

WM. DONOVAN STEAMSHIP COMPANY (INCORPORATED), (PLAINTIFF).. } APPELLANT;

1926
*May 6, 7.
*Oct. 11.

AND

THE SS. HELLEN (DEFENDANT).....RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Shipping—Collision in river—Ship passing another going in same direction—Respective duties of overtaking ship and overtaken ship—Navigation Laws and Pilot Regulations for Inland Waters of United States on Pacific Coast.

Two vessels, the D. and the H., were going down the Chehalis river in the State of Washington, seaward bound. The H. signalled her desire to pass the D. on the port side. The D. signalled her willingness. A collision took place, as to the cause of which, and the way in which it occurred, there was conflicting evidence. Martin L.J.A. held ([1925] Ex. C.R. 114) that both vessels were equally in fault and should bear the damages equally. This judgment was reversed by Maclean J., President of the Exchequer Court (hearing the appeal with the assistance of two nautical assessors), who held ([1926] Ex. C.R. 59) the D. wholly to blame. On appeal to the Supreme Court of Canada:

Held (per Duff, Newcombe and Rinfret JJ.): The appeal should be allowed and the judgment of Martin L.J.A. restored. The H. was the overtaking ship, and, having regard to the Navigation Laws and Pilot Regulations for the Inland Waters of the United States on the Pacific Coast, which were admittedly applicable, and especially

*PRESENT:—Anglin C.J.C. and Idington, Duff, Newcombe and Rinfret JJ.

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to the requirement that "every vessel overtaking any other, shall keep out of the way of the overtaken vessel," the *H.* had not, on the evidence, satisfied the burden resting upon her to excuse her collision with the overtaken ship. Moreover the evidence did not disclose that the *D.* materially altered her course or attempted to crowd upon the course of the *H.* or executed any movement material to the case which would affect the bearing as between her and the *H.* which was not, or should not have been, reasonably anticipated by the *H.* A vessel "keeps her course" within the meaning of said rules if, in proceeding from one reach of a river channel to another, she keeps the course which would ordinarily be expected of a vessel making that passage. The court, however, was not prepared to reverse the findings of Martin L.J.A. as to the responsibility of the *D.*, as, in the special circumstances of the case, good seamanship required that the *D.* should have given the *H.* more sea room. Both vessels were persistently navigating the channel on the side opposite to that to which they were equally directed by the regulations. Under the rules, the effect of the passing signal was to commit the *H.* to a passage on the port hand of the *D.*; and when the master of the *D.* realized that the *H.* was on a course to cross his bow he should not have been so late in porting his helm; and in obeying and construing the rules he did not observe due regard to the dangers of navigation and collision.

As to the character of the obligation of an overtaking vessel, *The Saragossa*, (1892) 7 Asp. M.C. 289, followed.

Anglin C.J.C. and Idington J., dissenting, would affirm the judgment of Maclean J.

Per Anglin C.J.C. (dissenting): The *D.* was alone to blame. The collision was caused by her failing, after assenting to the *H.* passing her to port, to maintain her course, and by her crowding upon the course of the *H.*, in contravention of articles 21 and 18 of said rules. Correlative to the obligation of the *H.*, as an overtaking ship, to keep out of the way of the *D.*, was that of the *D.* to maintain her course and in no case to attempt to crowd upon the course of the passing vessel. The guide of the overtaking vessel is the presumption that the other will keep her course. To excuse herself the *D.* must show that her departure from her course was necessary to avoid immediate danger and was no more than was necessary. Where the leading ship alters her course in contravention of article 21, the otherwise absolute obligation imposed on the overtaking vessel by article 24 "to keep out of the way" is satisfied by her using all reasonable care and skill, and if, having done so, a collision nevertheless ensues, she will not be held in fault.

APPEAL from the judgment of Maclean J., President of the Exchequer Court of Canada (1) reversing the judgment of Martin J., Local Judge in Admiralty of the Admiralty District of British Columbia (2).

The action was brought by the owner of the U.S. motor-ship *Wm. Donovan* against the Norwegian ss. *Hellen* for damages caused by a collision between the two vessels in the Chehalis river, state of Washington, U.S.A., on April 10, 1924, at about 5.15 p.m. The *Hellen* counterclaimed. Martin L.J.A. held (2) that both vessels were equally in fault for the collision and consequently should bear the damage thereby occasioned in like proportion. This judgment was reversed by Maclean J., President of the Exchequer Court (who heard the appeal with the assistance of two nautical assessors) who held (1) that the *Wm. Donovan* was wholly to blame for the collision, and that the plaintiff's action and cross-appeal should be dismissed and the defendant ship, the *Hellen*, should succeed in its defence and counterclaim in its action below, and in its appeal. The plaintiff appealed to the Supreme Court of Canada.

C. W. Craig K.C. for the appellant.

Martin Griffin for the respondent.

The judgment of the majority of the Court (Duff, Newcombe and Rinfret JJ.) was delivered by

NEWCOMBE J.—The collision occurred on the Pacific Coast of the United States, in the estuary of the Chehalis River, in the lower part of the defined channel. The *Wm. Donovan* is a twin screw motor ship of 2,204 tons register, length 243 feet, beam 47 feet, which, on 10th April, 1924, was outward bound from Aberdeen, in the state of Washington, to San Pedro, California, laden with lumber. The *Hellen* is a single screw steamship of 3,270 tons register, length 413 feet, beam 52 feet, which left Aberdeen on that day, partly laden, to complete her lading at Vancouver, where, upon arrival, she was arrested, at the suit of the appellant company, to answer the collision damages. These vessels left their moorings about three o'clock in the afternoon and proceeded down the channel, which is marked by red buoys on the south side and by black buoys on the north, the latter bearing the uneven numbers. The *Donovan* was drawing about 23 feet of water, the *Hellen* about 6 inches more. The *Donovan's* speed is estimated at 8 knots, and that of the *Hellen*, which proved to be the faster, at about 8 or 9

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knots. The *Hellen* saw the *Donovan* ahead of her in the channel at a distance of about a mile and a half, and this she gradually reduced until, about an hour later, just below no. 6 inner red buoy, she had approached to within eight to twelve hundred feet of the *Donovan*, when, it being apparent that the *Hellen* was overtaking, she blew two blasts of her whistle to indicate that she desired to pass the *Donovan* on the port side of the latter. The *Donovan* answered by two blasts, signifying her willingness that the *Hellen* should so pass. At this time the two ships were in a reach of the river which was straight, in a south-westerly direction, as far as no. 2 inner red buoy, a distance of nearly two miles. Here the river turns to the southward, and, from the bell buoy, no. 8 red, a little less than three-quarters of a mile below no. 2, pursues a more westerly direction to no. 6 outer red buoy, a distance of about a mile and a quarter, where it turns still further to the westward and follows that course, about west south-west, to no. 4 outer red buoy. It was in this part of the river, and about opposite to no. 4 outer red buoy, that the collision occurred. The width of the channel from no. 2 inner to no. 4 outer varies; it is 1,500 feet at no. 2; 2,200 feet at the bell buoy; 1,200 feet at no. 5, which is about midway between the bell buoy and no. 6 outer; 2,200 feet at the latter, and 1,200 feet at no. 4 outer, after which it becomes broader again to the southward until, at no. 2 outer, at or immediately inside of the bar, the width is 2,000 feet. The formation is sandy, and there is a note on the chart that the bar is subject to frequent changes and that the buoys are shifted accordingly.

The case of the *Donovan* is that the two vessels coming down the river in its several reaches had pursued practically parallel courses, the *Hellen* being abeam or nearly abeam of the *Donovan* from the turn at no. 2 inner, but that, when passing no. 4 outer, and about 400 feet to the northward, the *Hellen* came across the bow of the *Donovan*, causing the collision.

The case of the *Hellen* is not materially different, except that, according to the evidence of her witnesses, the *Donovan*, at the place of collision, instead of pursuing her parallel course, sheered abruptly to the southward and thus caused the impact.

The *Donovan* would have it that the *Hellen* struck with her starboard bow in the fore rigging of the *Donovan* and forged ahead on the *Donovan's* port bow and stem, which was split. The *Hellen* on the other hand contends that the *Donovan* struck her abaft of amidships, practically head on, or, as one witness says, at an angle of forty-five degrees. The result was serious damage to the *Donovan*, and some damage to the *Hellen*, which had several stanchions bent, and some port lights broken.

The case was tried before the local judge in Admiralty of the Exchequer Court at Vancouver.

It was assumed for the purposes of the case that the Navigation Laws and Pilot Regulations for the Inland Waters of the United States on the Pacific Coast apply, and these are admitted to be as stated in paragraph 9 of the defence, and in a certified official pamphlet, published by the Government printing office at Washington, which was put in as an exhibit. These rules appear to be in substantial conformity with the general regulations for preventing collisions at sea, but they contain some special provisions. The pertinent clauses, as pleaded and admitted, are the following:—

Art. 18, Rule VIII: When steam vessels are running in the same direction, and the vessel which is astern shall desire to pass on the right or starboard hand of the vessel ahead, she shall give one short blast of the steam whistle, as a signal of such desire, and if the vessel ahead answers with one blast, she shall put her helm to port; or if she shall desire to pass on the left or port side of the vessel ahead, she shall give two short blasts of the steam-whistle as a signal of such desire, and if the vessel ahead answers with two blasts shall put her helm to starboard; or if the vessel ahead does not think it safe for the vessel astern to attempt to pass at that point, she shall immediately signify the same by giving several short and rapid blasts of the steam-whistle, not less than four, and under no circumstances shall the vessel astern attempt to pass the vessel ahead until such time as they have reached a point where it can be safely done, when said vessel ahead shall signify her willingness by blowing the proper signals. The vessel ahead shall in no case attempt to cross the bow or crowd upon the course of the passing vessel.

Art. 21: Where, by any of these rules, one of the two vessels is to keep out of the way, the other shall keep her course and speed.

Art. 23: Every steam vessel which is directed by these rules to keep out of the way of another vessel shall on approaching her, if necessary, slacken her speed, stop or reverse.

Art. 24: Notwithstanding anything contained in these rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel.

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Every vessel coming up with another vessel from any direction more than two points abaft her beam, that is, in such a position, with reference to the vessel which she is overtaking that at night she would be unable to see either of that vessel's side-lights, shall be deemed to be an overtaking vessel; and no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

As by day the overtaking vessel can not always know with certainty whether she is forward of or abaft this direction from the other vessel she should, if in doubt, assume that she is an overtaking vessel and keep out of the way.

Art. 25: In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such vessel.

The learned local judge found that the *Hellen* had not passed the *Donovan* at any time before the collision, although she had, about forty-five minutes previously, given the signal of her desire or intention to pass on the port side of the *Donovan*; that both vessels were, having regard to Art. 25, on the wrong side of the channel, though neither had charged the other with this breach of the regulations; that, by reason of the contraction of the channel in the reach where the collision occurred greater caution was required, and that the *Hellen*, having assumed the obligation of a passing ship, was pursuing a course which, if both ships maintained their speed, would bring her into dangerous proximity at least to the *Donovan*, if they both continued to keep the wrong side of the channel; while the *Donovan*, keeping her speed, was embarrassed by reason of the strange conduct of the *Hellen*, by which I understand the learned trial judge to refer to the fact, which is implicit in his judgment, that the *Hellen*, although having given her passing signal, had not availed herself of her subsequent opportunities to pass, but had maintained her parallel course at speed practically no more than equal to that of the *Donovan*. The local judge found the case very unusual and perplexing, and, after careful study, it appeared to him impossible to reconcile the conflicting evidence, "or to accept in entirety either of the irreconcilable accounts of what occurred." In the result the only conclusion he could arrive at, satisfactory to himself, was that the collision was caused by the unseamanlike conduct of both vessels in not appreciating the dangerous position in which they were and taking proper steps to avoid it.

From this judgment the *Hellen* (defendant, now respondent) appealed to the Exchequer Court, and the *Donovan* (plaintiff, now appellant) gave notice by way of cross-appeal to vary the judgment by awarding to the plaintiff the full amount of the damages claimed, and dismissing the cross-appeal.

The appeal and cross-appeal were heard by the learned President of the Exchequer Court, who agreed with the local judge that the *Hellen* was an overtaking ship, but this he thought was a circumstance of minor importance, and he found the governing consideration in the fact that the *Donovan*, after receiving the *Hellen's* passing signal, did not take up and keep a course on her starboard side of the channel, as required by Art. 25 for the navigation of narrow channels. He considered that at no. 2 outer buoy, where the channel turns to the southwestward

the *Donovan* should have steered for no. 3 starboard buoy from no. 2 port buoy, and kept that starboard course, and not have gone close to port buoy no. 4.

In summing up he said:—

I agree with the trial judge that the *Donovan* was on the wrong side of the channel at the times here material, and those who advise me are also of the same opinion. I also think that the *Donovan* crowded upon the course of the *Hellen*, and steered a course which was likely to cross the course of the *Hellen*, in violation of Rule 8, and in this my assessors also agree. I cannot, however, concur in the view of the learned trial judge that the *Hellen*, in relation to the *Donovan*, was on the wrong side of the channel. In attempting to pass the *Donovan*, her proper place to attempt to do so in view of the signals exchanged, was on the port side of the channel, and at least on the port side of the *Donovan*. Having to pass on the port side of the *Donovan*, if at all, there was no other place in which she could make the attempt than where she did, and except for the conduct of the *Donovan*, it at no time involved a risk of collision. I cannot agree that the *Hellen* was on the wrong side of the channel, at least the *Donovan* cannot be heard to say so. She had undoubted right to be there, though perhaps at her own risk in respect of other ships navigating on that side of the channel. A situation might be imagined wherein another ship going up the channel might say so, but not the *Donovan*. I think the *Hellen* did everything that could reasonably be expected of her in passing the *Donovan*, that she was not guilty of negligence in any respect, and that it was the conduct and seamanship of the *Donovan* alone that brought about the collision. In all this, the persons who advise me, agree.

He accordingly found that the collision was caused entirely by the fault of the *Donovan*.

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Now in considering the facts of the case there is little difficulty in finding the course, relative position and procedure of each of these vessels from the time when they first came into relation with each other down to the time when, approaching outer red buoy no. 4, one or the other was put on the intersecting course which led to the collision. Down to this point the evidence of the witnesses is in substantial agreement upon the facts which are material. When the *Hellen* blew her two blasts she was, according to her pilot's testimony, very close to the line of no. 6 and no. 4 inner red buoys, and the *Donovan* was ahead two or three ship's lengths on the *Hellen's* starboard bow. At that place the channel is very broad, upwards of 2,000 feet. The learned President refers to a passage in the testimony of the Master of the *Donovan*, where he is asked why, upon acknowledging the signal, he did not starboard his helm, and he answers

No. I didn't alter it because she was over—and I was pretty well on the right side of the channel and she had plenty of room to pass me.

From this the President infers that the *Donovan* was at that time on her starboard side of the channel, or upon a course directed to that side. It seems to be clear upon the evidence however that the *Donovan* was not, either at the time of the passing signal, or at any time subsequently, on her starboard side of the channel, or on a course which, having regard to its sinuosities, would lead her to that side. The master of the *Donovan* says, immediately following the passage which I have quoted:—

Q. You didn't alter your course?

A. No, because he had plenty of room over on my port side and had plenty of room to pass.

Q. How much room was there from side to side?

A. Oh, in the side, I guess he was—well, 100 feet anyway on the side.

Q. He was 100 feet to the side of you?

A. That being a little astern of me, of course.

From this I understand his meaning to be that the *Hellen* had plenty of room to pass, because there was at least 100 feet of clear water between the port side of the *Donovan* and the starboard side of the *Hellen* upon the course which the latter was following, close to the line of the red buoys; from which it follows that the *Donovan* was at that time several hundred feet at least to the south of mid-chan-

nel. There is no express explanation in the evidence as to why both of these vessels were pursuing their way along the southern bank; but, looking at the chart, and assuming that neither vessel was impressed with the necessity of following strictly the starboard hand rule, it is easy to see that naturally the convenient and shorter course would be that which they followed. The river trends generally in a southwesterly direction; there is a very pronounced bend to the southwest at inner red buoy no. 2, and more gradually to the westward at the bell buoy, and again at outer red buoy no. 6, and the inside course is obviously the shorter. Both vessels seem to have considered that they had plenty of space on the southern side, and, shortly after the time when the signal was given, they actually met an incoming steamer, which they passed alternately port to port. It is significant, moreover, that the *Hellen*, neither in her preliminary act nor pleading, makes any complaint based upon Art. 25, and her case is founded entirely upon the alleged sudden sheer in the course of the *Donovan* at no. 4 outer buoy. The two ships went down the channel in its various reaches upon parallel courses, the *Hellen* close to the red buoys, the *Donovan* about 300 feet to the northward of the *Hellen*, the latter making the greater speed until the rounding of the point at no. 2 inner red buoy, where, according to her allegations and testimony, she passed the *Donovan*, which, being outside, would make the longer turn. At no. 6 outer they were however still abeam and at the same distance between their parallel courses. The weather was hazy, but the vessels were at all times within easy sight of each other. On approaching no. 6 outer the haze or fog prevented the *Donovan* temporarily from seeing no. 4 outer. Hitherto she had been steering by the buoys, but then, as no. 4 was not visible, she continued by compass, southwest by west half west, passing no. 6 outer on this course. Then there is a slight, though inconsequential, conflict in the testimony of the witnesses, the *Hellen* maintains that, after passing no. 6 outer, she steered for no. 4, which was at all times visible; her master says that between no. 4 and no. 6 the two vessels maintained their relative positions "about the same," keeping parallel courses. Ivor Vaumond, the

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Hellen's pilot, gives the following testimony in his direct examination:—

Q. Now, tell us what happened when you got down there towards no. 6 red buoy, what manoeuvres did the two ships execute?

A. Well, after I got down to no. 6 red buoy I changed the course to starboard, getting lined up for the Bar which is on the turn.

Q. You changed the course to starboard?

A. Towards starboard, yes, ported the helm; so did the *Donovan*.

Q. Now, how far apart were the two vessels when that manoeuvre was executed?

A. Well, as near as I could estimate it never changed very much at any time. Of course, I wasn't all the time watching the channel, looking ahead.

Q. About 300 feet then?

A. Practically, just an estimate.

Capt. Malmgren of the *Donovan*, who appears to be a fair and honest witness, says that

the *Hellen* seemed to alter her course towards no. 4. She wasn't going parallel with us any more, she was going over to the south jetty.

The south jetty is projected westerly from Point Chehalis along a sand-bank, at the edge of the deep water, from 1,200 feet or more to the southward of the line of no. 6 and no. 4 outer red buoys. Capt. Malmgren had directed his mate and second mate to look out for no. 4 buoy, and he says

I was going on my course and I asked the mate and third mate if they seen it and they said "No." A couple of seconds after I looked with the glasses. I sighted the buoy (no. 4 outer) which was right ahead, the *Hellen* then being fully four to five ship's lengths on the port side of me.

He says that then he altered his course one-half point to the northward so as to clear no. 4 by 400 feet, and that his ship had been on that course for five-eighths of a mile, or about one-half the distance between no. 6 and no. 4. Now if we are to have regard to the preliminary act and pleadings of the *Hellen*, to the evidence, and to the course of the trial, there is nothing material to the cause of the collision in the fact, to which Capt. Malmgren deposes, that on passing buoy no. 6, when no. 4 was shut out of view by the fog, he proceeded for a short distance upon a compass course which was found to require a correction of half a point to the northward when, midway between the buoys, no. 4 became visible. There is nothing in the case to suggest that the *Hellen* was thereby misled or embarrassed or affected in her navigation. On the contrary she did not observe any change in the bearing of the

Donovan between no. 6 and no. 4, and she makes no complaint of the *Donovan's* course or navigation until the ships came abeam of no. 4. Immediately after the collision, on the very day of its occurrence, the master of the *Hellen* wrote to the owners of the *Donovan* informing them of the accident, saying:—

Steamer *Hellen* outbound from Aberdeen to sea running abreast of the M/S *Wm. Donovan*, at no. 4 red buoy, between Pt. Chehalis and the bar, the M/S *Wm. Donovan* suddenly took a sheer and collided with the Norwegian steamer *Hellen* and done considerable damage. For this damage I hold you responsible.

By the preliminary act of the *Hellen*, which was filed on 22nd April, the specific fault alleged against the *Donovan* is that she was allowed to take a sudden sheer into the *Hellen*, and the facts are thus stated in the defence, which was pleaded on 16th July:—

5. Between the bell buoy and outer red buoy no. 4 the *Wm. Donovan* gained a little on the *Hellen* and when the latter ship was in a position close to the said outer red buoy no. 4 she had the *Wm. Donovan* off her starboard quarter about 300 feet distant. Both vessels were then steering parallel courses along the channel out to sea.

6. When the vessels were in the said position close to outer red buoy no. 4 those on board the *Hellen* saw the *Wm. Donovan* suddenly alter her course and head directly for the side of the *Hellen*, which said alteration of course made a collision between the two vessels inevitable. Immediately thereafter the bluff of the port bow of the *Wm. Donovan* struck the starboard side of the *Hellen* abaft amidships doing damage to the *Hellen*.

The undisputed fact therefore is that the *Donovan* reached the longitude of the point of collision, at no. 4 buoy, at a distance of about 400 feet to the northward of that buoy, and that she passed no. 6 at the same distance, without in anywise disturbing or interfering with the course of the *Hellen*, and upon a course which the master and pilot of the *Hellen* describe as parallel with hers. The suggestion that the accident was due to the *Donovan* having gradually approached the *Hellen* upon an intersecting course, while running down the distance between no. 6 and no. 4, is thus negatived, not only by the formal allegations of the *Hellen*, but also by the testimony of the witnesses on both sides of the case, and is without justification in fact.

It was as to the *Hellen's* course and the occurrences abreast or nearly abreast of no. 4 that the serious dispute occurs. This is what the master of the *Donovan* says, referring to the time when, five-eighths of a mile to the east-

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ward of the buoy, he altered his course half a point to the northward:—

Q. That is the time you saw the *Hellen* approaching you?

A. Yes.

Q. And the *Hellen* was then two to three ship lengths away?

A. Yes.

Q. Do you want to increase that. Tell us how far?

A. No, I could not tell you how far. It is impossible.

Q. 500 to 750 feet, to the best of your belief?

A. Yes.

Q. And she started to approach you and draw in towards you?

A. Yes.

Q. And then finally when she got near the no. 4 she shouted out "get over" or words to that effect?

A. Yes.

Q. How near were you to no. 4 then?

A. We were close up to no. 4.

On the other hand, the master of the *Hellen* says:—

We proceeded the usual way down the channel, keeping close to the red buoys all the way. The *Donovan* seemed to keep closer over towards the black buoys and made a little shorter cut there like, so by the time we got down between no. 4 and 6, the outer buoys, she had gained a little on us again, and about between 3 and 6 buoys I would say that her stem was a little abaft of our amidships.

Q. That was between no. 4 and no. 6 outer buoy?

A. Yes.

Q. Being the red buoys?

A. Yes.

Q. Just state the position of the two ships, Captain, then, will you?

A. At that time?

Q. At that time, you mean when the ships were in a position between—

A. No. 4 and 6 buoys.

Q. 4 and 6 red buoys?

A. Yes, she was running pretty near a parallel course, I should say about 300 feet apart.

Q. Which ship was leading?

A. We was ahead of the *Donovan*.

Q. How far astern of you was the *Donovan*?

A. Her stem was a little abaft amidships.

Q. Aft amidships of the *Hellen*?

A. Yes.

Q. That was the position of the two ships just after passing no. 6 outer red buoy?

A. Yes, I should say.

Q. About what time was this roughly?

A. Oh, that should be about five o'clock.

Q. And what was the weather like at that time?

A. It was nearly the same as when we started, a little misty, but quite visible. We could see all we wanted to see.

Q. Could you see quite clearly all the buoys in the channel?

A. Yes, sir, oh, yes.

Q. Explain what happened after you passed no. 6 outer buoy?

A. Just a little bit before we got to no. 4 buoy or practically abreast of no. 4 buoy I happened to look out and I saw that the *Donovan* was getting a little nearer and I drew the pilot's attention to it. I said: "Look, she is getting closer." The pilot then went over to the side of the bridge and shouted over to the other ship, "Where are you going, why don't you keep over," or something of that kind. He said, "Where are you going?" That was quite clear, and somebody that I took for the captain, came out from the wheelhouse and shouted back, "I am broke down."

Q. Yes, then what happened?

A. The pilot then came right in amidships and ordered the wheel hard astarboard.

Q. What was the *Donovan* doing at that time?

A. Heading right down on us at a right angle of ninety degrees. He did this, as we could see that a collision would take place, and he thought it would lessen the impact of the blow by swinging parallel with her.

Q. Could anything have been done at that time to avoid a collision?

A. Nothing could have been done at the time she swung over, it was done in a second.

Q. Where did the collision take place?

A. At that time I looked at my watch, I took particular note and it was just 4.13.

Q. Or 5.13?

A. 5.13 at the time and I was abreast of no. 4 outer buoy.

Q. Abreast of no. 4 outer buoy the collision took place?

A. Yes.

Q. And this you have been telling us about, your telling the pilot that the ship was coming near and so on, that was the work of a few seconds?

A. The work of a few seconds, the shortest possible time.

Q. Did the *Donovan* slow down?

A. I could not say. It looked to me as if she was coming full speed ahead all the time. That is hard to say, but it looked to me that way, she was coming down at such a speed.

Q. Where did the *Donovan* strike you?

A. She struck us about thirty or forty feet abaft of amidships.

Q. Then what did she do?

A. She bumped us and bent some stanchions, she bumped us again and bumped again and slid along the *Hellen* after doing some damage until she got clear.

Q. Did she do any damage to the *Hellen*?

A. Yes, sir, she did.

Captain Malmgren was impressed with the view that, after he had acknowledged the passing signal, his duty required him to keep his course and speed, and he is not charged to have done otherwise, except, in the last few hundred feet, at no. 4 outer red buoy. He denies any sheer towards the *Hellen*, or any breakdown of his machinery, and he and his witnesses maintain that there was no change of the *Donovan's* course in this locality. It was

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not until the collision became imminent, by the approach of the *Hellen*, that the *Donovan* ported her helm, and later reversed her engines. Capt. Malmgren says that his ship did not answer her hard aport helm, and this he attributes to the proximity of the *Hellen*, which was then coming very close. But, however that may be, there was no defect in the working of his steering gear. The ship had steered perfectly on the various courses down river, and did so after the collision, on the reverse of these courses to Hoquiam for repairs. It is, I think, apparent that neither the port helm nor the reversing on the *Donovan* had any substantial effect with relation to the collision or its consequences. The *Hellen* was only 40 feet or 50 feet off when the *Donovan* reversed, and the porting and reversing were too late to be of any use.

There is no finding by either of the learned judges who have considered the case that the *Donovan* suddenly sheered to the southward. It is only if she did that the *Hellen* can be held free from blame. I find nothing in the circumstances to indicate a greater probability that the *Donovan* abruptly changed her course to the southward than that the *Hellen* more gradually approached her from that direction. On the contrary, the *Donovan* was on her course, and was passing no. 4 buoy about 400 feet outside of it, as she had passed the other port buoys coming down channel. If she deviated from this course and approached the *Hellen* head on, or at any lesser angle which would bring the ships into contact in so short a space and time, it must have been by reason of a hard astarboard helm, but in the execution of her voyage at that place the *Donovan* had no use for a starboard helm. If the *Hellen* had the obligation of an overtaking ship, as both the learned judges find she had, she was under absolute obligation to keep out of the way of the *Donovan*. In fact, however, her pilot and master did not realize their duty, they considered that they had already passed the *Donovan*, that the latter had become the following ship, and that the course and navigation of the *Hellen* were no longer burdened or affected by any requirement of the law to keep clear. This appears, not only by the evidence, but is set up by the pleadings, paragraphs 4 and 10 of the defence. The *Hellen's* stem was admittedly ahead of the *Donovan's*.

The officers of the *Hellen* say that the *Donovan's* stem was abaft the beam of the *Hellen*. What actually happened is somewhat in the region of conjecture, but there is evidence that those responsible for the navigation of the *Hellen* were no longer keeping the *Donovan* in mind. There seems to have been no efficient lookout on the position or movements of the *Donovan*. The ships were coming up to the buoy, upon passing which they would naturally alter their course to the southward. The pilot of the *Hellen* was looking forward, he did not realize that the vessels were approaching each other until they were nearly in contact, when his attention was directed to the *Donovan* by Capt. Ommundsen, who said that he happened to look out and saw the *Donovan* coming down at an angle of 90 degrees, when nothing could have been done to avoid the collision. I have already quoted his evidence. The chief officer of the *Hellen*, who went on watch at four o'clock, says:—

Q. When you first saw that there was going to be a collision, could anything have been done by the *Hellen* to avoid an accident?

A. No, it was too late. The only thing to do was to try and minimize the damage.

and again:—

Q. It all happened in the course of one continuous act; the *Wm. Donovan* moved to port?

A. Suddenly moved to port.

Q. And struck you?

A. Yes, shortly after.

Q. How long after?

A. The time it would take to go from 300 feet and right into the *Hellen*.

Bendiksen, the able bodied seaman, who was at the wheel of the *Hellen*, and taking his orders from the pilot, naturally did not see the *Donovan*. He says he could not see as he stood inside the wheelhouse but "he says when the *Donovan* went on him he got the order hard astarboard."

The witnesses agree that the collision occurred in the channel opposite, or nearly opposite, no. 4 outer buoy, and the evidence to which I have referred is, to my mind, suggestive of the fact that the pilot and officers of the *Hellen*, believing that they had passed the *Donovan*, and that she was already "finally past and clear," in order to avoid the buoy, and preparatory to the change of course which was necessary upon passing it, had come too far to

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the northward on a course to cross the bow of the *Donovan*, which their stem was leading by half a ship's length. I think it more likely that the accident occurred in this manner than by the extraordinary event of a breakdown in the machinery of the *Donovan*, or the starboarding of her helm; and moreover if, as admitted, immediately before the vessels assumed their conflicting courses, they were on parallel lines about 300 feet apart, and if, as said by the *Hellen's* witnesses, the *Donovan's* stem was then abaft her beam, it is impossible that, if the *Hellen* maintained her speed, and the course which she claims to have pursued, the *Donovan* could have come into contact with her where they say she did by any abrupt change of her course.

It must, I think, be conceded that the *Hellen* was the overtaking ship and that the passing rules applied. These rules, in their present application, were enacted specially for inland waters, and must therefore have been intended to operate in rivers, where it is necessary for a vessel frequently to change its course, following the windings of the channel, and I should think that a vessel keeps her course, within the meaning of the rules, if, in proceeding from one reach of a channel to another, she keeps the course which would ordinarily be expected of a vessel making that passage, and, as I have said, there is no complaint here that the *Donovan*, after acknowledging the passing signal, pursued any general course other than that which was anticipated.

The character of the obligation which the law casts upon an overtaking vessel is shown by the judgment of the Court of Appeal in the well known case of *The Saragossa* (1), where Lord Esher, M.R., said, referring to the collision regulations then in force:—

If the ships were an overtaking vessel and a vessel being overtaken, then the first rule is this: "Every ship, whether a sailing ship or a steamship, overtaking another, shall keep out of the way of the overtaken ship." That is an absolute rule, equivalent to an Act of Parliament. If that rule stood alone, whatever the overtaken ship did, however much she might deviate from her course, the other is bound absolutely to keep out of her way, and nothing can excuse it except inevitable accident. There was a case in the House of Lords in which the nautical advisers found that a man was put into such a position with regard to the other ship by the fault of that ship that any sailor of ordinary care and skill

(1) (1892) 7 Asp. M.C. 289.

would have done just what the man did. The House of Lords held, nevertheless, that he was within the rule, and was bound to keep out of the way. It was a severe finding, I think—it overruled the Court of Appeal—but it shows that the rule is absolute. What is the effect of it? Why you say to a man, “You are to keep out of the way. We don’t tell you how to keep out of the way. It may be by starboarding or by stopping and reversing, or going at full speed. It may be in any way you please. You are to have the choice; you have the obligation of doing it which way you will, but do it you must.” It was thought right that if you put that tremendous obligation upon the overtaking ship you must give him all the means to carry it out, and therefore there is another rule: “Where by the above rule, one of two ships is to keep out of the way, the other shall keep her course.” That is, that the ship on whom the heavy obligation lies may not be hampered by anything the other does. He must have his full liberty to go ahead of you, astern of you, within ten feet of you on one side or the other. If he is to have that obligation you must keep your course, so that he may not be hampered by you in any way as to his choice. Then it seems to me that that at once makes the rules correlative, and that the obligation on the one and the obligation on the other exists at the same time.

This exposition of the rule may, I think, be accepted for the present case, save as it is affected or qualified by the additional express provisions, which were not introduced into the general collision regulations until 1897, that

the vessel ahead shall in no way attempt to cross the bow or crowd upon the course of the passing vessel,

and that, when a vessel becomes an overtaking vessel, no subsequent alteration of the bearing between the two vessels shall make the overtaking vessel a crossing vessel within the meaning of these rules, or relieve her of the duty of keeping clear of the overtaken vessel until she is finally past and clear.

I am unable, after attentive consideration of the evidence, to find that the *Donovan* materially altered her course, or that she attempted to crowd upon the course of the *Hellen*, or that the *Donovan* executed any movement material to the case, which would affect the bearing as between her and the *Hellen*, which was not, or should not have been, reasonably anticipated by the latter. Even were it otherwise, the enactment is specific that

notwithstanding anything contained in these rules, every vessel, overtaking any other, shall keep out of the way of the overtaken vessel;

and, having regard to the whole evidence in the case, I do not think that the *Hellen* has satisfied the burden which rests upon her to excuse her collision with the overtaken ship, or to set aside the original findings against her.

I would experience some difficulty in coming to the conclusion that the *Donovan* should be held at fault in any

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respect, notwithstanding that both vessels were persistently navigating the channel on the side opposite to that to which they were equally directed by the regulations, were it not for the fact that the effect of the passing signal, Art. 18, Rule VIII, was to commit the *Hellen* to a passage on the port hand of the *Donovan*, and therefore that the *Hellen* could not be in any manner impeded or embarrassed, in the course which she had notified, by the *Donovan* going further to the northward; and I am disposed to think that when the master of the *Donovan* realized that the *Hellen* was on a course to cross his bow he should not have been so late in porting his helm. I do not think that in obeying and construing the rules he observed due regard to the dangers of navigation and collision; I think that, in the special circumstances of the case, good seamanship required that he should give the *Hellen* more sea-room, and for this reason, I am not prepared to reverse the finding of the learned local judge as to the responsibility of the *Donovan*.

I would therefore allow the appeal, and restore the judgment at the trial.

ANGLIN C.J.C. (dissenting).—I have had the advantage of reading the opinion prepared by my brother Newcombe. I regret that I cannot agree in his conclusion.

The evidence, as I read it, supports the view of the learned President of the Exchequer Court that the collision was really caused by the *Donovan's* fault in failing, after having assented to the *Hellen's* passing her to port, to maintain her course, and in crowding upon the course of the *Hellen*, in contravention of Arts. 21 and 18 (Rule VIII).

The evidence of Malmgren, master of the *Donovan* (which I find unreliable except where he makes admissions adverse to the interest of his vessel), is that, up to a certain point, he had been steering by the red (or south) buoys and had maintained a course some 300-750 feet to the north of the *Hellen*; that after passing red buoy no. 6 his vision of outer red buoy no. 4 was obscured by fog or haze (which does not seem to have troubled anybody on the *Hellen*)

and remained so for some appreciable time; that he again saw red buoy no. 4 when about five-eighths of a mile, or 3,375 feet, east of it and found his ship heading for it, or, according to his earlier and more probable story, with that buoy a quarter of a point on her starboard bow; that he altered his course half a point northerly when 4 or 5 ship lengths (about 1,100 feet) from buoy no. 4, enough, he says, "to clear" that buoy, to which he also says that both vessels "passed close," although he elsewhere maintains that his vessel was over 300 feet to the north of the buoy; that shortly before the collision, when the *Donovan* was only 50 or 60 feet away from the *Hellen*, he heard the pilot of the latter shout to him "get over" or words to that effect.

I regard as most significant the fact that Malmgren did not reply to that demand by saying "keep over yourselves," or something of the kind, as one would have expected had he thought himself on his proper course and the *Hellen* encroaching upon it, which is now contended. Apparently conscious of his own default at that time, according to witnesses for the *Hellen* he answered "I am broken down" or "I can't handle her," or something to that effect, and, according to his own story, "I am trying to get her back." But, he says, the *Donovan* did not answer her helm, although it was then put hard over to port. She did not come "back," i.e., to her proper course, until after she had run into the *Hellen*.

Opposite buoy no. 4 the channel is 1,200 feet wide and there is no reason why the *Donovan* should not have passed that buoy at a distance of some 700 or 800 feet from it. Maintaining her course as it had been up to buoy no. 6 she would have passed it some 400 to 600 feet on her port side. The course of the *Hellen* lay to the north of buoy no. 4 and she was obliged to keep to the north of it in order to remain in the channel. She was steering as close to the red buoys on the south side as it was prudent for her to go. Thus, as found by the learned trial judge, she passed within 40 or 50 feet of the no. 6 outer red buoy, the south buoy immediately above and about  $1\frac{1}{4}$  miles distant from outer red buoy no. 4. When passing buoy no. 6 the *Donovan*

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was about 300 feet further out in the channel and running on a course practically parallel to that of the *Hellen*. From this point the *Hellen* steered a course to carry her past buoy no. 4 close on her port side. That buoy was plainly visible to her pilot from the time she passed buoy no. 6.

The weight of the evidence points to the collision having occurred some 50 to 100 feet to the north of outer red buoy no. 4—as put by the learned President, “quite close to no. 4 buoy.” It seems obvious to me that during the time her master says that his vision was obscured by fog or haze the course of the *Donovan* must have been materially altered to the southward so as to crowd upon that of the *Hellen*. His statement that when the fog lifted he had no. 4 red buoy slightly on his starboard bow five-eighths of a mile ahead makes this abundantly clear. In fact he eventually crowded in upon the course of the *Hellen* so much that he did not leave her sufficient room to pass buoy no. 4. This alteration of course and crowding in became apparent to the officers of the *Hellen* too late to permit of their doing anything to avoid the collision then apparently inevitable. The evidence does not show that they were at fault in not having sooner realized their danger. When they did perceive it, all they could do was to sheer off in order to minimize the results. The master of the *Donovan*, when 3,300 feet east of buoy no. 4, perceived that buoy one-quarter of a point on his starboard bow. Although he knew he was running on a course which would intersect that of the *Hellen*, he apparently maintained that course for 2,200 feet and changed it, at the most half a point, only when about 1,100 feet to the east of buoy no. 4. Assuming that he still had that buoy one-quarter of a point on his starboard bow when he made this change of course, it would bring his ship less than 60 feet to the north of that buoy when abreast of it. He did not put his helm hard-a-port until the pilot of the *Hellen* shouted to him to “get over”—the two ships being then only 50 or 60 feet apart. That the *Donovan* failed to answer—or to “get back”—her master admits.

In my opinion the proximate cause of the collision was breach of articles 21 and 18 by the *Donovan* after her mas-

ter had assented to the *Hellen* passing his vessel to port and his negligent failure to rectify that error, rather than to any blameworthy omission on the part of the *Hellen* to observe article 24.

I agree in the view expressed by the learned President of the Exchequer Court, with the concurrence of his assessors, that after passing the no. 6 buoy "the *Donovan* steered a course which was likely to cross that of the *Hellen*"—that "in view of the signals exchanged" the *Hellen* was rightly "on the port side of the *Donovan*" endeavouring to pass her, and that, "except for the conduct of the *Donovan* the attempt (of the *Hellen* to pass) at no time involved a risk of collision"—that "the *Hellen* did everything that could reasonably be expected of her in passing the *Donovan*, that she was not guilty of negligence in any respect, and that it was the conduct and seamanship of the *Donovan* alone that brought about the collision." "In all this," adds the learned president, "the persons who advise me agree."

Whether the deviation in the course of the *Donovan* was intentional in an endeavour to take a short cut in passing buoy no. 4, either regardless of the rights of the *Hellen* or in the mistaken belief that the *Hellen's* course would carry her out of the channel and to the south of buoy no. 4, or, as seems more likely, it was due to bad seamanship during the time when the master says his vision was obscured by haze or fog, and the failure of his belated attempt to rectify his error should be ascribed to some defect in the *Donovan's* steering apparatus, or to some other cause, it is a little difficult to determine; but that the *Donovan* did in fact change her course so that it would intersect that of the *Hellen*; that her master consciously persisted in that course for two-fifths of a mile and then altered it too little, and that the *Donovan* did in fact crowd upon the course of the *Hellen* and that her master made no attempt to correct his error until it was too late—all this in my opinion, upon the evidence, admits of no doubt.

The President of the Exchequer Court was, I respectfully agree, entirely right in his interpretation of the mean-

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ing of the word "course" in article 21. *The Roanoke* (1); *The Velocity* (2); *The Echo* (3). The view taken by that learned judge that correlative to the obligation of the *Hellen*, as an overtaking ship, "to keep out of the way" of the *Donovan* (art. 24) was that of the latter "to maintain her course" (Art. 21) and "in no case to attempt \* \* \* to crowd upon the course of the passing vessel" (Art. 18) is also abundantly warranted by the authorities. "The rule requiring a ship to keep her course and speed must be strictly observed." *The Olympic and H.M.S. Hawke* (4). The guide of the overtaking vessel is the presumption that the other will keep her course. *The Roanoke* (1). To excuse herself the *Donovan* must show that her departure from her course was necessary to avoid immediate danger and was no more than was necessary. Marsden, *Collisions at Sea*, 8th Ed., p. 388. There is no suggestion of anything of the kind. Where the leading ship alters her course in contravention of article 21, the otherwise absolute obligation imposed on the overtaking vessel by article 24 "to keep out of the way" is satisfied by such overtaking ship using all reasonable care and skill, and if, having done so, a collision should nevertheless ensue she will not be held in fault. *The Saragossa* (5); *The Effie Gray v. Inkula* (6). The "tremendous obligation" imposed on the overtaking ship by article 24 implies that its discharge must not be hampered by the leading ship; the two rules are correlative. If the ship which is bound to do so fails to keep her course and takes away part of the water to which the other is entitled she hampers her and the latter's "absolute obligation to keep out of the way" is gone.

For these reasons I would affirm the judgment appealed from.

IDINGTON J. (dissenting).—This action arises out of a collision between the steamship *Wm. Donovan* owned by appellant company, and the respondent when proceeding down the Chehalis river in the state of Washington and through Grays harbour out to sea.

(1) [1908] P. 231 at pp. 241, 247.

(2) (1869) L.R., 3 P.C. 44.

(3) [1917] P. 132, at pp. 136,

137.

(4) [1913] P. 214 at pp. 241, 245.

(5) (1892) 7 Asp. M.C. 289.

(6) (1921) 9 Ll.L.L. Rep. 264

The course as a whole is somewhat tortuous and liable to confuse mariners, strangers to it, in giving evidence, and hence, I imagine, arises some of the conflicting evidence presented.

The appellant brought this action which was tried before the Honourable Mr. Justice Martin, the local judge in Admiralty; and the respondent counterclaimed.

The learned trial judge finding they were, at the point of collision, both on the wrong side of the channel, though sailing in the same direction down the river, found that both were to blame and hence divided the damages and costs.

The rule he invoked is, I take it, to meet the cases of vessels meeting each other head to head in a narrow channel and the contingencies possible in such a case, but, I respectfully submit, that rule does not apply to this case, and especially where no other vessels going the other way implicated or mentioned.

Hence the present respondent appealed, from so much of said judgment as awarded against the said respondent a moiety of the damages and costs, to the Exchequer Court of Canada.

That appeal came on for the hearing thereof at Vancouver before the President of said court, assisted by two nautical assessors.

After hearing and duly considering said appeal the said President of said court allowed the said appeal with costs; dismissed the present appellant's action with costs, and allowed the present respondent's counterclaim with costs.

As I quite fully agree with the reasoning of the said learned President, assigned in support of his said judgment, I need not repeat same here.

I may be permitted, however, to add that having read the entire evidence, I too have come to the conclusion that on the conflict of evidence between the two sides of the contending parties the weight of evidence on all material points in issue is entirely in favour of the present respondent.

The evidence adduced by some of the witnesses for the present appellant, in regard to the essential features in dispute, was for the most part very unsatisfactory, as I read it, and especially that of the appellant's captain in charge

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at the time. The learned trial judge was charitable enough to assign that feature to his want of knowledge of English to an extent that I cannot agree with, though I hope making all due allowance for the want of knowledge of English and for the advantage the learned trial judge had over me in seeing the witness.

The dense haze which he alleges prevented him from seeing as others did can hardly be attributed to want of English.

Nor can the contradictions of his own evidence taken before the court of investigation be so, I submit.

And his theory of suction seems to have been only a guess and dispelled by evidence of an expert on that point.

The chief evidence of the respondent's witnesses was taken *de bene esse* as they could not be detained in the country and hence the appellant had the advantage of knowing it all before the trial and what it had to meet.

And that story is given, on the whole, very fairly I think, though of course in all such cases there are apt to be differences of recollection and of apprehension.

I am not at all inclined to hold that the appellant's captain was a wilful liar. It was, in my humble estimation, unfortunate that his peculiar mode of thought was likely to be upset by the least excitement. And this probably caused him to take inconsistent steps at the time of the approaching collision, as well as being much puzzled on the cross-examination he had to meet.

I refer to this phase of the case briefly lest anyone should be inclined to challenge the narrow ground on which the President of the Exchequer Court goes, though I agree with him.

I merely desire to point out that there is much more to be said in support of his judgment in the line of thought I am adverting to than he has given expression to, or I either, except to indicate that independently of the first ground the evidence as a whole renders it impossible for me to consent to the appellant succeeding herein.

I would dismiss the appeal with costs.

*Appeal allowed with costs.*

Solicitors for the appellant: *Mayers, Lane & Thomson.*  
 Solicitors for the respondent: *Griffin, Montgomery & Smith.*