1916
March 20

BRITISH COLUMBIA ADMIRALTY DISTRICT.

HIS MAJESTY THE KING

v.

THE "DESPATCH" (No. 3)

THE BORDER LINE TRANSPORTATION CO.

v.

McDOUGAL

Collision—Vessels in channels—Fixing liability—Evidence—Naval charts—Depositions.

A vessel which fails to keep to the starboard side of the fairway or mid-channel, when entering a harbour, in violation of art 25, and crosses at an excessive speed to the wrong side of the channel, without excuse, is liable for collision with a tug prudently proceeding out of the harbour, at a very low speed, with a heavy scow lashed to her starboard bow; under such circumstances the latter cannot be blamed for her failure to reverse her engines to avoid the collision.

The Kaiser Wilhelm der Grosse (1907) P. 259; *Richelieu & Ont. Nav. Co. v. Cape Breton* [1907] A.C. 112, 76 L.J.P.C. 14, referred to.

2. Canadian Naval charts, issued under the orders of the Minister of the Naval Service of Canada, are accepted as *prima facie* evidence to the same extent as Imperial Admiralty charts.

3. Depositions of the mate of a vessel in proceedings of a judicial nature before the Court of Formal Investigation, to inquire into a collision under secs. 782–801 of the Canada Shipping Act (R.S.C. 1906, ch. 113), cannot be received in evidence in the main action to determine the liability for the collision, the plaintiff having been a party to and represented by counsel at such proceedings.

ACTION for damages arising out of a collision of ships.

W. C. Moresby, for the Point Hope; *E. V. Bodwell*, K.C., for the Despatch.

MARTIN, L. J. (March 20, 1916), delivered judgment.

This is an action brought by His Majesty the King, against the steamship "Despatch" (170 feet long; R. N. McKay, Master), and her owners, the Border Line Transportation Co., for damage done to the Canadian Govern-

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ment tug "Point Hope" by collision in Victoria Harbour, on October 25, 1913, at 4.25 a.m. There is also an action, tried at the same time, by the said Border Line Transportation Co. against W. D. McDougal, master of the "Point Hope," for damages to the "Despatch" arising out of the said collision which is alleged to be due to the negligence of the said McDougal.

At the time of the collision, the "Point Hope" was going out of the harbour with a scow (about 93 feet long), laden with about 250 tons of dredged-up mud and silt, lashed to and projecting ahead of her starboard bow, the intention being to dump the load in deep water beyond Brotchie Ledge. It is agreed that the weather was calm and clear; and the water at the end of an ebb tide, almost low water, with no appreciable current; and that the proper lights were shewn by both vessels.

The contention, in brief, of the "Point Hope" is that, while she was keeping on her proper side of the fairway or mid-channel in navigating this narrow channel (as this part of Victoria Harbour is admitted to be), off Shoal Point, she was negligently run into by the "Despatch" which, it is alleged, in entering the harbour and rounding said point at too high a rate of speed, had got over into the wrong or port side of the channel instead of keeping to her starboard side of it. The "Point Hope" invokes arts. 19 and 25, but in so far as the former is concerned, I think it may, in the circumstances of this case, be dismissed from further consideration, because it cannot be said that within the true meaning of that article these were "crossing vessels." Both were in the channel and what each was attempting, properly, to do in rounding Shoal Point, across which they could see one another, was to follow the winding reaches of a narrow channel in the manner directed by art. 25, and there was nothing to indicate that there was any other intention, either to cross the channel for any legitimate purpose (such as to call at a port there, or make for a pilot station, as in "*The Perin*," cited in *Marsden on Collisions*),[1] or otherwise, so in the sense that the word is used in art. 21, there was no other "course" that either vessel could properly keep. There are, undoubtedly, cases

[1] 6th ed., 1910, p. 444.

where the crossing rule should be applied in narrow channels, but this is not one of them, *e.g.*, the "*Ashton*,"[1] and cases therein cited. Most of the cases on this subject are collected in Marsden, *supra*, at pp. 441, 443–6, and particularly at 26 Halsbury 438–9, where I find, after examining many authorities, that the following deductions from the decisions are well stated at p. 439, and are directly applicable to this case:—

"First, it appears that the crossing rule can only apply "when the lines of the courses to be expected with regard "to the two vessels will in fact cross, and when there is "risk of collision, that is to say, when both vessels will "come to the point of crossing at or nearly at the same "moment. Secondly, it appears that the two vessels will "not come within the crossing rule, whatever their bearings "from one another while rounding the bend may be, when "there is no indication that either vessel is in fact crossing "the river, and when they are keeping on opposite sides "of the channel or one is keeping in mid-channel, so that "the vessels, on the courses to be reasonably attributed "to them, will pass clear of each other."

Since that was written, the leading case of *The "Olympic" and the "Hawke,"*[2] has come before the House of Lords and been affirmed, and the last word on the point now under consideration was spoken by Lord Atkinson, who, after referring to the judgment of the Privy Council in *The "Pekin,"*[3] (cited in particular by Lord Justice Kennedy below in connection with and as adopted by the Privy Council in *The "Albano" v. Allan Line SS. Co.*)[4] and quoting Sir Francis Jeune's observation that "vessels may no doubt be crossing vessels within art. 22 in a river: it depends on their presumable courses," goes on to say:—

"But all that is meant by this last expression would appear to me to be this: Where two ships are navigating a narrow channel so winding in its course that the physical features necessitate, or the rules of good seamanship require, that either should relatively to the other take for a time a course which if continued would intersect the course of

[1] [1905] P. 21, at 28.
[2] [1913] P. 214; 83 L.J.P. 113; 84 L.J.P. 49; [1915] A.C. 385.
[3] [1897] A.C. 532; 66 L.J.P.C. 97. [4] [1907] A.C. 193, 76 L.J.P.C. 33.

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that other so as to involve risk of collision, and it can be reasonably assumed by the one that the other will change her course so as to avoid this risk as soon as those physical features will, consistently with the rules of good seamanship, permit, the article as to crossing ships does not apply: but the circumstances of each case must determine whether this necessity exists or this assumption can reasonably be made. This is, I think, clearly brought out in the judgment of Lord Justice James in *The "Oceano"*[1] where, in commenting on the case of *he "Velocity"*[2] The said, "What was decided really was, that in such a river the particular direction taken for a moment, or a few moments, in rounding a corner or avoiding an obstacle was not such an indication of the real course of the ship as to justify another ship in saying, 'I saw your course, I saw that if you continued in that course we should be crossing ships, and I left to you, therefore, the entire responsibility of getting out of my way under the rule.' "

It follows from this that, according to the collision rules and good seamanship, the submission of counsel for the "Despatch" that art. 19 (and consequently art. 22) does not apply to the situation at bar, is sustained.

It remains then to consider art. 25, as follows:—

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

It was said by Lord Alverstone in *The Kaiser Wilhelm der Grosse*[3]

"I would point out that art. 25 is not merely a rule "which is to be obeyed by one vessel as regards another "vessel, but is a positive direction that a steam vessel "shall be kept as far as practicable on the starboard side "of the channel."

And Fletcher Moulton, L.J., said, p. 270:—

"It is the imperative duty of ships to get to the right "hand in passing through such a channel."

Kennedy, L. J., concurred, and said, p. 274:—

"It is quite clear that the only possible excuse for dis- "regarding the rule would be that there was something

[1] (1878), 3 P.D. 60, at 63.
[2] (1869), L.R. 3 P.C. 44, 39 L.J. (Adm.) 20.
[3] [1907] P. 259, at 264.

"which rendered it neither safe nor practicable to follow "that rule."

This "excuse" might, of course, arise "in special circumstances" under the "departure from the above rules necessary in order to avoid immediate danger," authorised by art. 27, but as to the caution and limit to be observed in its application, and the burden of proof, see *e.g.*, the observations in 26 Halsbury 366 *et seq.*, and 468-71, and on the history of preceding statutes on the point see the remarks of Dr. Lushington in *The "Sylph."*[1] The decision also of this Court on *The "Charmer" v. The "Bermuda"*[2] is in point.

Here, however, both vessels contend that they were on their proper, *i.e.*, starboard, "side of the fairway or mid-channel," and the "Point Hope" places the point of collision well up to the northern edge of the channel, while the "Despatch" places it well to the south of mid-channel. The expressions "fairway and mid-channel" and "fairway" *solus*, as used in various statutes and rules, have been considered in several cases, such as *The "Panther;"*[3] *The "Sylph," supra*; and *Smith v. Voss*[4] (on "fairway and mid-channel" under former statutes); *The "Blue Bell,"*[5] (on the Thames by-law re "fairway"); *The Clutha Boat*, 147[6] (on the Medway by-law re "fairway"); and *The "Glengariff,"*[7] on "fairway and mid-channel" under the present article, wherein Bargrave Deane, J., says:—

"What is a fairway? A fairway is practically defined "by this article to be mid-channel. There is no rule "which says that you must keep in the fairway, but the "rule says that you must keep to the starboard side of the "fairway or mid-channel in narrow channels.

This view of the fairway as being practically the same as mid-channel is in accord with the direction of Chief Baron Pollock to the jury in *Smith v. Voss, supra*, which was upheld *in banc.* It is true that in the *"Blue Bell"* case, *supra*, the Divisional Court gave a wider scope to the term "fairway," but the word there was used alone, from the Thames by-law, and not in conjuction with "or mid-channel," so if anything should turn here on the exact

[1] (1854), 2 Sp. Ecc. & Ad. 75, at 79.
[2] 15 B.C.R. 506.
[3] (1853), 1 Sp. Ecc. & Ad. 31.
[4] (1857), 2 H. & N. 97.
[5] [1895] P. 242, at 246.
[6] [1909] P. 36, at 40–1.
[7] [1905] P. 106; 10 Asp. M.L.C. 103.

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construction I should feel obliged to follow the *Glengariff* decision, which is exactly in point. But in the present case it makes no difference, because if the "Despatch" had kept to the starboard side of the fairway, however viewed, or mid-channel, the collision would have been averted. I say this because after very careful consideration of the evidence and the assistance of the assessors in laying out the various positions and courses on the chart and harbour plan before us, the only conclusion to reach is that the collision occurred at a point which, while not so far to the west or so near to the north edge of the channel as is claimed by the "Point Hope," is yet well to the north of mid-channel, and approximately on the line deposed to by Fletcher, master of the "Petrel," viewed from his position at the stationary dredge "Ajax" (which he was alongside of), at the point indicated by A on the plan, to the point he marked at H, and which line he was in the best position to determine as regards direction though not the length of it, yet the weight of the whole evidence warrants the conclusion that the "Point Hope" was at the time of the collision well on her proper side of the channel. The result of this is that the "Despatch" must be taken to have got over to the wrong side of the channel in the water of the "Point Hope" without excuse, in which case, as their Lordships of the Privy Council said in *Richelieu & Ont. Nav. Co. v. Cape Breton.*[1]:—

"the sole question left is whether anything was done or "omitted to be done on board the (other ship) for which "she ought to be held responsible.

Here it is alleged that, in accordance with good seamanship under art. 29, the "Point Hope" should have stopped her engines before she did (about 2 seconds before the collision, her engineer says), and reversed them. These contentions have received our very careful attention, with the result that I am advised by the assessors that in all the circumstances, bearing in mind that the "Point Hope" had always been going at a slow speed, not over three knots, with a heavy scow lashed to her starboard bow, and the proximity of shoal water to starboard in a narrow channel, and that signals

[1] [1907] A.C. 112 at 118, 76 L.J.P.C. 14 at 18.

for a starboard crossing had been given and answered, that she could not reasonably be expected to act otherwise than as she did in regard to stopping, and that, in continuing to port her helm as far as was prudent, more should not be required of her, seeing that she was justified in assuming that the "Despatch" could and would pass her port side to port side; and as to reversing, that it would have been inadvisable in the circumstances as tending, owing to the position of the heavy scow, rather to have aided than averted the collision by bringing the bow of the "Point Hope" to port. My independent view of the matter is in accordance with this advice which I adopt. The difficulty of handling a tug with scow attached in a narrow channel is well known to mariners and to this Court—*cf. The "Charmer" v. The "Bermuda," supra.* The "Point Hope" was placed in a position of doubt and uncertainty by the action of the "Despatch" in apparently taking a course in the channel which did not correspond with her signal, and was entitled to expect almost up to the last that she would take such action as would avoid the collision, and which could have been done if the "Despatch" had ported her helm earlier or harder than she did. My view of the real cause of the accident is that the "Despatch" had got further out into the channel than she intended, owing to trying to round Shoal Point at too a high rate of speed.

It is said in *The "Tempus,"*[1] that:—

"It has been pointed out over and over again that one "ought to be careful not to be too ready to cast blame "upon a vessel which is placed in a difficulty by another "vessel".

The circumstances in which this language was used and applied were much more in favour of a liability being imposed than they are here. It must be remembered that as Lord Justice Fletcher Moulton put it, in *The "Kaiser Wilhelm der Grosse"* case, p. 272, the signals given by the "Point Hope" should "have recalled the other vessel to her duty. Not only was that possible, but it was what ought to have occurred." And other observations follow which are largely appropriate to this case; and also those of Lord

[1] (1913) 12 Asp. 396 at 398.

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Justice Kennedy on p. 275. Lord Alverstone says in the same case, pp. 266-7, "if art. 25 applies . . . . then there is no article which gives any direction with regard to the course or speed of the 'Orinoco' " (which vessel was charged with the same errors in seamanship as are charged here against the "Point Hope"), and so "it must depend upon the provisions of art. 29," requiring good seamanship in all cases, and the advice given to the Court of Appeal by the assessors (p. 268) was the same as that which is given to me.

Upon the whole case, I can only reach the conclusion that the sole blame for the collision must be laid upon the "Despatch" and therefore, there will be judgment for the plaintiff in the main case, with a reference to the registrar, assisted by merchants, to assess damages. The cross action will be dismissed.

It is desirable to put upon record two rulings on evidence.

First. The practice of this Court respecting the admission in evidence of Canadian Naval charts issued under the orders of the Minister of the Naval Service of Canada was stated and confirmed, viz.: that such charts are accepted as *prima facie* evidence to the same extent as Imperial Admiralty charts.

Second. The depositions of the mate of the "Despatch," Haskins, deceased since they were given in December, 1913, before the Court of Formal Investigation, so styled, held to inquire into the collision now in question, under secs. 782-801 of the Canada Shipping Act, by the Commissioner of Wrecks, with assessors, with powers not only of "full investigation" (sec. 789) into the casualty, and of awarding costs (sec. 794), but of "charges of incompetency and misconduct on the part of masters, mates, pilots or engineers" (sec. 791), and of inflicting penalties by way of cancellation or suspension of their certificates (sec. 801), should now be received in evidence herein, in the main case, the plaintiff (the Crown), having been a party to and represented by counsel at such proceedings, which on the authorities which follow were held to be judicial in their nature: *Cole v. Hadley;*[1] *Baron de Bode's case;*[2] *Re Brun-*

[1] (1840), 11 A. & E. 807.

[2] (1845), 8 Q.B. 208.

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ner;[1] *The Queen v. London County Council;*[2] *Re Grosvenor etc. Hotel Co.;*[3] *Roscoe's Nisi Prius Evidence;*[4] *Taylor on Evidence;*[5] *Phipson;*[6] *and Best.*[7]

Judgment for plaintiff.

[1] 19 Q.B.D. 572.
[2] (1895), 11 T.L.R. 337.
[3] (1897), 13 T.L.R. 309, 76 L.T. 337.
[4] (18th ed.), p. 201.
[5] (10th ed.), 354 *et seq.*, 545–6(n. 6); 1,268.
[6] (1911), 416–21.
[7] (11th ed.), 468.