

ON APPEAL FROM THE BRITISH COLUMBIA ADMIRALTY
DISTRICT

1926
February 9.

THE SS. *HELEN* (DEFENDANT) APPELLANT;

AGAINST

WM. DONOVAN STEAMSHIP CO. }
(Incorporated) (PLAINTIFF) } RESPONDENT.

Shipping—Collision—Narrow channel—Overtaking vessel—Duties of overtaken vessel

The steamers *D.* and *H.* were at the time of the collision in question, navigating in daylight, on the Chehalis River, in the state of Washington, U.S.A., seaward bound, the *D.* leading. This river has a winding course, and is a narrow channel within the Regulations, with buoys on both sides marking the channel or fairway. The *H.* when six or seven hundred yards behind the *D.* gave the regular signal to indicate her intention of passing the *D.* on the port side of the latter, which signal was properly answered. Before the *H.* had fully passed the *D.*, while the *H.* was on the port side of the channel, and near one of the port buoys, a collision occurred between the *H.* and the *D.* on the port side of mid-channel, and near one of the port buoys.

Held (reversing the judgment appealed from), that the *H.*, in passing the *D.* on the port side, could not be said to be on her wrong side of the channel, if in order to so pass she had to go to the port side of mid-channel.

2. That, notwithstanding that Art. 24 provides that an overtaking vessel must keep out of the way of an overtaken vessel, there is a correlative duty imposed upon the leading vessel to keep her course, which is the course reasonably to be attributed to her, and which in the circumstances was on the starboard side of the channel, as required by Article 25, and Rule 8 of Article 18 (U.S. Regulations), and that the *D.* crowding upon the course of the *H.* in violation of Rule 8, was solely to blame for the collision.

APPEAL and cross-appeal from judgment rendered in the British Columbia Admiralty District.

Vancouver, 21st September, 1925.

Appeal now heard before the Honourable the President.

S. A. Smith for the SS. *Helen*.

E. S. Mayers for the Donovan Steamship Co.

The facts are stated in the reasons for judgment.

MACLEAN J., now this 9th February, 1926, delivered judgment.

This is an appeal and cross-appeal from a judgment of the Honourable Mr. Justice Martin L.J.A., for the Admiralty District of British Columbia, wherein he found both ships involved in a collision equally in fault. His reasons

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for judgment are to be found in Exchequer Court Reports, 1925, page 114, where the essential facts are very concisely set forth, and accordingly I need not repeat them, and there is very little, if any, that I need add thereto. The appeal was heard by me with the assistance of two nautical assessors.

The case for the *Donovan* is that the *Helen* by improper helm action sheared into her; that the *Helen* was an overtaking ship, and that it was her absolute duty to keep out of the way of the *Donovan* under article 24, and regardless of anything contained in any other rule. For the *Donovan* it was also urged, that if their courses were crossing, it was the duty of the *Helen* to keep out of the way of the *Donovan*, she having the *Donovan* on her starboard side. The case for the *Helen* is that the *Donovan* crowded upon her course and even crossed her course; that the *Donovan* should have proceeded on the starboard side of mid-channel; and that the *Donovan* by improper helm action sheared into the *Helen*.

The learned trial judge found that both ships were on the wrong side of the channel at the time of the collision, that is on the port side of the channel; and that both were guilty of unseamanlike conduct in their movements, particularly from red buoy No. 6, to red buoy No. 4 about where the collision took place, a distance of $1\frac{1}{4}$ miles. The trial judge, owing to the conflict of evidence, was unable to determine which ship by its helm action was responsible for shearing into the other at the last moment as claimed by each. I also understand the learned trial judge to have found that the *Helen* was at all times material here, and within the regulations, an overtaking ship. The real matter in issue is quite important, and like the trial judge, I have found it quite difficult in reaching a conclusion.

The ships in question were at the time of the collision, navigating in daylight, the Chehalis River, in the State of Washington, U.S.A., seaward bound. This river is a narrow channel within the regulations, and was buoyed on either side, red buoys being on the port side and black buoys on the starboard side. It was apparently the fairway between those buoys marking the channel, that ships navigated while proceeding up and down the river. The *Helen*, when 600 or 700 yards behind the *Donovan*,

gave the required signal to indicate her intention of passing the *Donovan* on the port side of the latter, and which signal was properly answered by the *Donovan*. I do not think that weather conditions were an important factor, if any, in the movements of either ship upon the occasion in question. The learned trial judge did not base his conclusion upon any condition of this nature, it was not emphasized before me on the hearing of the appeal, and a careful review of the evidence does not impress me with the idea that there was anything of this nature rendering it dangerous or difficult for either ship to navigate anywhere within the confines of the buoyed channel if care were exercised, and in this my assessors agree. Both ships apparently were proceeding at the rate of seven or eight knots or more, and there is no evidence of fog signals having been given by either ship. For a time, the weather was referred to as "hazy" or "misty" by the masters of both ships, but I do not feel justified in attaching any importance to that fact, because it is clear from the evidence that both ships could see a very considerable distance at all times.

The rules or regulations for the prevention of collisions applicable to the case are those applying to the inland waters of the United States on the Pacific Coast, and the following are particularly material to the decision:—

Rule VIII (of Article 18):—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.

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

Article 25:—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.

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There is no doubt, I think, that the *Helen* was an overtaking ship, but I am not sure that under the facts developed in this case, that this circumstance is the important or controlling consideration in the case. Immediately before the collision the *Helen* was leading, but there was not clear water between them. An overtaking ship has the right I think, and is entitled to pass a leading ship, if she is able to do so, and where it may safely be done. I know of nothing in the regulations, or of any decision of which I am aware, to the contrary. In fact she may do so at her risk in the face of a signal against passing by the leading ship, or, if the leading ship refuses to answer the signal of the overtaking ship, indicating her desire to pass.

Rule 8 and article 24 when read together, would appear to mean that the *Helen* might pass, but she must keep out of the way of the *Donovan* in doing so. If such a construction without any qualification be the correct one in this case, and it is the construction so ably urged by Mr. Mayers, it would in practice mean that a slow leading ship in a narrow channel might be able, by acting on such an interpretation of the regulations, to cause confusion and impede unfairly the course of the overtaking ship, though Rule 3 would seem to have been designed specifically to provide for such a case, and to facilitate with safety, such an end. The proper construction of these two regulations is therefore of importance, and is, I think, the real point involved in the appeal.

Rule 8 was presumably enacted for a purpose. It was I think intended to cover a case like this. It was not I think enacted to meet the case of crossing ships, as other rules provide for that situation. It applies to ships running in the same direction and was enacted particularly for application in narrow inland waters. It gives an overtaking ship, running in the same direction as the leading ship, the right to pass, and while I think she has it clear of this rule, yet to absolve herself from blame in the event of a collision, she must show an observance of the terms of this rule.

Conceding, however, the applicability of Article 24 to narrow channels and to the facts in this case, the question arises, was there a correlative duty imposed upon the *Donovan*. What was the *Donovan's* "course" and did she

keep it, and what in all the circumstances and under the regulations, was the duty of the *Donovan*. The reason for strict adherence to "course and speed" is obvious and important in the open sea, particularly where ships are on crossing courses and where an unsteady or inconsistent course would prejudice and embarrass the overtaking ship. This rule was designed to ensure consistency in "course" so that the overtaking ship might with some security fix her course and line of action. "Course" does not mean compass course, when ships are in a winding channel. Vessels must follow the curves of a river or channel, and they are not crossing ships, if the course which is reasonably to be attributed to either ship, would keep one clear of the other. The *Donovan's* course in a narrow channel is first regulated by article 25, that is, she should if *practicable and safe* keep to the starboard side of mid-channel. That is a statutory direction. But regulations to prevent risk of collision only come into operation when there is a risk of collision. The *Donovan* having assented to the *Helen* passing her in a narrow channel, or having acknowledged that she understood the signals of the *Helen* to mean that she intended passing on the port side of the *Donovan*, this would I think constitute a risk of collision, and the appropriate rules would become operative. It was to prevent the risk of collision that Rule 8 was framed. Then article 25 says that in narrow channels ships shall "if practicable and safe" keep to the starboard side of mid-channel, and it was undoubtedly both safe and practicable for the *Donovan* to do this. The *Donovan* in my opinion should have been on the starboard side of the channel, or at least so far towards there, that there was no risk of collision. That was the "course" which the *Donovan* should have pursued, and I think that was the "course" designated by the regulations and prudent seamanship for her observance in the circumstances here, but which "course" she did not keep.

Further I might say, that the master of the *Donovan* states that when he answered the signal of the *Helen* he did not alter his helm because he was well on the right hand side of the channel, and that the *Helen* had ample room to pass. Again, a little later on when the ships were about to pass bell buoy No. 2 (port side), the *Donovan*

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slightly leading, the master of the *Donovan* says he kept this buoy well on his port, and had black buoy No. 5 (starboard side), on his starboard bow, which I understand to indicate the adoption of a course that would carry the *Donovan* well to mid-channel if not on the starboard side of mid-channel, and one which would at least afford the *Helen* ample water to pass if she could do so.

The *Donovan* did not, however, keep this course, for when she reached red buoy No. 6, she was on the port side of mid-channel, in fact only about 450 feet from the extreme port side of the buoyed channel, and about 600 feet to port of mid-channel. Then, the master of the *Donovan* states that when he first saw port buoy No. 4, in sailing between No. 6 and No. 4 port buoys, he was on the south side of mid-channel, with port buoy No. 4 on his starboard bow. He then states that he changed his course so as to leave red buoy No. 4 clear on his port side, but there is nothing in his evidence to indicate at what distance he intended to pass that buoy, and I think it is a fair inference that he calculated on passing that buoy just a short distance off his port bow. This was a course as it turned out, well upon the *Donovan's* port side of mid-channel, and in fact on the port side of a line midway between mid-channel and the port buoys, because the collision took place on the port side of such an imaginary line. It was the course which the *Helen* might have been expected to sail, and in fact the master of the *Helen* states he sailed almost a straight course between No. 6 and No. 4 port buoys, and that his plan was to reach No. 4 port buoy with the same on his port bow, at a distance of about 40 feet. Here, I should say, the buoyed channel was about 2,200 feet wide at No. 6 red buoy, and therefrom it gradually narrowed to about 1,200 feet at No. 4 red buoy. Only a short distance beyond the latter buoy both ships would be obliged to go sharply to port to pass through the channel leading to sea, which is also important to remember. There is no disclosed reason or justification for the *Donovan* sailing the course she did between these two buoys, except that the master of that ship acted on the assumption that he was not governed by any particular regulation, and that the *Helen* was in any event bound to keep out of his way.

If there was a duty under Article 24 upon the *Helen* to keep out of the way of the *Donovan*, there was a correlative duty resting upon the *Donovan* to keep on the starboard side of the channel, or at least on the course she adopted for quite a time after answering the signal of the *Helen* and which was apparently safe. Between port buoys No. 6 and No. 4, the *Donovan* was not in her right water, and did not keep her proper course, and this in my opinion brought about the collision.

Special consideration, however, must in my opinion be given to Rule 8, which is a special regulation for ships running in the same direction in narrow channels, and for passing one another. It seems to me that the *Donovan*, having understood that the *Helen* intended passing on her port side, she was bound to give the *Helen* sufficient water to do so, and which she could easily have done, and she should have followed all the rules applicable to such a situation in order to avoid a risk of collision, and I can see no excuse for her not having done so. If she thought there was danger in attempting to pass, she could at any time have warned the *Helen* not to pass. It might be contended that the *Helen* would have pursued a more prudent course had she again signalled her desire to pass on the port side, when she came closer to the *Donovan*. However, the *Donovan* knew what the *Helen* meant by her signal, she knew what the *Helen* was trying to do, and I am of the opinion that the burden of ending this understanding by reason of developing danger, or otherwise, was upon the *Donovan*. A consent to pass, being once given in a narrow channel, surely means the leading ship must not crowd the overtaking ship, and by consent I mean that the leading ship understood the signal of the overtaking ship, and that is all the return signal meant. From red buoy No. 6 to red buoy No. 4 the *Helen* was on the extreme port side of the buoyed channel, and nothing more could reasonably have been expected of her by the *Donovan*. The exact point of collision is not clearly fixed, but it was quite close to No. 4 red buoy, undoubtedly well on the port side of mid-channel. This certainly was crowding upon the course of the *Helen*, which was against the rule No. 8, and there was no possible excuse for so doing, because the *Donovan* had ample water to starboard. My assessors advise me that

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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. This seems so reasonable and obvious that I readily adopt it. It cannot, I think, be fairly said that the *Donovan* kept her side of the channel or did not crowd the *Helen*. Between the two port buoys, No. 6 and No. 4, there was no bend in the channel, and there was no danger whatever in the *Helen* attempting there to pass the *Donovan*, unless the latter were crowding upon the course of the former. That there was ample room for the *Donovan* to keep to her starboard side of mid-channel is not at all contested. The master of the *Donovan* again and again stated that the *Helen* was the overtaking ship, and it is I think clear that he acted upon the assumption that under the regulations he could go where he pleased in the channel, and that presumably the *Helen* should take care of herself as best she could. He apparently disregarded rule 8 altogether. Mr. Mayers contended that the *Donovan* was not on the wrong side of the channel because she was an overtaken ship, and that the *Helen* was obliged to keep out of her way in any event, and he also contended that if they were crossing ships it was equally the duty of the *Helen* to keep out of her way. I think this view is based on a misapprehension of the regulations applicable to this case. I have, however, already dealt with this contention and have expressed the opinion that even on this footing the *Donovan* did not keep her course as required by the rules, and by so doing brought about the collision. I think also that the *Donovan* utterly disregarded Rule 8 and crowded upon the course of the *Helen*.

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 *Helen*, and steered a course which was likely to cross the course of the *Helen* 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 *Helen*, 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 *Helen* 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 *Helen* 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. With very great respect for the conclusions of the experienced and learned trial judge in a very important and difficult case, I can reach no other conclusion than that the *Donovan* is wholly to blame for the collision, and that after the most careful study and consideration I could give to the matter.

The result is that the plaintiff's action and cross-appeal is dismissed, and the defendant ship, the *Helen*, succeeds in its defence and counter-claim in its action below and in its appeal, and is entitled to its costs following the event in both courts, and the cause is remitted to the court of first instance to be there dealt with in conformity with this judgment.

Judgment accordingly.

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