

1919
 Nov. 8.

IN THE EXCHEQUER COURT OF CANADA.

APPEAL FROM NEW BRUNSWICK ADMIRALTY DISTRICT.

DAVID COY, CHESLEY W. McLEAN, AND
 HARRY C. TITUS, OWNERS OF THE SHIP
 "PREMIER",

(PLAINTIFFS) APPELLANTS;

v.

THE SHIP "D. J. PURDY",

(DEFENDANT) RESPONDENT.

*Collision—Narrow channel—Evidence, weighing of—Crew on alert—
 Witnesses on shore—Preliminary Act, force of—Conflicting evi-
 dence—Liability in common fault. 4-5 Geo. 5, ch. 13, sec. 2,
 (Can).—Personal equation—Reasonable course.*

A collision took place in a narrow channel, of the St. John River, between 800 and 1,000 feet in width, at mid-day, in clear weather.

The "Premier" was on her starboard side of the channel, when in answer to one blast signal from the "Purdy", meaning that she would keep to her starboard side, the "Premier" answered one blast that she would keep to starboard, and the collision took place on the "Premier" side of the channel.

The "Purdy" was also for a time on her starboard side, and signalled she would so continue, but at a given moment without notice or reason she sheered across the channel towards the "Premier", when the collision happened. The "Purdy" had only one man at the wheel, when it was admitted she was hard to steer, and two should have been on duty on the occasion in question.

Held (varying the judgment appealed from), that the "Purdy" was navigated improperly and contrary to the signals given by her and was guilty of negligence and solely to blame for the accident.

2. That the evidence of disinterested witnesses standing on the shore in such a position of advantage as to have a full and clear view of both ships and thus follow the courses and manoeuvres of the vessels, will be accepted in preference to that of a passenger in the saloon of one of the ships with a limited range of sight as to the course of the two colliding ships,—due allowance being made for personal equation.

3. That in the presence of conflicting evidence, the Court should examine into the probabilities of the matter and draw its own conclusion as to what would be the most reasonable courses. The "Mary Stewart"¹ and the "Ailsa"² referred to.

4. That where statements in the preliminary act contradict those made at trial, the former will generally be accepted as a formal admission, and binding on the one making it. The "Seacombe" referred to.³

5. That more credibility attaches to evidence of the crew that is on the alert. The "Dahlia" referred to.⁴

EDITOR'S NOTE.—The change in the measure of liability for damages where both ships are to blame for collision affected in England by 1-2 Geo. 5, ch. 57, secs. 1 & 9, and in Canada by 4-5 Geo. 5, ch. 13, sec. 2, whereby instead of the damages being equally divided the "liability to make good the damage or loss shall be in proportion to the degree in which each vessel is in fault," referred to.

¹ (1844), 2 Rob. 244.

² (1860), 2 Stuart's Adm. 38.

³ (1912), P. 21.

⁴ (1841), 1 Stuart's Adm. 242.

THIS is an appeal from a judgment of the Exchequer Court of Canada, New Brunswick Admiralty District.

The judgment in the lower Court was rendered by the Honorable Mr. Justice Hazen on April 22, 1919, declaring both ships at fault and equally responsible.

Here follows the reasons for judgment appealed from:

HAZEN, J. J. A. (April 22, 1919) delivered judgment.

The collision in question in this suit took place opposite Middle Hampstead in the St. John River, on the 5th October last, between twelve and one o'clock in the afternoon. It was about a mile and three-quarters higher up the river than Hampstead wharf, and in that part of the river which lies be-

1919

COY, McLEAN
& TITUS

v.
S.S. "D. J.
PURDY"

Reasons for
Judgment.

1919
 COV. McLEAN
 & TITUS
 v.
 S. S. "D. J."
 PURDY
 Reasons for
 Judgment.

tween Long Island on the east and the main bank of the River St. John on the west. There was a light wind—in the language of the captain of the "Purdy" it was "a little mild breeze" and there was a current in the river of about two miles an hour. "The day was clear.

"It is first necessary to ascertain from the evidence and the position and courses of the vessels prior to and at the time of the collision and how the collision occurred. It was claimed on behalf of the 'Premier' that after leaving Gerow's wharf on the eastern side of the River St. John, it rounded Long Island, coming over to the Hampstead side at first and then coming over in a slanting course to the Long Island side, and then proceeding parallel with Long Island and within a very short distance of its shore, up river; that when it first sighted the 'Purdy' that ship had rounded what is called the curve in the island and was coming down river about midstream or further over towards the Hampstead shore, and that when it was within a few hundred yards of the 'Premier' it turned suddenly to port and ran into the 'Premier', striking it almost, though not quite at right angles on the port side, about eight feet aft of midships, injuring the 'Premier' to such an extent that it had to be beached in order to prevent it sinking. Evidence to this effect is given by the captain and members of the crew of the 'Premier', by some passengers who were on board, and by some witnesses who saw what occurred from the shore about half a mile away. As the river at the point where the accident occurred is between nine hundred and one thousand feet wide, these witnesses not only viewed the disaster over the water, but over a con-

“siderable distance of land intervening between
 “the point where they stood and where the water
 “on the western side of the River St. John com-
 “menced, and while I do not in any way dispute
 “their *bonâ fides*, I am disposed to think that they
 “were not in as good a position to speak accurately
 “in regard to the accident or the distance of the
 “‘Premier’ from Long Island or the position of the
 “‘Purdy’ as would be those who were on the ves-
 “sels at the time when the accident occurred, and
 “that it would be an easy thing from their view-
 “point to be mistaken in regard to the matter.

“On the other hand the evidence on behalf of the
 “‘Purdy’ is to the effect that the vessel rounded the
 “point of the island and came down river running
 “within a short distance of the Long Island shore
 “and parallel to it; that when the ‘Premier’ was
 “first sighted it was coming up river on the Hamp-
 “stead side of the midstream, and that it gradually
 “came across towards Long Island; that the ‘Purdy’
 “continued its course down river, keeping to the port
 “side of midstream and close to Long Island, and
 “that if both vessels had kept their course they
 “would have passed one another without any acci-
 “dent occurring, but that as they approached the
 “‘Premier’ kept coming over towards the Long
 “Island shore, and finally attempted to cross the
 “bows of the ‘Purdy’. The ‘Purdy’s’ engines were
 “reversed, but it struck the ‘Premier’ at the point
 “that I have mentioned with the result as before
 “stated.

“As is the case in nearly all collision cases, the
 “evidence was of a very conflicting character, and
 “if there was only the verbal evidence of the wit-
 “nesses to be considered it would be a difficult mat-

1919

COY, MCLRAN
& TITUSv.
S.S. "D. J.
PURDY"Reasons for
Judgment.

1919
 COY. MCLEAN
 & TITUS
 v.
 S. S. "D. J.
 PURDY"
 Reasons for
 Judgment.

“ter to decide between them. Some of the evidence,
 “however, I think should be referred to. One of the
 “witnesses was Mr. Parker Glasier, who was travel-
 “ling on the ‘Purdy’ that day, and who has had an
 “experience of half a century in connection with
 “steamboating and freighting on the River St. John.
 “He states that he had his dinner on board the boat
 “about twelve o’clock, and that when he came out
 “of the dining saloon the ‘Purdy’ was quite close to
 “the island shore, that a returned soldier came out
 “at the same time with him, and they stood talking,
 “facing the Hampstead shore, and that after they
 “had been talking a short time the soldier asked him
 “what that was coming up river, and Mr. Glasier
 “said it was the ‘Premier’. At this time the ‘Pre-
 “mier’ was between a quarter and a half mile below
 “the ‘Purdy’, and nearly midstream, while the
 “‘Purdy’ was quite close to the island shore and
 “keeping quite close to it. He judged that the boats
 “were between a quarter and a half mile apart when
 “he first sighted the ‘Premier,’ He went on with his
 “conversation with the soldier and did not see the
 “‘Premier’ again until the boats were right close
 “together; that the ‘Premier’ then changed her
 “course to starboard and ran towards the island
 “and across the bows of the ‘Purdy’, when the col-
 “lision occurred, although at that time the ‘Purdy’
 “had reversed her engines and was backing. He
 “states that if the ‘Premier’ had continued on the
 “course that she was apparently on when he first
 “saw her, and the ‘Purdy’ had continued on the
 “course that she was on at that time, they would
 “have passed one another in safety. He swears
 “distinctly that the ‘Purdy’, which is 140 feet long,

"was not more than three lengths from the island
 "nor more than two lengths from the eel grass where
 "the deep water begins and that when the collision
 "occurred both boats were close to Long Island.
 "This evidence given by Mr. Glasier is confirmed by
 "the evidence of the officers on the boat, members
 "of the crew and other passengers. It will be seen
 "therefore that there is very strong evidence in sup-
 "port of both contentions. The witnesses, however,
 "all agree that the angle of incidence at which the
 "'Purdy' struck the 'Premier' was only a little less
 "than a right angle, and this is confirmed by a photo-
 "graph which is placed in evidence, and by the evi-
 "dence of Tichard Retallick, an experienced ship
 "carpenter who was called in to give evidence re-
 "garding the state of the 'Premier' after the col-
 "lision took place.

"The contention on the part of the 'Premier' is
 "that when the two boats were only a short distance
 "apart, the 'Premier' being nearer the island shore
 "and running up parallel to it, the 'Purdy' suddenly
 "turned, without any apparent reason for so doing
 "and ran directly over to the 'Premier'. If the
 "'Premier' had not been there she would undoubt-
 "edly have run on the shore of the island. I can-
 "not see what possible reason there could be for
 "such action on the part of those who were in charge
 "of the 'Purdy', and fully expected to hear some
 "evidence to the effect that the steering gear and
 "machinery of the 'Purdy' was out of order on that
 "day. No such evidence, however, was offered,
 "though there was evidence from the mate of the
 "'Purdy' to the effect that it was a hard boat to
 "steer in windy weather, and that was the only
 "evidence offered which in any way bore upon this

1919

COY, McLEAN
& TITUSv.
S.S. "D. J.
PURDY"Reasons for
Judgment.

1919

COY. McLEAN
& TITUSS. S. "D. J.
PURDY"Reasons for
Judgment.

"subject. The fact, however, that the blow from the
 " 'Purdy' was delivered almost at right angles, had
 " an important bearing on the case. The evidence
 " of those on board the 'Premier' is to the effect that
 " the 'Purdy' and 'Premier' were only a few hun-
 " dred yards apart, when as they allege the 'Purdy'
 " changed its course and turned sharply to port.
 " Captain McLean in cross-examination stated that
 " when the 'Purdy' changed her course she was
 " about 200 yards from the 'Premier', that is, that
 " there were about 200 yards from the bow of the one
 " to the other on parallel courses, and that there were
 " about 200 yards latterally between the two, and
 " that if the 'Premier' had held on its course and the
 " 'Purdy' had held on her course that where the col-
 " lision took place they would have passed with 200
 " yards from port side to port side. In order, there-
 " fore, for the 'Purdy' to have turned to port and
 " run into the 'Premier' it would have had to make
 " a very sharp turn and from the evidence given I
 " do not believe it could have turned so quickly as
 " to have struck the 'Premier' in the way that it was
 " alleged to have done by the witnesses for the libel-
 " lant. In order to have inflicted the wound, the blow
 " being delivered almost at right angles, the "Purdy"
 " would have had to turn a quarter circle, and I can-
 " not make myself believe, in view of the evidence,
 " that she could possibly have done so in that space,
 " with the 'Premier' moving up river all the time. A
 " witness named Connor, who was called on behalf
 " of the 'Premier', states that the 'Purdy' was only
 " two hundred or two hundred and fifty yards above
 " the 'Premier' when she blew, and that she was
 " about one-third of the river out from Long Island,

“or may be a little better, and other witnesses agree
 “to the same thing. The only evidence given as to
 “the possibility of the ‘Purdy’s’ ability or inability
 “to turn in the space that I have mentioned so as to
 “inflict the blow on the ‘Premier’ if it was running
 “up the Long Island shore, was given by Captain
 “Day, who upon being asked the question as to the
 “distance in which the ‘Purdy’ could be turned at a
 “right angle from her course, said that it would take
 “nearly the width of the river there.

“In view of all the evidence, I have come to the
 “conclusion that if the ‘Purdy’ was coming down
 “river about midstream or a little nearer to the
 “Hampstead shore, and the ‘Premier’ was coming
 “up along the Long Island shore, that it would have
 “been a physical impossibility for the ‘Purdy’ when
 “within about two hundred yards of the ‘Premier’
 “and being two hundred yards distant from her in
 “a lateral direction, to have turned so sharply to
 “port as to strike the ‘Premier’, the blow which she
 “received, and I find that the collision occurred
 “when the ‘Purdy’ was proceeding down river on
 “the port side of midstream, when the ‘Premier’ on
 “its way upstream attempted to cross the bows of
 “the ‘Purdy’ for the apparent purpose of getting
 “to the starboard or Long Island side of the river.
 “Although I have come to this conclusion, it by no
 “means determines the case, for there are other im-
 “portant matters connected with the rules and regu-
 “lations for the safety of vessels at sea which must
 “be considered before it can be settled that the
 “course pursued by either vessel was the proximate
 “cause of the collision.

“The first of these questions which I have to de-
 “cide is as to whether the St. John River at this

1919
 COY, McLEAN
 & TITUS
 v.
 S.S. "D. J.
 PURDY"
 Reasons for
 Judgment.

1919
 COY, McLEAN
 & TITUS
 v.
 S. S. "D. J.
 PURDY"
 Reasons for
 Judgment.

"point is or is not a narrow channel. No definition
 "of a narrow channel had ever been attempted, and
 "I think it is largely a matter of common sense, and
 "is a question of fact that must be decided by the
 "Judge trying the case in which it arises, having
 "regard to the general tenor of decisions in other
 "courts. At this point the river was from nine
 "hundred to one thousand feet wide, the River St.
 "John being divided by Long Island into two chan-
 "nels, of which this was the western. I have con-
 "sidered the cases in which the question of narrow
 "channel has arisen, and find that the Detroit River
 "at Bar Point, *The Tecumseh*¹; the harbor of Char-
 "lottetown, P.E.I., near Alshorn Point, *The Tiber*²;
 "the mouth of Charlottetown Harbor outside the
 "blockhouse, *The Heather Belle*³; the south channel
 "in Nanaimo Harbor, *The Cutch*,⁴ the entrance
 "to Halifax Harbor, *The Parisian*,⁵ and the
 "navigable channel in the harbor of Sydney,
 "were all held to be narrow channels. In some
 "of these cases the channel was wider and in some
 "narrower than at the point where the collision
 "occurred. In addition to the cases I have men-
 "tioned we have a case in New Brunswick of *The*
 "*General* (1844), (see Stockton's Vice-Admiralty
 "Reports, p. 86), in which it was decided by the late
 "Judge Waters that the St. John River at Swift
 "Point, which is a few miles above Indiantown, and
 "where the width of the river is about a quarter of a
 "mile, or considerable wider than the point where
 "the present collision occurred, was a narrow chan-

¹ (1905), 10 Can. Ex. C. R. 44 at p. 61.

² (1900), 6 Can. Ex. C. R. 402 at p. 407.

³ (1892), 3 Can. Ex. C. R. 40 at p. 46.

⁴ (1893), 3 Can. Ex. C. R. 362.

⁵ [1907], A. C. 193.

“nel. There is also the case of *The Tecumseh*,¹ in
 “which Mr. Justice Hodgins of the Ontario Bench,
 “held that the channel in question, being about eight
 “hundred feet wide must, he thought, be held to come
 “within the designation of narrow channels men-
 “tioned in Article 21, especially in view of the length
 “and tonnage of steamer sailing on the island water.
 “The length of the ‘Purdy’ was one hundred and
 “forty feet and that of the ‘Premier’ ninety-three
 “feet, the tonnage of the latter being one hundred
 “and ninety-one, and I have considered the size of
 “these vessels in coming to the conclusion which I
 “have. It was contended by the learned counsel for
 “the ‘Purdy’ that what was a narrow channel at
 “night might not be regarded as a narrow channel
 “during the day, and that the size of vessels which
 “were in the habit of traversing the water, and other
 “circumstances, must be taken into account. I have
 “given consideration to this argument, and while
 “there is some authority to the effect that a Judge
 “might well consider the size of vessels that traverse
 “the waters in question, I cannot possibly bring
 “myself to think that whether a channel is narrow
 “or not can possibly depend upon whether it is being
 “used by day or by night. If it is a narrow channel
 “at one time of the day in my opinion it is narrow
 “during the whole twenty-four hours. After giv-
 “ing full consideration to the cases that have been
 “decided on the subject, and to all the facts and
 “circumstances of the present case, I have come to
 “the conclusion that that part of the St. John River
 “where the accident occurred, which is from nine
 “hundred to one thousand feet in width—the deep

1919

COY. MCLEAN
& TITUSS.S. "D. J.
PURDY"Reasons for
Judgment.¹ 10 Can. Ex. C. R. 44 at p. 61.

1919

COY. McLEAN
& TITUSS. S. "D. J.
PURDY"Reasons for
Judgment.

"water in which is probably about seven hundred
 "feet in width, is a narrow channel, and I so find.
 "Having come to that conclusion it is quite clear the
 "rules and regulations for the safety of ships at sea
 "will apply. Article 25 provides that in narrow
 "channels every steam vessel shall, when it is safe
 "and practicable, keep to that side of the fair-way
 "or channel which lies on the starboard side of such
 "vessel. On the day the collision occurred it was
 "perfectly safe and practicable for both vessels to
 "do so, and yet neither of them observed the rule.
 "If the 'Purdy' had kept to the starboard side of
 "the channel, the 'Premier', having regard to the
 "position in which it was when first seen from the
 "'Purdy' been on the starboard side of the fair-way
 "to the Long Island shore to have passed in safety,
 "and had the 'Premier' when first sighted by the
 "'Purdy' been on the starboard side of the fair way
 "or mid-channel, and kept on that course, the ves-
 "sels could have passed without collision. So far as
 "Rule 25 is concerned, both vessels were deliberate
 "transgressors of the law. Had both been on the
 "side where they should have been or had either
 "been on its proper side, I do not think the collision
 "would have occurred, and I am of opinion that in
 "thus violating the rule both vessels were at fault
 "and contributed to the disaster. It was urged that
 "the proximate cause of the collision was the action
 "of the 'Premier' in going too far to starboard after
 "the 'Purdy' was sighted, instead of proceeding up
 "on the port side. In view of the fact, however, that
 "the 'Purdy' was not following its proper course
 "and its being out of its course was a contributing
 "cause, I cannot accede to that view.

"Two other points were taken on behalf of the
 "'Premier' under the rules and regulations. One
 "was that there was a violation of Article 28, which
 "provides that when vessels are in sight of one an-
 "other, a steam vessel under way in taking any
 "course authorized by the rules, should indicate
 "that course by certain announcements on her
 "whistle, and that the only signal that was given
 "was by the 'Purdy', which gave one short whistle,
 "which is contended meant that it was directing its
 "course to starboard. The evidence with regard to
 "the short whistle was that it was given when the
 "vessels were almost in collision, and at the same
 "time the bells were given to the engine room for a
 "reversal of the engine. I am not deciding what this
 "short whistle meant for there is contention on that
 "point and evidence to the effect that on the St.
 "John River one short whistle is given when a
 "steamer is approaching a wharf or a snag in the
 "river, and is a direction to the engineer to stand by
 "his engine. I do not think it necessary to do so, as
 "the whistle was, in my opinion, under the evidence,
 "given too late to have any effect one way or the
 "other. Had a whistle been given by either vessel
 "at an earlier period the collision might have been
 "avoided.

"It was also claimed that the 'Purdy' did not have
 "a sufficient look-out. In my opinion this applies
 "to both vessels. There was very little evidence re-
 "garding the matter, and in my opinion had there
 "been an adequate look-out on either vessel the ac-
 "cident might have been avoided. Such a contention
 "it seems to me would apply with equal force to the
 "'Premier' as to the 'Purdy'. Having found that

1919
 COY. MCLEAN
 & TITUS
 S. S. "D. J.
 PURDY
 Reasons for
 Judgment.

1919

COY. MCLEAN
& TITUSv.
S.S. "D. J.
PURDY"Reasons for
Judgment.

“both vessels were to blame by non-observance of
 “article 25 of the Regulations I give judgment in
 “accordance with the rule laid down in the *London*
 “*Steamship Owners’ Insurance Company v. Gramp-*
 “*ian Steamship Company*,¹ for the libellant against
 “the ‘Purdy’ for one-half of the amount by
 “which the ‘Premier’s’ damage exceeds the dam-
 “age to the ‘Purdy,’ and as no damage was claimed
 “by the ‘Purdy,’ that will be one-half the damage
 “which the ‘Premier’ has incurred. No evidence
 “was given at the trial with regard to the amount of
 “damages, so I presume it will be agreed upon be-
 “tween the parties. If not, there will have to be a
 “further application in order to ascertain it.”

The appeal herein came on for hearing before the
 Honorable Mr. Justice Audette, at St. John, N.B.,
 on May 27, 1919.

Fred. R. Taylor, K.C., for appellant.

J. B. M. Baxter, K.C., for respondent.

The reasons handed down by the Court set forth
 the facts, as follows:

AUDETTE, J. (November 8, 1919) delivered judg-
 ment.

This is an appeal from the judgment of the Local
 Judge of the New Brunswick Admiralty District,
 pronounced on the 2nd April, 1918, in a collision
 case, wherein he found both vessels to blame and
 gave judgment and “pronounced in favour of the
 “plaintiffs claim for one-half damages and con-
 “deemed the ship ‘D. J. Purdy’ in the amount to

¹ (1890), 24 Q. B. D. 663.

“be found due to the plaintiffs for such half damages.”

The action arises out of a collision which took place shortly after 12.30 o'clock, in the afternoon of the 5th October, 1918, between the S.S. “Premier”, —(93 feet in length)—and the S.S. “Purdy”, (145 feet in length) on the St. John River, N.B., between Central Hampstead and Long Island. The weather was good, not sunny, but with a clear atmosphere. There was a current of two miles an hour, and the wind was blowing about six miles an hour down river.

The collision occurred quite close to Long Island shore, where the “Premier” was beached within a minute or two after the accident.

The witnesses on behalf of the plaintiffs, and there is great unanimity between them, testify that on the day in question, the “Premier” having left St. John, at about eight o'clock in the morning, for Chipman and intermediate ports, stopped at Gerow's, on the eastern shore of the river, about opposite Spoon Island, and thence proceeded up river toward Long Island and taking the channel between that Island and Central Hampstead, cleared the southern end of the Island by passing and keeping her course very close to the Island, on the eastern side of the channel, with the object of avoiding the current in the centre, which had been at the time, increased by freshets. It is further contended that the “Premier” all through steadily kept her course close to the Island, on the eastern side of the river, which at that place is reckoned to be between 850 to 1,000 feet wide. The attention of those on board of her was especially attracted by the eel grass which grows on

1919
 COY. McLEAN
 & TITUS
 v.
 S.S. “D. J.
 PURDY”
 Reasons for
 Judgment.

1919
 COY. MCLEAN
 & TITUS
 v.
 S. S. D. J.
 PURDY
 Reasons for
 Judgment.

the shore of the Island, and being so close to the shore fear was by some entertained that the propeller might get entangled in this grass.

While thus keeping her course, the "Premier" contends that having seen the "Purdy" coming down,—almost mid-stream,—some witnesses placing her slightly to the west of the fair-way—at about 250 to 300 yards, she blew one short blast, which was immediately answered by one blast from the "Premier". The "Purdy" then suddenly changed her course, slashing across the river,—swung herself upon the "Premier", striking her abaft mid-ship, practically at right angles, perhaps 40 degrees, and inflicted a jagged V shaped hole, of about 18 inches wide and running about four feet below the water line. The Captain of the "Premier" gave one bell to stop, and when the "Purdy" got clear and released the "Premier", the "Premier" was ordered ahead again, and was beached whilst there was still steerage on her, thus saving the passengers and the boat, while the "Purdy" backed right across the river.

Now, on behalf of the "Purdy", it is alleged and testified to, among others by her Captain, that when turning the bend she first saw the "Premier," the "Purdy" was about one-quarter of the way across from the Island side where the width of the river is about 900 feet; and, he asserts, the "Premier" was then, about opposite Hampstead, a little to the westward side of the fair-way, and that afterwards she seemed to come more to the middle, the "Purdy" keeping the same distance from the Island.

The Captain claims he held his course for some time after seeing the "Premier," intending to pass

to port. He does not think he did ever go as far as mid-stream, *but would not be positive about that.* When he saw the "Premier" holding her course he changed his own course to port, and shortly after that, he says, the "Premier" changed her course and tried to cross his bow, and at that time she was about two lengths from the "Purdy." He further contends he held the "Purdy's" course to port until she got to the left of the "Premier," and then steadied up. In the result it is contended the "Premier" travelled from west to east across the river, and threw herself across the "Purdy's" bow.

Therefore, it is common ground that the collision happened, that the "Purdy" struck the "Premier" slightly aft amidships as already mentioned, almost at right angles, and that the collision took place on the east side of the river, very close to Long Island. This latter fact being a very important element to consider in the endeavour to place the right interpretation upon the evidence,—the collision having taken place in the course the "Premier" should have followed and away from where we should expect the "Purdy."

The evidence adduced on behalf of both parties with respect to the course pursued is very conflicting. The "Premier" contends she always kept to starboard and close to the Island, and the "Purdy" practically contends the "Premier's" course previous to the collision was from the west of the fair-way towards the Island, while the "Purdy's" course was on a short distance from the Island and not on the western side of the fair-way or not in the midway.

1919
 COY. MCLEAN
 & TITUS
 v.
 S.S. "D. J.
 PURDY"
 Reasons for
 Judgment.

1919
COY. McLEAN
& TITUS
v.
S.S. "D. J.
PURDY"
Reasons for
Judgment.

Let us endeavor to reconcile this conflicting evidence with the object of discerning the truth.

Approaching the evidence on the question of reliability, one must first admit that the five witnesses heard on behalf of the "Premier," who were standing on land, at Central Hampsted, were in the very best position to witness the manoeuvre of the two vessels. Not only could they see the vessels better, but this testimony is that of absolutely disinterested witnesses, neither influenced nor biased one way or the other, as witnesses and officers on board a vessel may be, and so often are. Indeed, as Wellman, on the "Art of Cross-Examination," so truly says that "one sees, perhaps the most marked instances of partisanship in Admiralty cases "which arise out of a collision between two ships. "Almost invariably all the crew of one ship will "testify in unison against the opposing crew, and, "what is more significant, such passengers as happen to be on either ship will almost invariably be "found corroborating the stories of their respective "crews." I fear this is a weakness in the make-up of human nature, and while such a witness is not deliberately committing perjury, he is unconsciously prone to dilute or colour the evidence to suit a particular purpose by adding a bit here and suppressing one there, but this bit will make all the difference in the meaning.

I accept without hesitation the evidence of the four witnesses on land, not only because they are disinterested and corroborated but because they were in a better position to follow the courses and the manoeuvres of the vessels, and their unanimity is also very convincing.

A deal of this class of evidence adduced by the passengers on board is given not from actual observation of the course of the vessel, but by deduction from casual observation at a given moment.

One must also not overlook the personal equation resulting from being on board a moving body. It is next to impossible for one on a moving vessel, unless he is in a position which allows him to see her from stem to stern, and at the same time maintain a complete and commanding view of the shore, to follow the course or evolution in the manoeuvres of a vessel.

Moreover, in cases of collision, "where the evidence on both sides is conflicting and nicely balanced, the court will be guided by the probabilities of the respective cases which are set up." "*The Mary Stewart*,"¹ "*The Ailsa*."²

Let us pursue this search for finding what was the most reasonable course, the course most consonant with probability, that these vessels would have followed under ordinary circumstances.

What is the course that the "Premier" should have followed after leaving Gerow, if not the one substantiated by the unanimous evidence adduced in her behalf? She leaves Gerow, takes the most direct course to clear the south end of Long Island, and keeps as close to the Island as is consistent with good seamanship, with the double object of keeping out of a current that would impede her speed and of shortening her course while keeping in good waters,—maintaining a direct course. Moreover,

¹ (1844), 2 Rob. 244.

² (1860), 2 Stuart's Adm. 38.

1919

COX, McLEAN
& TITUSv.
S. S. D. J.
PURDYReasons for
Judgment.

travelling in a narrow channel, she keeps to the starboard side of the channel.

What is the most rational course for the "Purdy," after clearing the bend in the Island, if not to keep in the fair-way, near or to the west of it with the object of benefiting by the current and also, as she is travelling in a narrow channel, to keep to starboard?

However, there has been a false manoeuvre somewhere; but so far, the courses of the two vessels, up to the time the "Purdy" sheered to port, is absolutely the reasonable one, the one most probable and in accord with ordinary seamanship—the very one described by the four witnesses viewing the manoeuvres from the land, whose view I accept corroborated as it is by the balance of the plaintiff's evidence, although questioned by evidence to which I am unable to give credence.

A perusal of the defendant's evidence, conflicting as it is with the plaintiffs', will show conclusively that it is not only weak, but it is also wanting, excepting perhaps that of the Captain, in any statement resulting from personal observation consonant with that reliability from which one can deduce a satisfactory conclusion. Let us, as an example, examine the testimony of the old man Glassier,—a witness upon whose testimony the learned judge below seems to lay great stress, and rests his judgment in a large measure. That testimony has impressed itself upon my mind as earmarked with improbability from his manner of stating facts more from surmise and conjecture than from actual personal observation, leading me forcibly to adhere

to the view that the evidence of the shore-witnesses must in preference be accepted.

He *thinks* the position of the "Premier" is as he says, with respect to the east shore, when he does not see that shore from the place he is standing, in fact, he was mostly absorbed, as he admits, in the conversation he was carrying on with the returned soldier, and his evidence, for the most part, is no more than an offer of opinion as to what he thinks and not from personal observation. And here again the personal equation of a person standing in the saloon of the boat and looking exclusively to one side of the stream, would militate against its acceptance, in preference to the evidence of the shore witnesses corroborated in the manner hereinafter mentioned.

Then the nautical knowledge of this witness, who was travelling free on board the "Purdy," was most deplorably inadequate, and that ignorance seemed to have been shared by the "Purdy's" crew, as disclosed by the evidence.

Here follows an extract from the evidence of witness Glassier, viz: pps. 135, 136 and 137.

"Q. How is it that you figure you were below the bend if you didn't take particular notice about the houses?—A. Of course I only *think*, but I *think* we were below the bend.

"Q. You say you think the 'Premier' was coming up about amidstream, and you didn't keep looking at her?—A. *No, sir.*

"Q. You were simply talking?—A. *Simply talking.*

"Q. Were not paying particular attention to the shore or anything else—paying attention to this conversation.—A. *Yes, sir.*

1919
 COY, McLEAN
 & TITUS
 v.
 S. S. "D. J.
 PURDY"
 Reasons for
 Judgment.

1919

COY. McLEAN
& TITUSv.
S.S. "D. J.
PURDY"Reasons for
Judgment.

"Q. Did you, after you saw the 'Premier,' notice
 "the shore particularly after the first time you saw
 "the 'Premier'—you say you were engaged in
 "conversation—after that did you pay any par-
 "ticular attention to the shore?—A. *I might have*
 "*casually seen them* but not to recognize—to know
 "whose they were.

"Q. You were not paying any particular attention
 "to the shore after that at all?—A. No.

"Q. Then the next thing you noticed was that the
 "angle of the 'Premier' towards the 'Purdy' was
 "different from the angle that it had been when you
 "first saw them?—A. Yes.

"Q. You didn't notice the shore at all, but noticed
 "the angle that one bore to the other was different
 "from the angle when you first saw it. At first
 "when you saw the vessels they were going about in
 "parallel courses I think you said—or is that right?
 "—A. *Parallel courses?*

"Q. Would you say they were going in about
 "parallel courses when you first saw them?—A. I
 "would say so because I was standing here and the
 "way it *looked to me*—the way they were going—if
 "they had both kept on the courses they would have
 "passed.

"Q. You would not say they were crossing ships—
 "one was not heading across the bow of the other?—
 "A. No.

"Q. When you first saw them they were going in
 "about parallel courses or was one angling slightly
 "towards the other?—A. *I don't think so.*

"Q. You wouldn't say so—slightly or consider-
 "ably?—A. When I first saw them—no I wouldn't
 "think so.

“Q. Afterwards when you saw them again it was
“how long after you first saw them would you say?”

“—A. That would be quite a few minutes.

“Q. Who called your attention to them the second
“time—what called your attention to them the sec-
“ond time?—A. I don’t know as anything in par-
“ticular.

“Q. Anyway you saw them, and at the time you
“noticed one was going in a course across the bows
“of the other—is that right?—A. Yes.

“Q. You were not paying attention to the
““Premier” to see whether she continued her
“course in between—you did not see the “Premier”
“in between when you first saw her and the time
“they were coming together?—A. *No*, from the time
“*I first seen her the two boats were right close to-*
“gether.

“Q. You do not know whether the “Premier”
“changed her course or not?—A. *No*.

“Q. You do not know whether the “Purdy”
“changed her course or not?—A. *No*.

“Q. You cannot say which boat changed her
“course?—A. *No*.

“Q. One of the boats must have changed her
“course so the two were not going parallel?—A. I
“don’t think the “Purdy” changed her course, be-
“cause when I went forward and seen there was go-
“ing to be a collision—I went forward and looked
“toward the island—the “Purdy” was heading
“right down—.

“Q. The “Purdy” was still heading down river?
“—A. Yes.

1919

COY, McLEAN
& TITUSS. S. "D. J."
PURDYReasons for
Judgment.

1919

COY. McLEAN
& TITUSv.
S.S. "D. J.
PURDY"Reasons for
Judgment.

"Q. About how far was the "Purdy" from the "island at that time?—A. She might have been—do you mean the island or the river bank?

"Q. I mean the island?—A. She would not be "three lengths from the island."

Is this testimony that can justify its acceptance in preference to the shore witnesses? I must find in the negative.

The evidence of witness Turner, heard on behalf of the defendant, is also very characteristic of this personal equation. He is on the forward deck,—he walks up and down, and ultimately says he could not say how the "Premier" got across their bow,—all he knows is she was there. And at page 177, he says that after the collision the "Purdy" backed, *working her stern out into the stream—away—from the island.*

Moreover on this question of the course of the "Purdy," the evidence on her behalf in that respect is not satisfactory, and the "Purdy's" own Preliminary Act gives it a straight denial.

As cited by Mr. E. C. Myers' *Admiralty Law and Practice*, p. 242: "The object of the preliminary act "is to obtain from the parties statements of the "facts at a time when they are fresh in their recollection, '*The Frankland*'" and before either "party knows how his opponent shapes his case."

The memory of the witness or party must be taken to be more accurate when deposing to a recent occurrence, than when testified to after a certain length of time. And, as put by Lord Moulton in *The Seacombe*,² "A statement of fact in a "preliminary act is a formal admission binding the

¹ (1872), L. R. 3 A. & E. 511.

² (1912), P. 21.

“party making it, and can only be departed from
“by special leave.”

A number of authorities have also been submitted
by plaintiff's Council upon this well-known point.

Coming to the question of the signals it is uncon-
troverted evidence that the “Purdy,” before chang-
ing her course to port, indicated her course to star-
board by the signal of one short blast, which under
the Rules of the Road means “I am directing my
course to starboard,” and was in turn answered by
the “Premier,” with a one short blast also. Had
the “Purdy” followed that course, as thus indi-
cated, she would have gone towards Central Hamp-
stead, toward the west, and as the collision admitted-
ly took place on the east, close to the Island shore,
the accident would have been avoided.

Had the “Purdy” desired to signal she was going
to port, she had then to give two short blasts, which
under the Rules of the Road mean, “I am directing
“my course to port.”

Now, I do find, as clearly testified to by the shore
witnesses, that previous to the accident, the
“Purdy” suddenly started across the river and col-
lided as above mentioned. True that manoeuvre
was very erratic and devoid of any seamanship; but
here again we have evidence corroborating that evi-
dence by explaining it. The evidence of the Mate,
on this point, is all that may be desired by way of
explanation. While the Mate was eating his dinner
in the dining room, his attention having been direct-
ed to the proximity of the “Premier,” rushed up to
the pilot house to assist the Captain, because he says
the “Purdy” is a hard boat to steer—“One man is

1919

COV. McLEAN
& TITUS

v.

S. S. "D. J.
PURDY"Reasons for
Judgment.

1919

COY. MCLEAN
& TITUSv.
S.S. "D. J.
PURDY"Reasons for
Judgment.

"no good to steer at all in 'windy weather'." The evidence further shows, as follows:

"Q. You thought he (the Captain) needed another man at the wheel. You went there as quickly as you could?—A. Yes.

"Q. You thought that was a sort of a day when the Captain needed some sort of help at the wheel?—A. I did."

The explanation fills the needed gap. Everything is explained. The boat was hard to steer. She took a sheer, as clearly described by all the witnesses on behalf of the plaintiff, and more especially by those on the shore.

More credibility is to be attached to the crew that are on the alert, *The Dahlia*¹ and accepting again this as a guidance one will be more than astonished to hear that just previous to the accident,—almost when it was inevitable,—in the agony of the collision,—we see an officer on board the "Purdy," running to the engine room and giving orders to the engineer, ignoring the Captain, who is in full command of the vessel at the time. We also have a crew, from the Captain down, who are unacquainted with the Rules of the Road, and repeatedly admitting it, contending that one blast means an order to the engine room. In view of such poor nautical knowledge are we to be astonished at the lubberly seamanship displayed by the "Purdy"?

Moreover, if these vessels were travelling in a narrow channel,—a fact which seems to be accepted by both parties,—and as found by the learned trial judge,—each vessel under Article 25 had to keep to that side of the fair-way or mid-channel which lies

¹ 1 Stuart's Adm. 242.

on the starboard side of such vessel—and if the evidence of the “Premier” is reliable it would seem the “Purdy” did keep that course until her steering gear would have seemed to become beyond control, yet the Captain of the “Purdy” and the witnesses heard on her behalf, insist in placing her on the Island side. However, from the reading of the evidence the view has impressed itself upon me that the Captain of the “Purdy” knew very little of the Rules of the Road, as admitted by himself.

Coming to the question raised by the judgment appealed from, in respect of the rule as to the division of the loss where both vessels are to blame, it will be sufficient to say that the old rule of division followed below has been changed in England by 1-2 Geo. 5, 1911, ch. 57, secs. 1 and 9, and in Canada by the Maritime Conventions Act, 1914, 4-5 Geo. 5, 1914, ch. 13, sec. 2, whereby it is now enacted, in lieu of the old “arbitrary rule,” that the liability to “make good the damage or loss shall be in proportion to the degree in which each vessel was in “fault,”—as provided by the Act.

Therefore there will be judgment in favour of the plaintiffs, allowing the appeal and dismissing the cross appeal, both with costs.

Solicitor for appellant: *Fred R. Taylor*, K.C.

Solicitor for respondent: *J. B. M. Baxter*, K.C.

1919
COY. MCLEAN
& TITUS
S.S. "D. J.
PURDY."
Reasons for
Judgment.