

CASES

DETERMINED BY THE

SUPREME COURT OF CANADA ON APPEAL

FROM

DOMINION AND PROVINCIAL COURTS

AND FROM

THE SUPREME COURT OF THE NORTH-WEST TERRITORIES AND THE
TERRITORIAL COURT OF THE YUKON TERRITORY.

JAMES DAVIDSON (DEFENDANT } APPELLANT;
INTERVENING) }

1902
*Nov. 1, 9, 20.
*Dec. 9.

AND

THE GEORGIAN BAY NAVIGATION COMPANY (PLAINTIFFS).... } RESPONDENTS.

THE "SHENANDOAH" AND THE "CRETE."

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA
TORONTO ADMIRALTY DISTRICT.

*Admiralty law—Navigation—Narrow channels—"White law" R. 24—
Right of way—Meeting ships.*

Rule 24 of the "White law" governing navigation in United States waters provides "that in all narrow channels where there is a current, and in the rivers St. Mary, St. Clair, Detroit, Niagara and St. Lawrence, when two steamers are meeting the descending steamer shall have the right of way and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take."

Held, that this rule has no reference to the general course of vessels navigating the waters mentioned but applies only to meeting ves-

*PRESENT :—Taschereau, Sedgewick, Girouard, Davies and Mills JJ.

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sels. Therefore, a steamer ascending the St. Clair with a tow was not in fault when she followed the custom of up-going vessels to hug the United States shore.

The "Shenandoah" with a tow was ascending the St. Clair River in a fog and hugging the United States shore. The "Carmona" was coming down the river and they sighted each other when a few hundred yards apart. They simultaneously gave the port and starboard signals respectively and the port signal was repeated by the "Carmona." The "Shenandoah" then gave the port signal and steered accordingly. The "Carmona," thinking there was not room to pass between the other vessel and one lying at the elevator dock, reversed her engines. She passed the "Shenandoah" but on going ahead again collided with the vessel in tow.

Held, reversing the judgment of the local judge (8 Ex. C. R. 1) that the "Shenandoah" was not in fault, and that as the local judge had found the "Carmona" not to blame, and as her captain's error in judgment, if it was such, in thinking he had not room to pass between the two vessels was committed while in the agonies of collision, his judgment as to her should be affirmed.

APPEAL from a decision of the local judge for the Toronto Admiralty District of the Exchequer Court of Canada (1) in favour of the plaintiffs.

The facts of the case sufficiently appear from the above head-note and are fully stated in the judgment of Mr Justice Davies on this appeal.

Nesbitt K.C. and *Hough* for the appellant. The evidence of the hands on the "Shenandoah" and "Crete" shows they were not in fault and is of greater weight respecting what was done on those vessels than that of others. *The Havana* (2).

As to the right of defendant's vessel to follow the general custom, see *The Velocity* (3); *The Esk and The Niord* (4); *The Ranger and The Cologne* (5).

Mulvey K.C., (*M. J. O'Connor* with him) for the respondents. As to navigation in a fog see *The Sea*

(1) 8 Ex. C. R. 1.

(3) L. R. 3 P. C. 44.

(2) 54 Fed. Rep. 411.

(4) L. R. 3 P. C. 436.

(5) L. R. 4 P. C. 519.

Gull (1); *The Warrior* (2); *The Mary A. Bird* (3).

This court will not reverse on questions of fact.
The Picton (4).

TASCHEREAU, SEDGEWICK and GIROUARD JJ. concurred in the judgment of Mr. Justice Davies.

DAVIES J.—This is an appeal from a judgment of the Exchequer Court of Canada, Toronto Admiralty District. The action is one *in rem*, brought by the Georgian Bay Navigation Company, Limited, owners of the steamer "Carmona" against the ships "Shenandoah" and "Crete," owned by James Davidson, the defendant intervening, for damages arising out of a collision between the "Carmona" and the "Shenandoah" and "Crete" on June 25th, 1899. The action was tried on January 17th, 18th and 20th, 1902, before the local judge in admiralty, who delivered his judgment on June 2nd, 1902, awarding the plaintiffs \$2183.25 damages and costs and dismissing the defendant's counterclaim for his damages arising out of the said collision with costs. The defendant, James Davidson, appeals from this judgment.

The facts, so far as they are material to be stated are thus summarised by the learned trial judge :

The "Carmona" is a British paddle-wheel steamer, 183 feet long, and the "Shenandoah" is an American steam barge or propeller, 328 feet long, and the "Crete" is an American tow barge, 300 feet long. The "Shenandoah" and her tow were coming up the river on their way to Duluth, loaded with coal, the "Carmona" was descending the river with passengers upon her regular voyage from Sault Ste. Marie to Cleveland, intending to call at Sarnia on her way down the river. The time of the accident was about 1.30 a.m.; the weather had been clear and fine and there was no wind but a bank of fog covered the

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(1) 23 Wall. 165.

(2) L. R. 3 Ad. & Ecc. 553.

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(3) 102 Fed. Rep. 648.

(4) 4 Can. S. C. R. 648.

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river from about the Grand Trunk Railway docks for some distance down the river. When the "Carmona" entered the river it was clear and she had no difficulty in getting the range-lights, but when she reached the Grand Trunk docks she encountered the fog. The "Shenandoah" had had clear weather up the river until a little below the waterworks dock on the American side, or about five hundred yards below Botsford's elevator, when she too entered the fog. The collision took place opposite Botsford's elevator, which, as nearly as may be, is about four or five hundred yards down the river from the Grand Trunk Railway docks; in other words, the fog bank covered, approximately, a thousand yards of the river. The collision took place between the vessels about the centre of the fog.

The appellants contended that the "Shenandoah" with her tow, following a custom or practice which has prevailed for over forty years in this river, was slowly steaming past Port Huron, hugging the United States shore, and that, in doing so, she was not violating any rule or regulation governing the navigation of the river, nor was she guilty of any neglect of duty which contributed to the collision.

The respondents contended that the proper construction of the rules shewed the "Shenandoah" to have been on the wrong side of the channel, and that the "Carmona" having the right of way and not having been guilty of any negligence or violation of the rules, was entitled to recover for all damages she sustained.

The waters where the collision occurred are within the United States and the regulations governing the navigation of these waters are what are known as the "White Law." Rule 24, upon the proper construction of which so much depends, is as follows:

Rule 24. That in all narrow channels where there is a current, and in the rivers Saint Mary, Saint Clair, Detroit, Niagara and Saint Lawrence, when two steamers are meeting, the descending steamer shall have the right of way, and shall, before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take.

The English rule which requires that

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

has not been incorporated in the White Law Rules and is not in force in the waters where the collision occurred.

A large amount of the evidence was given to show what had been the custom and practice with respect to the side of the channel up-stream tugs with their tows should take, and I think it is clear that the learned judge was of the opinion that but for rule 24 the "Shenandoah" was not in fault in taking the side of the river she did. He says at one place:—

As between the two vessels, if the custom prevails *and be held to supersede the statutory rule*, the "Carmona" was on the wrong side and the "Shenandoah" on the right side.

And again.

I have already briefly adverted to the evidence offered in support of the alleged custom. More witnesses affirm the custom than negative it, but is the evidence so overwhelming as to justify the court in holding that *it supersedes the statutory rule 24*, which gives the descending vessel the right of way and choice of course?

Now if the statutory rule gave the "Carmona" the right to the side of the channel lying next the United States coast it is perfectly clear that no evidence of custom as to a contrary practice could operate to repeal the statutory rule. But with great deference we do not think rule 24 was designed to have or has any reference whatever to the side of the channel vessels going up or down the river must take. It has an entirely different object and is limited to determining, as between up and down vessels, which shall have the right of way and which shall have the right of election as to the side of the approaching vessel it will pass. These rights are perfectly consistent with an estab-

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lished custom on the part of up going steamers with tows to hug the United States shore, nor does the fact of such custom existing at all supersede or minimize the full effect of rule 24. The custom would show that the "Shenandoah" on the night in question was not in fault in taking her course close to the United States bank for she was in the customary track of up-bound vessels. But she had not the exclusive right to that side of the river, and the "Carmona," in coming down might be justified in taking that side too, but if she did she was bound to exercise unusual care and precaution. She would still, if she met up bound vessels and circumstances permitted it, be entitled to her right of way and her election to choose on which side of each other the vessel should pass. But she was not in fault in using any part of the channel she saw fit provided always she observed the rules of navigation which prevailed there and exercised the prudence and caution which, in my opinion, the existence of the custom followed by up bound vessels cast upon her.

It was, I venture to say, the wrong construction placed upon this rule that led the learned judge to pronounce the "Shenandoah" to be in the wrong and responsible for the collision. The vessels did not see each other far enough apart to enable the "Carmona" to exercise the election she undoubtedly had and for which the rule provided. If it is assumed that neither vessel was at fault in being where they were respectively when they first discovered each other, then where lies the fault of the "Shenandoah"? Both vessels signalled. The "Carmona" gave the port signal, the "Shenandoah" the starboard. As the judge finds, these signals were given practically simultaneously. The vessels were then within a few hundred yards of each other and almost opposite the elevator. As soon as the "Shenandoah" recognised that the

“Carmona” had elected to go to starboard and pass her port to port she accepted the election and at once signalled the port signal and placed her helm apart. Looking at the relative position of the two steamers at the time they sighted each other, and the close distance of the “Shenandoah” from the shore, I am unable to say that her first signal was not a prudent one to give, nor am I able on the other hand to say that her acceptance of the “Carmona’s” signal in lieu of the one she herself had first given was wrongful or bad seamanship. She recognised the right of the “Carmona” to elect which side she should pass on and accepted it. As a matter of fact the result proved that she did right. The two steamers were in the act of passing each other port to port when the “Carmona” fearing she had not room to pass, owing to the presence of another steamer lying at the end of the elevator dock, backed her engines and, as a consequence, slightly collided with the “Shenandoah.” No real harm was done to either steamer and the “Carmona” by giving a couple of turns ahead to her engine passed by. Up to this moment of time I am unable to say that either vessel was seriously at fault. The signal at first given by the “Shenandoah” may have been accepted by her tow, the “Crete,” and she may too have starboarded. Her captain says she did not, but the judge did not believe him. At any rate, it is asserted that the bow of the “Crete” was turned towards the shore at a few moments later when she collided with the “Carmona,” which struck her on the starboard bow. The captain of the “Carmona” agrees that when he sighted the “Shenandoah” he saw her two white head-lights, indicating that the latter steamer had a tow. He was bound, therefore, to act with the knowledge that the fact of these two head-lights conveyed to him. Did he do so? He says himself that he found himself

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jammed in between the "Shenandoah" on the one side and the steamer lying at the end of the elevator wharf on the other, and did not think there was room for him to pass between. The learned trial judge finds most strongly that, in his opinion, the "Carmona" was not guilty of any fault; I am not satisfied that I would have reached the same conclusion. I incline to the opinion that he could have safely passed between the tow of the "Shenandoah" and the shore had he tried to do so. But I cannot ignore the fact that, at this moment of time, he was in extreme peril and the absence of the cool and calm judgment and decision which, under ordinary circumstances, would have been required of him, may, under the circumstances of extreme danger, arising from the fog, the collision with the "Shenandoah" and the proximity of the shore on the other side, be excused. At any rate, he did nothing.

The current running at the rate of about five miles an hour speedily carried him towards the "Crete" approaching at the rate of about two miles an hour; his steamer got the tow-line under her guard and she swiftly met the "Crete" and collided, causing the damage to herself for which this action is brought. After getting clear of the "Crete" she drifted past her starboard side and then across her stern and between her and the "Grenada," avoiding further collision and damage.

Under these circumstances, we are of opinion that there is no ground for holding the "Shenandoah" liable for any damages. The only question is as to the liability of the "Carmona" for the damages to the tow-line of the "Shenandoah" and the losses caused to the tow of that ship for delays and otherwise consequent upon the collision.

Whatever conclusion I might have reached had I been determining this question in the first instance, I do not, under all the circumstances, feel justified in reversing the finding of fact which the learned trial judge has reached as to the proper navigation of the "Carmona." He had not only the advantage of hearing the witnesses and noting their demeanour, but, in a case where so much depends upon relative distances, the further great advantage, which we are denied, of having very many of their important statements explained and illustrated by the witnesses on the maps and charts of the river. Much of the evidence, without this advantage, is difficult to understand.

In addition to the judge's express finding of want of fault on the "Carmona's" part, there is the extreme peril in which she was placed at the critical moment immediately after his collision with the "Shenandoah" when everything depended upon the correctness of the judgment her captain formed. The fact of his not seeming to have paid the proper attention to the notice given to him by the presence of the two headlights of the "Shenandoah" that she had a tow is strongly against him. On the other hand, he undoubtedly thought himself jammed between the "Shenandoah" and the vessel lying at the wharf on his starboard beam. His attempt to extricate himself from the jam by backing had only resulted in his colliding with the "Shenandoah" and his lack of judgment, or inability to form a decision as to what he should do, may be pardoned, owing to the extreme peril and exceptional circumstances in which he found himself placed.

Under all the circumstances, therefore, we are of opinion that, while the action should be dismissed, the counterclaim should not be allowed.

The appeal will be allowed with costs to the appellant in both courts and the counterclaim is also dismissed, but without costs.

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MILLS J.—I agree with the conclusions reached by

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my brother Davies, in this case.

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The "Carmona" a paddle-wheel steamer of Canadian register, which was on her way from Sault Ste. Marie to Cleveland, had, under the rules which regulate the

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navigation of the river on the United States side, the right of way. She chose the starboard side but, owing to the density of the fog, she was close upon the "Shenandoah" when her choice was made. The

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"Shenandoah" with her tow was very near the shore, too near to permit the "Carmona" to pass safely on her voyage between the "Shenandoah" and the docks and shipping before Port Huron. There can be no doubt that the position of the "Shenandoah" and her tow was one that she chose at her peril, for, while it was the custom of up-bound vessels, at this point, to keep near to the United States side of the river St. Clair, they must in doing so, not interfere with that freedom of choice which the descending vessels had a right to make. Owing to the density of the fog, the "Carmona" was unable to make known her choice of way until she was close upon the "Shenandoah." When she undertook to pass the "Shenandoah," and the barges which she had in tow, she found herself too near the shore to pass safely on her voyage. Not being able to direct her course in the dangerous position in which she was placed, she was carried by the current down the river at the rate of five miles an hour, while the "Shenandoah" with her tow was moving at half this rate of speed in the opposite direction. In this position, she ran upon the tow-line of the "Crete" and collided with her. The vessels were in a perilous position and I cannot say that, apart from the proximity of the "Shenandoah" to the United States shore, there was not, on the part of the officers in charge

of each, due diligence and skill exercised to avoid collision.

*Appeal allowed with costs.*

Solicitor for the appellant: *F. A. Hough,*

Solicitor for the respondents: *J. W. Hanna.*

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