caradale* which I have already described, and the actual direction of each ship is interdependent with the other. I have already stated my view of the *Caradale's* direction. The time which elapsed after the order full astern was executed in the engine-room until the collision is difficult to fix, but it was enough to reduce the way of the *Kakariki* very greatly. I estimate that the reduction was from a speed of $8\frac{1}{2}$ knots to a speed of 2 knots. Probably the time was a minute and a half. As the *Caradale* came round her red light came into view and then her green light shut out. But this was, I believe, after the *Kakariki* had been put hard-a-port.

I do not propose to discuss the very many questions of evidence which are involved in, or perhaps I should say lie behind, the findings embodied in the above statement of the circumstances attending the collision. For the most part the views I have taken will be apparent to the parties. But there are certain observations which I should expressly make.

In the first place, I have regarded the question whether the *Kakariki* lay upon the port bow of the *Caradale* while the latter steamed on a course S. $\frac{1}{4}$ E. as of much importance. I am convinced that she did not. Every consideration seems to me to tell against such a relative position of the ships. I believe the evidence that she displayed her green light to the *Kakariki*. Then the time at which the lights of the *Kakariki* were picked up by the *Caradale* was about eleven o'clock. The bearing of the *Kakariki* could scarcely be less than S. $\frac{1}{2}$ E. magnetic if she were on the *Caradale's* port hand, that is, less than three degrees on her bow. I accept the evidence of James and Ricketts. Upon that evidence I think that at about five or six minutes past eleven the *Kakariki* was in a position not further east than of a line which can most conveniently be described by adopting the end of the Gellibrand pier as a reference point and

taking therefrom a bearing of S. 4° W. true. She was, I believe, further west, but that line I regard as the eastern limit of her position. It would be impossible for her to move across in the interval and at the same time exhibit to the *Caradale* any coloured light but her green. The manœuvre is a most improbable one, and all the evidence from the *Kakariki* is opposed to it. Moreover, when from the *William Andrew* she was first seen within, that is, west of, the line I have stated, her red, not her green, light was visible, which means that she must have at that moment been steaming at least five degrees east of north true. This would make it necessary for her to have gone round towards the east after having moved over towards the west.

When from the *Kakariki* some of the lights of the *Caradale* were seen before she had rounded the Williamstown flashing buoy and steadied on her course S. $\frac{1}{4}$ E. magnetic, I think that the bearing of the lights was not particularly noticed but that the general impression remaining in the minds of those navigating the *Kakariki* was that they were ahead. As a result probably of studying charts and going over the facts of the case they have formed the belief that, although, roughly speaking, these lights were ahead, they were slightly on the port side of the *Kakariki's* fore-and-aft line. The *Caradale*, before she rounded the buoy, was necessarily moving across the natural line of vision. I think it improbable that any impression of where she precisely was in relation to the fore-and-aft line of the *Kakariki*, when first sighted, was made upon the minds of the witnesses with sufficient distinctness to make their statements on the question a reliable guide. At the same time I do not under-estimate the importance of the bearings of, say, the flashing buoy and of the Gellibrand light from the course of the *Kakariki* at the time when the *Caradale* came round the buoy. For, if the relation of those points to the fore-and-aft line of the *Kakariki* could be established it would fix within limits the position of the *Kakariki*. But the two bearings on any view could not be very far apart, that is, could not include a large angle, and it would, therefore, be necessary to obtain them with a good deal of precision. I do not think that before the collision the position of these points at a given stage, particularly the position of the flashing buoy,

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assumed enough importance to leave an impression upon which any dependence could be placed. I think the Gellibrand light was probably somewhere about half to three-quarters of a point on the *Kakariki's* port hand and the flashing buoy somewhat finer. As she came up the bay the Gellibrand light, which was picked up ahead and at that distance was apparently almost right ahead, had been, I believe, gradually assuming a position on the port bow. When the helmsman began to steer by shore lights, it may well be, as I have said, that he brought the ship's head over somewhat to the west of the original course. That reason, coupled with the evidence of those navigating the *Kakariki* as to the Williamstown lights being ahead, has led me to think that possibly the course at that moment may have been as far over the compass from 22° E. true as 16° E. Of course, whether the *Caradale* saw both her side lights, that is, on the former's starboard bow, before going to starboard depends to some extent on the same question and on the same doubt.

I am not prepared to act upon the evidence given by those navigating the *Caradale* as to her actual movements and the time and distance between them and the relation of the other vessel. I think that they were off their guard at the critical time and fell into excitement and confusion. In reconstructing the events leading up to the casualty, they found the justification of the part played by the *Caradale* in the belief which they were under that the ships would pass red to red and, doubtless, this meant assigning the bearing of the *Kakariki* to the *Caradale's* port bow. But it does not follow that every part of the account given of the *Caradale's* navigation should be rejected, and, as will be seen from my statement above, I have treated much as representing actual occurrence but the picture as having suffered some distortion.

I have given times and distances where I have felt able to do so, not because they are essential to the conclusion, but because it is more satisfactory to trace each step in the events preceding the collision and to see its bearing on the others, and it is almost needless to say that in the process of forming my opinion I have traced them backwards as well as forwards.

In stating that at about eleven o'clock the *Kakariki* was in a position between S. 13° and 15° W. from the Gellibrand light and

then giving the course only within a limit of six degrees, I have fixed margins which, if the extremes are combined, will produce a considerable difference in the positions which they leave open to the *Kakariki* six minutes later. There is, I think, a difference east and west of at least a cable and a half between the position which she would have reached steaming N. 16° E. at 8½ knots from two miles S. 15° W. of Gellibrand and that steaming N. 22° E. from two miles S. 13° W. But I do not think the first of these extreme combinations, or anything closely approaching it, occurred. The *Kakariki* was not, in my opinion, so far west after 11.5 p.m. as it would mean. Again, although I am unable definitely to say that the *Kakariki* was at eleven o'clock off a course of 22° E., I believe that before the *Caradale* starboarded near the Gellibrand light, she was slightly on the *Kakariki's* starboard bow. This means that, if the *Kakariki* was on a course of 22° E. at eleven o'clock, she must have swung off it before that movement of the *Caradale*. The witnesses from the navigation bridge of the *Kakariki* put the *Caradale* on the ship's starboard hand much earlier. But I think that they must be mistaken in doing so. If the *Caradale* had held the green light alone of the *Kakariki* for some considerable length of time, I cannot think the *Caradale* would have starboarded. The explanation is, I believe, that the *Kakariki* had the green light of the *Caradale* on her starboard bow when she ported and that, with this impression prominently in mind, the length of time it was there is over-estimated and, in the process of reconstructing the events preceding the collision, put altogether too soon.

On the other hand, I am inclined to think the starboarding of the *Caradale* was based on the notion that she held the two side lights of the *Kakariki*, the loss of the red not having been observed. That it should not be observed may be thought improbable. But, without some failure in appreciation, on one ship or the other, of the movements of the second or of the changes in the relation between them, the collision could not have taken place. It must not be forgotten that the master was at the most important time the only person undertaking the duty of a look-out.

In dealing with the times, speeds and positions of the *Caradale*, I have compared the evidence of those aboard that ship not only

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with the evidence of those aboard the *Kakariki* but also with the observations of James and Ricketts and with the deductions which may be made from the times they give, the distance traversed by the *William Andrew* between different points and her speed and movements. In putting the first starboarding of the *Caradale* just before 11.6 p.m., I am guided by an inference based upon a number of matters. There is, first, what was seen from the *William Andrew* and the time at which or after which it must have been seen. In particular I attach importance to Ricketts' statement that "at a stage in the proximity of the breast line of the Gellibrand light she moved slightly to the westward." But, considering the distance from the place of collision, I think his estimate of two to two and a half minutes as the time she held that course excessive. In the second place, there are the descriptions given by the witnesses from the *Kakariki*, and, in the third place, it seems to me probable that the explanation of the distance at which I am satisfied that the *Caradale* passed the Gellibrand light as well as the evidence given by those on her bridge is that the course of S. $\frac{1}{4}$ E. was kept much longer than they state and continued until they were drawing abreast of the light.

Although I have expressed the view that the *Caradale* made a still greater movement to starboard before the final order of hard-a-starboard, I do not regard it as of any great importance whether she did so or not. I think, however, that the more probable explanation of the attempt to avoid a collision by putting the helm over to starboard is that her stem was already further over than is admitted, and this fits in better with the other descriptions of the final stages of the collision and her position at the time of impact. But I do not think that she had shut out her green light from the view of the *Kakariki*. In fact I think that a mistake was made by the master of the *Caradale* in putting the helm hard-a-starboard. He saw that the other ship had gone to port, and if he too had ported a collision would not have occurred. His ship had much more time to answer the movement of the helm before the engines were full astern than in the case of the *Kakariki*, and her way was greatly maintained.

From the facts as I have found them, it follows that the *Caradale* was in fault. She had the *Kakariki* on her starboard hand for some time. The courses upon which the two ships were did, no doubt, intersect, but before the *Caradale* changed her course, it was in fact certain that the *Kakariki* would not reach the point of intersection until the *Caradale* had passed that point, and I do not think that at the time of the *Caradale's* movement to starboard there was danger of collision. It was her starboarding that created the risk, and her further starboarding led to the actual collision. It was then that the collision rules began to apply. The *Kakariki* was still on her starboard side; she was, therefore, in a position of a give-way ship. If she regained or held both the *Kakariki's* lights, the crossing rule applied and the *Caradale* took the wrong course. If the ships were green to green, it was improper to starboard to the green light. The final order, hard-a-starboard, as in effect I have already said, turned out to be wrong. As something done in the crisis of a collision, that it turned out to be wrong would not mean fault or negligence. But I think it arose out of some failure in vigilance occurring on the navigation bridge and out of the confusion and excitement due to a sudden realization of the danger thus created. It is not possible to say whether, if a look-out had been posted on the forecastle head, he would have given a warning in time or at all. But, in the absence of a look-out there, it cannot, I think, be right for the same man to undertake the navigation of the ship and, at any rate in those waters, the duties of a look-out on the bridge. While the third officer was in the chart house, the master occupied that position, and the realization of the state of danger into which they had got did not, in my opinion, occur until on the third officer's return the *Kakariki's* blasts called their attention to it.

On the part of the *Kakariki* there was, of course, no fault in porting when she did so with the *Caradale* on her starboard bow, however slightly over the *Caradale* may have been. I think that the *Caradale's* movement to starboard did not result in placing upon the *Kakariki* either the obligations of art. 21 or of art. 18. It is, I think, true that for a short space the *Caradale* again got the *Kakariki's* two lights. But it appears to me to be improbable that she held them. The *Kakariki* was herself porting, and it is unlikely that the ships

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ever came end on, and they were certainly not "meeting end on or nearly end on." I think too that when the *Kakariki* next ported she was again showing her green light alone to the *Caradale*.

I find that the *Caradale* was solely to blame and that the collision was due to her negligence. I, therefore, pronounce the collision in question in this suit to have been occasioned by the fault of the owners, master and crew of the steamship *Caradale* or some or one of them, and I pronounce for the plaintiff's claim for damages and against the counterclaim and condemn the defendant in damages and in costs. The claim of the plaintiff for damages will be referred to the registrar assisted by merchants to report the amount due to the plaintiff.

Afterwards, on 25th August 1937, the parties appeared to speak to the minutes of the decree, and on 8th September 1937 the following reasons were given as to the form of the decree :—

DIXON J. At the conclusion of my reasons for judgment I stated my decree in terms based upon the form given in the *Encyclopædia of Court Forms and Precedents in Civil Proceedings*, vol. I., No. 143, p. 415. The parties have since appeared before me to advance some suggestions or contentions in relation to the form of the decree and to some other matters arising in the proceedings.

In the first place, they do not wish that on the reference to assess damages the registrar should be assisted by merchants. Accordingly that direction will be omitted.

In the next place, the defendants object to a pronouncement that the fault occasioning the collision lay in the owners, either as a definite finding or as an alternative with the master or crew. The practical ground of the objection is that it may prejudice them upon any proceedings they may bring for limitation of liability because it may be used to negative absence of their personal fault or privity. An observation of *Atkin* L.J., as he then was, in *The Ran* (1) was brought to my notice. He says :—"I am not sure that it is right to ask for a pronouncement that the collision was occasioned by the fault or default of the owners or their servants. That might lead to trouble on the limitation suit as to the actual fault or privity

(1) (1922) P. 80, at p. 91.

of the owners." Having regard to this observation I, think it is better to omit the reference to the owners.

The third question now raised is whether the decree should not be expressed to condemn the bail. At the time when I gave judgment there was nothing before me to show how the ship *Caradale* was released. The file disclosed only a consent on the part of the plaintiffs to the release. It now appears that a bond was given and that sureties gave guarantees. The material parts of the instruments were read to me. In my opinion the sureties are not bail who are liable to condemnation in the decree.

A difficulty has arisen owing to the form of the defendants' appearance, and this is the fourth matter to be dealt with. It ran: "Enter an appearance for the defendant the ship *Caradale* her cargo and freight", and the solicitors entering it described themselves as acting for such a defendant. No objection is offered to amending the appearance so as to make it an appearance of the owner or owners by that description or by name stating that it is in the character of owners that they appear. The decree will include an order for such an amendment. The decree will then pronounce against the defendants.

Pronounce collision to have been occasioned by the fault of the master and crew of steamship Caradale *or some or one of them. Pronounce for plaintiff's claim for damages in consequence thereof and against the counterclaim and condemn defendant in damages and costs.*

Solicitors for the plaintiff, *Malleson, Stewart, Stawell & Nankivell.*
Solicitors for the defendant, *Moule, Hamilton & Derham.*

H. D. W.