IN THE MATTER OF LICENSE NO. 234435
Issued to: Camille TERREAULT

DECISION OF THE COMMANDANT
UNITED STATES COAST GUARD

1661

Camille TERREAULT

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 137. 30-1.

By order dated 18 February 1967, an Examiner of the United States Coast Guard at New York, N. Y. suspeneded Appellant's liscense for three months upon finding him guilty of negligence. The specifications found proved allege that while serving as master on board the SS MORANIA MARLIN under authority of the license above described, on or about 12 January 1966, Appellant failed to keep to the right in a narrow channel (33 U.S.C. 210) and failed to keep out of the way as burdened vessel in a crossing situation (33 U.S.C. 204), both faults contributing to collision with MV PATRICIA MORAN.

At the hearing, Appellant was represented by professional counsel. Appellant entered a plea of not guilty to the charge and specification.

The Investigating Officer introduced in evidence certain documents and the testimony of the pilot of PATRICIA MORAN.

In defense, Appellant offered in evidence his own testimony, but only as to the first specification.

At the end of the hearing, the Examiner rendered a written decision in which he concluded that the charge and both specifications had been proved. The Examiner entered an order suspending Appellant's license for a period of three months.

The entire decision was served on 18 February 1967. Appeal was timely filed on 7 March 1967.

FINDINGS OF FACT

Subject to the comments made in "Opinion" later, the Examiner's "Finding of Fact" are hereby adopted and quoted:

> "1.Camille Terreault, Z-147549-D1, while serving as master of a merchant vessel of the United States, the M/V MORANIA MARLIN, under authority of his duly issued license No. 314768 (formerly No. 235535) and Merchant Mariner's Document Z-147549-D1, on 12 January 1966, while said vessel was operating in Kill Van Kull, New York Harbor, under his direction, in disregard of Article 25 of the Inland Rules of the Road (33 USC 210), fail to keep his vessel to the starboard side of the narrow channel, thereby contributing to a collision between his vessel and the M/V PATRICIA MORAN. (The allegation of "wrongfully" in the first specification is found not proved in the sense that "wrongfully is used to designate intention under a charge of misconduct. The charge herein is negligence. See Appeal No. 436.)
>
> "2.The person charged, while serving as aforesaid on 12 January 1966, while the vessel was operating in Kill Van Kull, New York Harbor, under his direction and involved in a crossing situation in which the M/V PATRICIA MORAN was on his starboard hand in disregard of Article 19 of the Inland Rules of the Road (33 USC 204), failed to keep out of the way of the M/V PATRICIA MORAN, thereby contributing

> to a collision between his vessel and the M/V PATRICIA MORAN. (The allegation of "wrongfully" in the second specification if found not prove in the sense that "wrongfully" is used to designate intention under a charge of misconduct. The charge herein is negligence. See Appeal No. 436.)

Appellant complains that the Examiner substituted speculation for evidence as to what happened.

First, it may be accepted from Appellant's brief on appeal that his position is that MORANIA MARLIN did "sheer" to the right, and that the Examiner impliedly found that it did not, but merely went straight ahead.

Appellant argues that, since the only evidence of record is that MORANIA MARLIN "sheered" into collision, no fault may be imputed to its pilot by any speculation of the Examiner. Giving Appellant's position consideration from all aspects, I can find no comfort for him in this collision.

There was only two possible actions of MORANIA MARLIN just prior to collision on the evidence here. It was either going ahead, with no change of heading, or it had come right.

Appellant insists that the Examiner was bound by the following testimony of he sole witness against him.

> "... it seemed to me that the MORANIA MARLIN started to sheer to the right ... It seemed to me that no matter how hard I tried to steer away from her, she seemed to be getting closer, very close."

Appellant says that since the word "sheer" was used, he is absolved by fault.

While the Examiner found, implicitly, that MORANIA MARLIN did not come right, I am inclined to agree with Appellant that it did come right. It does not seem possible for a privileged vessel in a crossing, even after agreeing that the burdened vessel should

cross ahead, to be hit on its starboard side aft by a burdened vessel which had not come right. For this to be accomplished, the privileged vessel would be required to have crossed ahead of the burdened vessel and then come back to the other side. There is not the slightest shed of evidence that this occurred. *Arguendo*, then, Appellant's argument that his vessel came right prior to collision may be agreed with.

The sole witness has used the word "sheer". Appellant's position now is that a "sheer" is an uncontrolled, accidental movement which give rise to no imputation of negligence on Appellant's apart. There are three reasons why I cannot agree with this.

The first is that the characterization of the movement,if it be thought to imply a certain causality, is a mere conclusion. The witness did not know why MORANIA MARLIN came right. He is competent to testify only that it did. The trier of facts need not consider an attribution of cause which is, at best, a speculation. We have, then, substantial and unrebutted evidence that MORANIA MARLIN, after soliciting and obtaining an agreement that it cross ahead, turned to the right into a vessel which was coming left pursuant to the agreement and had, indeed, come so far left that it presented its starboard side to the MORANIA MARLIN'S bow.

In the second place, the word "sheer" is not necessarily limited to an undirected movement. There is not, in *Words and Phrases*, a purported definition of "sheer" by an admiralty court. In the common parlance the term is frequently used to denote intentional action. It is said by pilots of ships, operators of boats, and drives of motor vehicles, "I had to sheer away to avoid collision." Thus used it connotes more an abruptness of commencement of the action and not a lack of intent. Judge Addison Brown, in *The Columbia*, D.C.S.D.N.Y., 29 F. 716, used the words "sheer" five times on one page (718) with specific reference to intentional avoiding action by a vessel in a crossing situation.

Lastly, even if Appellant himself had offered evidence, as he did not, to the effect that there had been a "sheer" in the sense to which he would limit the word, he would not be exonerated automatically.

It is well settled in collision that when a vessel claims an accidental sheer, the burden is on that vessel to prove that the cause of the sheer were absolutely beyond its control. *The Austrolia*, CA 6 (1903), 120 F. 220; *Davidson v American Steel Barge Co.*, CA 6 (1903), 120 F. 250; *Christie & Lowe v Fane S.S. Co.*, CA 5 (1908), 159 F. 648; *The Princeton*, CA 2 (1913), 209 F. 199; *Nicholas Transportation Co. v Pittsburgh S.S. Co.*, CA 2 (1913), 209 F. 348; *Royal Mail Steam Packet Co. v Comphania De N.L.B.*, D.C.E.D.N.Y. (1913), 50 F. 2nd 207.

This line of decisions places the burden of proof on MORANIA MARLIN and leaves it, on this record, clearly at fault.

Since Appellant was in actual direction and control of the vessel at the time of the alleged "sheer" he has, in this action, the burden of showing that a "sheer" was beyond his control. Appellant, however, did not claim "unavoidable sheer" at the hearing, and even in attempting to take advantage of the use of the word by another person has not attempted to show that the action attributable to him as the pilot of the vessel, resulted from circumstances beyond his control.

Appellant's point, both at the hearing level and on appeal, is properly rejected.

IV

Appellant's fifth point is a matter, it seems to me, of nicety of pleading. In effect, he says, "I may have been at fault; but if I was, you have laid the fault under the wrong article of the Rule of the Road."

As long as a matter was openly litigated in an administrative proceeding, it is not necessary that the formal pleadings have encompassed the matter of the ultimate findings. *Kuhn v Civil Aeronautics Board*, CA D.C. (19950), 183 F2nd 839.

In these days, in Federal judicial proceedings, of permitting amendment of pleadings to conform to proof, it is not even

necessary to make a formal amendment to the pleadings. *Kincade v. Jeffrey -DeWitt Insulator Corp.*, CA 5 (1957), 242 F. 3nd 328.

These rules have been applied to the class of proceedings under consideration. Decision on Appeal No. 1574.

It may also be added here that I do not see a feasibility of attempting to formulate a specification under the "Special Circumstance Rule" (33 U.S.C. 212) when a situation contemplated and regulated under the Rule has existed.

V

Even as a substantive matter, it does not seem that Appellant's argument has merit. Appellant cited *The Newburgh*, CA2 (1921), 273 F. 436, 440, as showing that once a crossing contrary to the rules has been agreed upon a "special circumstance" exists. On appeal, it is urged that the Examiner, in his decision, misconstrued *The Newburgh*.

The Examiner's first quotation from this decision (p.439) appears as follows, at D-10:

> "It is good law that, when the burdened vessel decides to 'keep out of the way ' by crossing the bows of the privileged vessel, though she gets an assent to such proposal, he assumes the risks involved in choosing that method.***The duty of the privileged vessel in such case is to cooperate and she need not keep her course.***The situation, at least in this circuit, after the agreement, is one of special circumstance.***"

It is interesting to note that the omission indicated by the Examiner's third set of asterisks reads, "The George C. Schultz, 84 Fed. 508,510 ... (Semble)." It is somewhat strange to find a "semble" statement of twenty three years of age cited as setting a "rule" for a circuit in the sweeping generalization used. More interesting are the case cited at the Examiner's first asterisked omission.

The Nereus, D.C.S.D.N.Y. (1885), 23 F. 448, 455, says, of

a proposal by a burdened vessel to cross contrary to the rules assented to by the privileged vessel:

> "Such a reply does not of itself change or modify the statutory obligation of the former to keep out of the way as before ..."

In *The Greenpoint*, D.C.S.D.N.Y. (1887), when GRAND REPUBLIC was the burdened vessel proposing a crossing contrary to the rules, the court said:

> "The Greenpoint's answer by two blasts to the previous signal of two blasts ... did not of itself change any of the legal obligations of the Greenpoint, nor shift the burden of keeping out of the way nor did it relieve the Grand Republic of her duty to keep out of the way..."

Two other decisions to the same end may be referred to. In *The Columbia*, D.C.S.N.Y. (1887), 29 F. 716, 720, the court said of a situation where a crossing contrary to the rules, proposed by the privileged vessel, had been agreed upon:

> "The assenting signals of two whistles, given by the tug, did not relieve the tug of her duty to keep out of the way, nor change the burden imposed by the rules of navigation."

In *The Admiral*, D.C.E.D.N.Y. (1887), 39 F 574, where the burdened CRESTON proposed a crossing contrary to the rules to the privileged ADMIRAL, the court said:

> "The reply of the Admiral to her signal gave the Creston no immunity from the responsibility cast upon her by the law."

The import of these decisions cited in *The Newburgh*, and of the other two not there cited, is clear. The burdened vessel in a crossing situation, although it may not have to go astern of the other vessel after crossing contrary to the rules has been agreed

upon, always has the duty to "keep out of the way."

Appellant's argument would appear to be that *The Newburgh*, in announcing that a "special circumstance" is created by a two-blast agreement, means that from the moment of agreement "all bets are off;" all previous duties are abrogated; all future navigation will be as though there were no rules; the only governing considerations are those of prudent navigation under the new conditions.

But the language of The Newburgh itself refutes this. At p. 440, the court said:

> "...we think that, although the proposal emanates from the privileged vessel, and should be taken as meaning that she will undertake activity to keep out of the way, it need not absolve the burdened vessel from her similar and *original* duty also to keep out of the way..."

There is no question that there is an obligation on the burdened vessel. The nature of the obligation is that of its original obligation: the obligation to keep out of the way. Obligation to "keep out of the way" to another vessel. If a vessel under the rule of *The Newburgh* still has its "original" obligation, that obligation arose under the "crossing rule," 33 U.S.C. 204, and a violation of that obligation is properly chargeable as a violation of that rule.

ORDER

The order of the Examiner dated at New York, N.Y. on 15 February 1967, is AFFIRMED.

W.J. SMITH
Admiral, U.S. Coast Guard
Commandant

Signed at Washington, D.C., this 5th day of October 1967.

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***** END OF DECISION NO. 1661 *****

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