CASES

DETERMINED IN THE

EXCHEQUER COURT OF CANADA.

TORONTO ADMIRALTY DISTRICT.

THE GEORGIAN BAY NAVIGATION COMPANY ..... } PLAINTIFFS;

1902

June 2.

AGAINST

THE SHIPS "*SHENANDOAH*" AND "*CRETE*."

Admiralty law—Collision—Right of way.

In the case of a river traversed annually by thousands of vessels and used by two nations, a custom which in effect supersedes a statutory rule ought to be established by the most conclusive and cogent proof; and when it is sought to make it binding upon foreign as well as domestic vessels, the proof should include some convincing evidence that a knowledge of the alleged custom existed amongst mariners generally, and extended to mariners sailing on vessels carrying a foreign flag and habitually traversing a busy river.

THIS is an action brought by the plaintiffs against the American steamer *Shenandoah* and the barge *Crete*, the latter being in tow of the former, to recover damages for injuries to the plaintiffs' steamer *Carmona*, as the result of a collision which took place in the River St. Clair, on the morning of the 25th of June, 1899.

The trial of the case took place at Windsor on the 17th, 18th and 20th days of January, 1902, and the argument of counsel was heard, at Toronto, on the 1st day of February, 1902.

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Argument of Counsel.

The facts of the case are fully set out in the reasons for judgment.

T. Mulvey and *J. W. Hanna* for the plaintiffs;

F. A. Hough for the defendants.

T. Mulvey for the plaintiffs: I do not think there is any doubt as to how the *Carmona* came into the river. She was on her voyage from Goderich to Sarnia and of course came down the easterly side of the lake, and, while still in the lake, passed a tow starboard to starboard. After she got into the river and some distance below the lighthouse, she passed a single vessel port to port, and that is the point I lay stress upon; because it is to some extent an answer to the contention of my learned friend that she should not have gone down the American side of the river, and of itself, I think, shows that we were taking our proper course down the river. When she passed this vessel there was no fog. It was not until about as she crossed the ranges that the fog set in. This would bring her about opposite the Grand Trunk freight sheds on the American side, and the chart shows that point to be about 1,500 feet from the place where the collision occurred. Various opinions were expressed with regard to the strength of the current. The defendants' preliminary act says seven miles an hour, some witnesses say four; but the reason I take up that point is to estimate the time that the *Carmona* was in the fog. Supposing she was run as slowly as she could be to retain steerage way—about two miles an hour, and the current was running five miles an hour, she would be travelling about the rate of seven miles an hour and would be passing the land at the rate of half a mile in the neighbourhood of four minutes.

[BY THE COURT: In other words she would have been travelling from the time she entered the fog, from four to five minutes.]

It would be in the neighbourhood of three and one-half minutes she was in the fog. There is no doubt she came quite close to the American bank in the fog, and we say that at the time she sighted the *Shenandoah* she was within about 75 or 100 feet from the bank.

There are some variations in evidence as to how the *Carmona* was headed at the time the *Shenandoah* saw her. Captain Stevenson, the master of the *Shenandoah*, said she was coming down broadside, but the evidence of the plaintiffs' witnesses do not agree with that. Captain Stevenson also states that the *Shenandoah* moved up the river and swung a little to port, and then the *Carmona* backed into the *Shenandoah*. By models here I show this would be impossible, because if the *Carmona* were coming down broadside upon the bow of the *Shenandoah* she must have gone into the bank, and she could not, as he states, have backed into her. I think the evidence of the master of the *Shenandoah* is on that point entirely inaccurate, because there was not room for the *Carmona* to come broadside like that—there was not room to do it, as her length was 180 feet over all.

[BY THE COURT: Or they must have been a good deal further out.]

In their evidence they do not say they were any further out—not one of their witnesses say they were more than 200 feet out, and there was this barge at the dock with a beam of 40 feet, and they expressly said that the space between the barge and the *Shenandoah* was not 200 feet; but there was that space between the dock and the *Shenandoah*, so that there could have been only 150 feet between the barge and the *Shenandoah* at the time of the accident. We say that the *Shenandoah* was nearer, that they were only from 100 to 150 feet from the shore at the time of the accident, and that the position

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of the *Carmona* was heading down the river almost parallel with the American shore, and her port bow in a line with the stem of the *Shenandoah*. Not only does the position of the vessels at the time indicate that, but also their subsequent manœuvres, because the *Carmona* in backing made very little headway against the current—one of the witnesses for the defendants, I think the master of the *Shenandoah*, said that although the *Carmona* was backing for all she was worth, she was still going down the stream, and he also states that when they came together the *Carmona* was going down the stream, that is relatively with the *Shenandoah*.

[BY THE COURT: That she was moving down stream although she was backing.]

Yes, and the *Shenandoah* was going ahead relatively to her. That shows that the pleadings are not accurate. The *Carmona* did not back with the *Shenandoah*, but they came together while passing one another. It may have been a sheer or suction from the *Carmona* that brought them together. It is hard to say how that happened, for at any rate the *Carmona* was backing, but was not going up the stream faster than the *Shenandoah*.

[BY THE COURT: Still the backing into her might be while passing, that is to say, she was altering her position in the stream while moving onwards.]

But the position in which they came together shews it was not a backing but a pulling together. It is well known that a large vessel will pull a small vessel towards her when passing.

[BY THE COURT.—That may be in still water.]

A large number of collision cases, even in the Detroit River, show that that it is very likely to happen.

There is considerable dispute regarding the whistles that were given and I draw attention to the fact that

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a starboard whistle was given by the *Shenandoah* and subsequently a port whistle. It is true that the crews of the *Crete* and *Granada* both say that they did not pay any attention to these whistles. That may be so, but I submit that it is impossible to give an intelligent explanation of how this accident happened unless they did give some attention to these whistles, because I think it is most clearly shown that the *Crete* had her bow turned in somewhat towards the American shore, and therefore she had starboarded when the two-whistle blasts were given. I am not saying whether the two-whistle blasts were given before or after the *Carmona* signalled, but at any rate they were given, and subsequently the *Shenandoah* gave one blast, and they ported their wheels. The *Crete*, after that port whistle was given, could not have had time to change her course because it was almost immediately, the captain of the *Shenandoah* says, when the *Carmona* was passing by his stern that she gave that whistle, and then the *Carmona* would have only about 300 feet to go to come to the *Crete*, and in that distance the alteration of the *Crete* could amount to very little.

Now there is some dispute in the evidence as to the way the tow-line was broken. I submit the circumstances show clearly that the plaintiffs' contention on that point is accurate. The evidence is that the tow-line was "chewed" up to about 100 feet from the bow of the *Crete*—that about 100 feet of it went in on the *Crete*, and the balance, 400 feet, was taken in on the *Shenandoah*; and there was no chewing whatever on the part the *Crete* took in, and there was no "chewing" near the stern of the *Shenandoah*—but that the "chewing" took place in the outer 100 feet of the part taken in by the *Shenandoah*. One of the witnesses for the defence says he was at the bow of the

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Crete when the collision took place, and saw the *Carmona* about 75 feet from the *Crete* and saw the line snap across the bow of the *Carmona*. The circumstances do not show that that is accurate. If that were so how would the line be "chewed" in the last 100 feet from the break? The only thing that could "chew" the line was the action of the paddle, wheels on it, and how could it be "chewed" if it broke across the bow of the *Carmona*.

On the other hand one witness, who was on the bow of the *Carmona* immediately before the *Crete* and *Carmona* came into collision, says that while the *Carmona* was fifteen feet away from the *Crete* he looked down and saw the line still taut against the side of the *Carmona*. I think the evidence all shows that the way the break of the line took place was, that when the vessels came together there was a sudden jar, and the line at that time being under the wheel of the *Carmona*, the sudden jar broke it off. The line could not have been snapped across the bow of the *Carmona*. The line was a very heavy one and the *Carmona* was not headed across the line. Then the *Carmona* came down upon the *Crete* and struck her about five feet from the stem on her starboard bow.

Now as to the law applicable to the case. First, I will take a point raised by my learned friend that there was a custom of vessels to go to the American side of the river in going up. In discussing that point I draw attention to the International rules. Art. 25. says "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 side of such vessel." That is not the United States rule but the International rule, and that applies to all vessels over which the Canadian Government has jurisdiction. It applies to mid-channel in that river.

That is concluded in authority because it has been held in more than one American case, that the Canadian rules apply on the Canadian side of the channel. (Cites the *Lansdowne* (1).

[BY THE COURT:—Do the United States courts hold that this rule applies to their vessels in Canadian waters?]

Yes. Their vessels are governed by the Canadian rules when they pass the centre of the river. That is held by the Supreme Court in the case of the *New York* (2). The whole point is considered there. It is held there that the Canadian and United States rules apply on their respective sides of the International boundary.

My learned friend put a series of questions to his expert witnesses as follows: "Do you know the custom of mariners in passing Botsford's elevator?—A. Yes. What do you do there?—A. We go to starboard." Now if they went to starboard in Canadian waters they would be going contrary to Art. 25, and they would be in fault, so that they were going a little beyond the mark in answering those questions as they did. There is no corresponding rule for the United States side of the boundary; but there is a clear and well defined rule for the Canadian side; and these expert witnesses did not limit their testimony at all, but without qualification they said, in passing that part of the river—they didn't say one side or the other—we go to the starboard, because it is proper to go to starboard.

There is a number of cases in which the law on this subject is clearly and well laid down. The cases I propose to cite show that it is good navigation to go port to port in such places as that and not starboard to starboard. I will cite English cases decided before this

(1) 105 Fed. Rep. 436. (2) 175 U. S. 187.

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Article 25 was adopted as a rule of law, that is adopted as practically laid down by statute, and I submit that even for United States waters these are good decisions now. The first rules on the subject were adopted by the Trinity House in 1840, but these rules had no binding effect; they were rules laid down by the Trinity masters for the guidance of navigators, and one of the rules was "a steam-vessel passing another in a narrow channel must always have the vessel she is passing on the larboard hand." (Cites the *Duke of Sussex* (1); *The Friends* (2). The rules of the Trinity House were superseded in 1853 by *The Merchants Shipping Act* of 1854, sec. 297, but it is unimportant to discuss that section here and it practically gives statutory force to this particular rule; before that the rule was merely good seamanship. In 1862, 25 & 26 Vict., that section of *The Merchants Shipping Act* was repealed, and for some time after that there was no statute upon that point at all, and it was not until the rules of 1880 that the rule was adopted again that in narrow channels the ships must go to port.

[BY THE COURT:—Were there any intermediary decisions when there was no statutory rule?]

Yes; in the case of the *Unity* (3) decided in 1856, while the statute was in force the same point was held; there is also the case of the *Fyenoord* (4). This case merely holds that these rules apply to foreign vessels. I refer you to the *Vianna* (5); that was the case of a collision at a launching and it was contended that all customary notice was given of the launching; there the court says "no custom is proved because a custom in law must be universal, or at least so universal that any departure from it is recognised as unusual and extraordinary." (Cites *Hand of Providence* (6); *The*

(1) 1 W. Rob. 274.
(2) 1 W. Rob. 478.
(3) Swab. 101.
(4) Swab. 374.
(5) Swab. 405.
(6) Swab. 107.

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Sylph (1); *The Nimrod* (2); *The Seine* (3); *The Velocity* (4); explained in *The Esk* (5).

It was held in *The Rhondda* (6), since the rules, that the vessel which, in a narrow channel, did not go to the starboard side was to blame or in fault. There are some United States cases also, which may be a little more instructive.

[BY THE COURT:—They are more apposite, dealing with American waters.]

I refer also to the *Newport News* (7), this was a case of a collision in a fog on the Potomac, tried in 1900. *The Pavonia* (8); *The James Bowen* (9).

[BY THE COURT:—All the masters and seamen called in this case stated that the general rule was to keep to the right, but they contended that there was a custom here which varied it.]

Mr. Mulvey cites *The City of Macon* (10); *The Milwaukee* (11); and the *Mary Shaw* (12). There is only one case, so far as I know, in Canada where there is any such local custom as that spoken of by the expert witnesses for the defence, and that is provided for in Art. 35 of the International rules. There are circumstances where the port side should be taken in a narrow channel, and the rules provide for it; that exception is as well known as the rules themselves. That is what I think the case of the *Mary Shaw* requires. *Wheeler* v. *The Eastern State* (13), is another case regarding the effect of custom, as is also *Barrett* v. *Williamson* (14).

I say the *Shenandoah* and *Crete* both acted improperly in not cutting the hawser and in support

(1) 2 Spinks 75.
(2) 15 Jur. 1201.
(3) 5 Jur. N.S. 298.
(4) L. R. 3 P. C. 44.
(5) 2 L. R. 3 P. C. 436.
(6) 8 App. Cas. 549.
(7) 105 Fed. Rep. 389.
(8) 26 Fed. Rep. 106.
(9) 52 Fed. Rep. 510.
(10) 85 Fed. Rep. 236.
(11) Brown's Ad. Rep. 313.
(12) 6 Fed. Rep. 918.
(13) 2 Curtis 141.
(14) 4 McLean 589.

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of that I cite the *Jane Bacon* (1), a decision of the Court of Appeal. It is quite clear if in this case the *Crete* had cut their tow rope as soon as the *Carmona* came in sight, there would have been no accident at all; no complaint is made about the collision with the *Shenandoah*; it was trifling.

There are a number of United States cases also showing the duty and liability of tugs and tows. I cite the *Mary A. Bird* (2); *The America* (3). These cases show that the English and the United States law upon this subject is the same.

[BY THE COURT:—Had the *Crete* any time to do anything when she first saw the *Carmona*?]

The matter was almost instantaneous. I have some other authorities which will help us out on that point. A second would have done it. There should have been an axe there ready to cut the hawser, and then the *Carmona* could have gone down the river without any trouble at all. It was the headway that the *Crete* was making up the river at the time which caused the injury to the *Carmona*. I also refer to the *George S. Shultz* (4), and the *Mount Hope* (5).

The *Shenandoah* should have arranged a signal with the *Crete* to tell her to cut the tow-line. That is held in the case I last cited, and also in the *David Crockett* (6). In the *Osceola* (7), it is held that the tow is bound to stop just the same as the other vessel. More than one rule says that the plaintiffs here would have the right of way, and that the other vessel should have stopped. Every rule applicable to navigation shows that the *Shenandoah* should have stopped. There are a number of authorities about stopping in fogs, and on that point I cite the *Kirby Hall* (8). It is only fair

(1) 27 W. R. 35.
(2) 102 Fed. Rep. 648.
(3) 102 Fed. Rep. 767.
(4) 84 Fed. Rep. 508.
(5) 84 Fed. Rep. 910.
(6) 84 Fed. Rep. 698.
(7) 50 Fed. Rep. 326.
(8) 8 P. D. 71.

to say that the English decisions qualify to some extent the liability of a tow, and the latest case upon the subject is the *Lord Bangor* (1). In that case it is held that for all purposes a tug and a tow are not one vessel, and that the rule should not govern them as one vessel. In that case it is also held that in a fog a tug and tow are not bound to come to a stand still, but they are bound to come to such a speed as will merely keep their tow-line out of trouble. Apply that case to the one before us. Here we are in a current going at the rate of about five miles an hour; if the *Shenandoah* had stopped, her line could not have been fouled; even if she had reversed—had gone back, she could not have fouled because the current would have held the barges away from her. If she had slackened her speed in the first instance the accident would not have happened at all. It was the *Shenandoah's* duty to have stopped as soon as she saw the *Carmona*, and she would have gone back without trouble; in either case she was at fault. If she had had only headway on, and no more, she could have stopped and reversed without getting her line into trouble. I refer here to the *Passaic* (2), as showing that it would be improper for the *Carmona* to have anchored there when she found herself in the fog.

I also refer to the *Galatea* (3); also to the *Columbia* (4). There are a number of other cases to show that in a fog the fact that a whistle is not heard should not prevail against the person that does not hear it.

The *Genevieve* (5) relates to cross signals and the duties of vessels under such circumstances. In the *Marguerite* (6), it is held that a vessel which has a right to be where she is should not be held to be in fault for

(1) [1896] P. 28.
(2) 76 Fed. Rep. 460.
(3) 92 U. S. 439.
(4) 104 Fed. Rep. 105.
(5) 96 Fed. Rep. 859.
(6) 87 Fed. Rep. 953.

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an unwise manœuvre made in a moment of extreme danger. I also refer to the *H. M. Whitney* (1), a case in regard to tugs and tows.

The defendant in his evidence sought to show that at the time of the accident the *Shenandoah* was making for the Grand Trunk wharf. I objected to that evidence but was overruled. I point out that there is nothing with regard to this in the preliminary act of the defendants and at the trial a party cannot give evidence contrary to the statements contained in his preliminary act. On that point I refer to the *Vortigern* (2). It was not until the second day of the trial that we heard anything about the *Shenandoah* making for a dock. The defendants no doubt saw that it was necessary to account more particularly for the presence of the *Shenandoah* on the *American* side, and I object strongly to the admission of this evidence, and I say that that evidence should not be considered in disposing of this case; my learned friend might say that his preliminary act is substantially correct and that the course was up the St. Clair Rapids; but is there not a very great omission? Her course was not up, but across, if he were landing at the wharf; and when my learned friend put in a preliminary act as he did, he had in his mind that the *Shenandoah* was on her course to Duluth. While I object to the evidence, if it is to be considered I wish to comment upon it. Notwithstanding the fact that the *Shenandoah* was going for the wharf she should have looked out for us; we had the right of way, and she was taking the risk.

I call attention to the fact that the *Carmona* was following her usual course in going down the river.

As to the question of damages from loss of profits, I think a perfectly fair way to get at it would be to

(1) 86 Fed. Rep. 697. (2) Swab. 518.

compare the trips of that season with the trips of the succeeding season. I do not think it would be fair to take the succeeding trip in 1899, i.e. after the accident happened, and say what the profits likely would be from that. I think you might take the two corresponding trips.

I also refer to two further cases, the *Godiva* (1), and the *Miranda* (2).

J. W. Hanna followed for the plaintiffs:

I wish to draw attention to the evidence of Capt. Stevenson. There can be no doubt that the *Shenandoah* was moving up the river, and did move up the river, from the time when she first met the *Carmona* until the *Crete's* tow-line was broken, some 900 feet. If you take the evidence of Capt. Stevenson as to the rate of speed at which he was moving, it would occupy twenty minutes to go 900 feet; but there can be no doubt that from the time the two boats met until the tow-line of the *Crete* had parted there were only a few minutes. The circumstances that we find do not tally with Capt. Sevenson's evidence that he was only going through the water at the rate of a mile an hour, but they do corroborate the evidence of the plaintiff's witnesses that he was going at a greater speed, in fact that he was running at an illegal rate of speed. I also point out that in the statement of defence the place of contact is given differently from what any of the witnesses have sworn to.

[BY THE COURT: Of course the pleadings are not conclusive.]

They are an indication of the instructions given the solicitor at the time as to which part of the ship came into contact. The statement in the defence is exactly as we state, that it was on the port side aft that the two ships came into contact; but according to Capt.

(1) 11 P. D. 20. (2) 7 P. D. 185.

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Stevenson's version, as soon as the *Carmona* had passed the bow of the *Shenandoah*, after striking, she appeared to go down sidewise. Some of the other witnesses, however, say that she went down with her bow thrown in and her stern towards the middle of the river. The theory of the defence is that after the *Shenandoah* and the *Carmona* came together, the *Carmona* was put ahead apparently without any regard to which direction she was going and she did run across the tow-line. If that contention were correct, if there were any force being applied by the *Carmona* as against the tow-line, as quick as the tow-line parted, would not the *Carmona* be released and would not that very same force that had broken the tow-line drive her over onto the other side so that she would have avoided the *Crete* altogether? Instead, however, we find that she came down and struck the *Crete*, almost on the starboard side of the bow.

What I submit the facts show is this, that it was the fault of the *Shenandoah* that the *Crete* acted as she did, and that she was to blame. I think the captain of the *Crete* did exactly what any good seaman would do; he tried to pass the *Carmona* on the side that it was indicated to him the steamer was going to pass on, and in doing that I think he exercised good judgment. The captain of the *Shenandoah* said that there was between 150 to 200 feet between him and the shore. Why did he blow an alarm whistle if there was no danger? Why did Captain McFarlane go out and tell the captain of the *Carmona* to run her nose in the mud if there was no danger, if there was 150 feet of clear water there? Or is the fact not as we have stated that we were being crowded by those barges, and there was not that much water; we have evidence that they did attempt to pull the barges out, and it seems to me that that is really the key-note of the whole thing.

McFarlane would not have spoken in that way if there had not been some occasion for it.

I wish to point out further that there are three witnesses which should be called in the case of a collision, that is the captain, the wheelman and the engineer, but here we have only the captain.

The whole question comes down to this, was the *Carmona* rightfully where she was? If she was, did she herself contribute to the accident? The authorities cited by my learned friend show clearly that she did have a right to be where she was. Then we ask was there anything she should have done that she did not do? There is no doubt as soon as she heard another steamer approaching it was her duty to slow down; but I do not think it was her duty to back as it was the duty of the other steamer, she having the right of way. I refer to rule 15 of the American rules corresponding to the 16th English rule, rule 17 American, corresponding to rule 18 English, rule 18 American corresponding to rule 19 English, 21 American corresponding to 23 English. These rules all apply more or less to this case. I refer also to the case of *Stoomvaart Maatschappy Nederland* v. *Peninsular, &c., Navigation Co.* (1); the *Ceto* (2); the *Franklin* and the *Kestrel* (3); the *Love Bird* (4), and the *Kirby Hall* (5). These cases make it incumbent for a boat meeting another to stop and back; it is not merely sufficient that she should stop, but she should stop and back, and there does not appear to be any exception made in the case of a tow. All the circumstances corroborate the plaintiff's story, and there are none that corroborate the defendants' story as to how the collision occurred.

F. A Hough for the defendants:

(1) 5 App. Cas. 876.
(2) 14 App. Cas. 670.
(3) L. R. 4 P. C. 529.
(4) 6 P. D. 80.
(5) 8 P. D. 71.

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It is clear that we have never claimed the custom which we have set up in this suit to be one which existed through the whole of the St. Clair River, but simply at this particular point, and the moment you pass the shoulder of the bend in the river the reason for that custom ceases to exist and the custom ceases to exist with it. As to my learned friend's statement that above the scene of the accident they had passed another vessel port to port, and his using that as an argument against the custom which we have set up, we might with just as much consistency say that the fact of their having passed another boat further up starboard to starboard, is an argument in favour of the custom for which we are contending. I submit that neither of these instances can have any effect on the situation at the point where the collision took place. My learned friends also urged that the *Carmona* did not back into the *Shenandoah*. If that is so and the mate of the *Carmona* shouted out to the captain to "Go ahead, you are backing into this ship"—that was their own language—it seems to me it is immaterial whether he backs astern or backs in a sideways direction. The facts on the evidence, I think, show that the *Carmona* did the backing into the *Shenandoah*, and did the running into the *Crete*. As far as the question of suction is concerned, it is a well known fact that there can be no suction unless the vessel which caused it is a very large one and moving very rapidly; but that I submit on the evidence was not the case here.

The next statement made was as to the tow-line, and my learned friends wish to show that the tow-line did not break until the collision took place and that the "chewing" was done by the paddle-wheel. The evidence is that the line was chewed for a distance of seventy-five feet from the bow. If that were done by the paddle-wheel it could not have got within that

distance of the bow because the paddle-wheel of the *Carmona* is about 125 feet from her bow, so that it is impossible that the chewing could have been done by the paddle-wheel. Looking at the lithograph of the *Carmona* I submit fairly that these braces could be held to cause the erosion and straining of the line.

The next point that I wish to refer to is that the *Carmona* buckled to starboard. I do not know that it is necessary to give any reason for it buckling to starboard; if it were, as I think it is clear, practically a shell, it must buckle some way when there is force coming against it, and the ordinary law would be that it would give in the weakest point. I submit that the least inclination would be sufficient to buckle the stem in the opposite direction. The fact of the *Carmona* coming down as she did and crossing the tow-line and getting on the shore, when she was not working her engines, simply indicates to my mind the fact that the current sets in towards the American shore at this point; and I think that that fact is also established by the fact that the *Crete* and the *Grenada* both, when they were loosened, went ashore here on the American side. It was not because the *Grenada* was out in the stream in one direction and the *Crete* in another; it seems to me a ridiculous contention to make that the tow could go up the river in that zigzag way such as is now indicated. Unless my learned friends can show that the *Crete* was headed in shore, and headed in shore by reason of those two whistles, then their case must fail.

The next point my learned friends made was that the *Shenandoah* must have gone 900 feet up the river during the accident. If the *Carmona* did not move at all, if she stood perfectly still, that would take the *Crete* away up to this position (indicated on chart) before she would strike. I submit the proposition is ridicu-

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lous. The minute the *Crete's* tow-line was broken she dropped her anchor, that is as soon as the collision took place, and it is safe to say she did not go any further up than that.

As to the variation of the testimony of the witnesses, when the plaintiffs' witnesses made their declarations before the notary they all wanted, no doubt, to hold their jobs; if there was any inducement for a man to stretch a point in favour of his employer it was at that time, and having made them they were tied down to them. I would expect, however, that when they made those declarations the day after the collision that there would be a perfect unanimity among them with regard to all the salient facts; but when one man swears the very next day as to one set of signals and another man swears to a different one, if their evidence is the same now, then I say it is not reliable. The defendants' witnesses differ in many of the minor points, but as to the one point of the signals they are absolutely unanimous, there is no difference of opinion, and I submit that the evidence of the defendants show that they were thoroughly honest in everything they did say and that they did agree in all the important points.

Then the plaintiffs urge that the *Shenandoah* and *Crete* acted improperly in not cutting the tow-line. I submit that the navigators of the *Shanandoah* and *Crete* had no reason to suppose that this vessel was going to attempt to cross their tow-line until she actually did it. The *Crete* could not have known the *Carmona* was coming down on her tow-line until she saw her, and she was then 150 feet from her, and I submit that at that time and under those circumstances there was not time to cut the tow-line or do anything which could possibly have prevented it at that point.

I wish to cite the case of the *Lord Bangor* (1), already referred to, as to a vessel with a tow not being bound

(1) [1896] P. 28.

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to reverse or jeopardise herself by getting the tow-line in her wheel; that is good seamanship the world over. I am satisfied to have the evidence given by the witnesses who swore that they were going to the dock and that the lines were ready at the time of the collision. I think the circumstances show that it was a very wise thing for the captain of the *Shenandoah* to do under the conditions existing at the time. As to the delay in the plaintiff bringing this action, it seems to me that the man who is honest and who thinks he has a fair case would not have waited two years in bringing his action unless there was some motive.

The plaintiffs knew that there was a fog and they knew that there was a vessel in the fog; then I say they were negligent in coming down the river as they did. By coming down the river in the position in which the *Carmona* placed herself, she could not alter her course to starboard, she could not alter her course in any way except by crossing the bows of another boat, and I submit that the fact of the *Carmona* coming down there as she did put her in a pocket for which they alone are liable, and I say that, aside from any custom existing at that point, they should have expected and provided for the very thing that happened.

I submit the *Carmona* had no business to go down the river at the rate she did. The cases are clear that when a vessel hears another ahead of her in a fog in such a position that she cannot ascertain her location she must stop; it is not sufficient for her to check her speed, but she must stop. That is what I say the *Carmona* should have done until she ascertained where the other vessel was.

I submit that when the *Carmona* did get the starboard signal from a vessel in front of her, if her navi-

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gators were at all familiar with the locality, she should have taken it for granted that the other boat was either close to the dock, or going to the dock, or was hugging the American shore, and she should have known that there was ample room to the starboard; then she should have accepted the signal and passed to starboard.

My next reason is that having come in to the port of the *Shenandoah*, she clearly should have held her course. That, I think, is the foundation and the vital point of this whole action; as she saw that she had about 150 feet of water inside there was no reason for her attempting then to cross the tow-line. But instead of doing that she moves across the tow-line and gets herself caught, and is, I submit, responsible for her own misfortune. Another alternative which my learned friends suggested was that they could have tied up at the Grand Trunk dock; that would have been a wise thing to do according to the experts; anything would have been wise rather than what they did coming down that river in a fog. It is considered one or the most dangerous localities on the Great Lakes.

That brings me to the first proposition which I have to make, which is that, if the defendants were entirely in fault, the plaintiffs cannot succeed if at any time they could have done anything to prevent the damage and did not do it. The second proposition is that unless the preponderance of evidence is found in favour of the plaintiffs, the onus being upon them, the action must fail.

I submit that the experts who gave testimony clearly prove the existence of a custom at the point where this accident took place, that the up-bound boat should take the west side of the channel, and the down boats should pass to starboard. I submit that

your lordship cannot but find on the evidence of the defence that there is such a custom existing at the point where this collision took place. If this is so found, then the *Carmona* was clearly wrong in attempting to come down, knowing, as she should have known, that she was liable to meet an up-bound boat. As to the discrepancy spoken of between the preliminary acts of the defendants and the evidence, I submit that there is no great discrepancy in our act, in not saying that we were going to tie up at the dock any more than there is in their preliminary act by their not saying that they were bound for Sarnia. I submit that there is no substantial variance, and if there is it is owing to the plaintiffs' delay in bringing the action and our inability to get reports and to get the evidence in shape.

I do not think that I need argue that the White Law is to govern in this case and the White Law only, the collision taking place in American waters.

[BY MR. MULVEY: That is admitted.]

The International rules have no bearing on the subject whatever.

[BY MR. MULVEY: I do not admit that by any means; they have some bearing on the question of whether there is a custom at that point.]

[BY THE COURT: Do I understand the contention of the plaintiffs is that even with the White Law, the defendants are in fault unless the custom they allege lets them out?]

[BY MR. MULVEY: Yes, and I say there cannot be a custom because under the Canadian rules it is illegal for a vessel to go down on that side—it is contrary to the express statement in the International rules for a vessel to go down on the Canadian side, so that if a Canadian vessel starboarded opposite the elevator in Canadian water she is in fault.]

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[BY THE COURT: The point is this, that even under their own rules they were in fault as to the steps taken unless they establish, with clearness, a custom which should be known to people using the American side of the river; and if it were a custom established by such consensus of opinion and for a large number of years, that the *Carmona* should be presumed to have notice of by using American waters.]

Should have known it; if they did not it is immaterial to us.

As to the negligence of the *Carmona* I would cite the *Baltimore* (1). I submit that the *Carmona* did not comply with that rule; that she could have stopped much sooner than she did, and if she had done so the collision would have been avoided. I refer also to the *Aurania* (2). The fact that the cases are all strong to the effect that "we had the right of way", is not a sufficient answer to the damage as done. (The *Beryl* (3). I think it is plain in law that the simple fact of one vessel having the right of way does not entitle her to navigate without using ordinary precautions. The strong case on that point is the *Warren* (4). As to the negligent navigation of the *Carmona* in the fog at the time of this collision, I refer to the *North Star* (5). Also the *City of New York* (6).

I submit that the captain of the *Shenandoah* acted in accordance with what is laid down in these cases—he brought his vessel to a practical stand-still. He swore to his intention of going into the dock and states he thought he would wait until the vessel which he heard coming down got by. And I submit that he took every precaution that a careful man should take,

(1) 34 Fed. Rep. 660.
(2) 29 Fed. Rep. 98.
(3) L. R. 9 P. D. 137.
(4) 18 Fed. Rep. 559.
(5) 62 Fed. Rep. 71, and in appeal 22 U. S. App. 242.
(7) 35 Fed. Rep. 604, afterwards in 147 U. S. 72.

and that the other boat continued to come down the river three miles an hour and never once stopped. I refer to *Marsden on Collisions* (1). As to the general usage governing the navigation of local waters, I refer again to rule 38 of the White Law; to the *City of Washington* (2); to *Spencer on Collisions* (3); *Marsden on Collisions* (4). And also to the *James Bowen* (5), as to the effect of a custom in regard to vessels meeting and passing in the Delaware River; in that case it is clearly held that the custom superseded the rules.

I submit that on the whole evidence the plaintiffs cannot succeed in their action.

T. Mulvey in reply.

Notwithstanding what my learned friend says it is quite apparent from the map that the *Shenandoah* went 1,000 feet during the accident, and the assertion of my learned friend to the contrary I think does not answer that.

My learned friend argues that the *Carmona* crowded the *Shenandoah* into shore and did not go to starboard. The evidence all shows that it was impossible, when the *Carmona* saw the *Shenandoah*, to go any other way than to port; the *Carmona* could not have gone slower than she did and have maintained steerage way. As to the reasons given by my learned friend why the plaintiffs should not succeed, even assuming that the plaintiffs' evidence were true—there is no question that we knew there was a fog, but we did not know of that fog until after we got into the river, and got into the current, so that we could do nothing but go down.

The second point he advances is that the *Carmona* had no business to come down the river at the rate she did, and should have stopped when she heard the

(1) 3rd ed. pp. 396, 435.
(2) 92 U. S. 31.
(3) Sec. 22.
(4) P. 467.
(5) 52 Fed. Rep. 510.

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whistle ahead. My answer is that she could not have gone down the river at any other rate. She would not have steerage way if she went slower, and she stopped as soon as she saw a vessel ahead.

His next point is that having come in to the port side of the *Shenandoah* she should have held her course and not come across the tow-line. I have a comment to make on that which I made a short time ago. The mate of the *Shenandoah* said "Run ashore!" I do not think that is very satisfactory advice to give. There was some chance of getting out the other way, and if the *Crete* or *Shenandoah* had cut their tow-line as they should have done, we could have got out the other way, and there would have been no accident at all.

My learned friend's next proposition is that if the defendants are in fault and the plaintiffs could have done anything to prevent the accident and did not do it, they cannot recover—but he does not cite any authority upon that subject neither does he suggest anything that we might have done to prevent the accident which we did not do.

My learned friend also says that the onus is upon the plaintiff, and he says, too, that Captain Cameron in his evidence stated that this was his first trip down the river and that he was taking the usual course. It is not fair comment to say that because this was his first trip he did not take the accustomed course.

McDOUGALL, L.J., now (June 2nd, 1902) delivered judgment.

This is an action instituted by the plaintiffs in the Exchequer Court, Admiralty side, against the American steamer *Shenandoah* and the barge *Crete*, (the latter being in tow of the former, but both belonging to the same owners), to recover damages for injuries to

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the plaintiff's passenger steamer *Carmona* as the result of a collision between the *Carmona* and both the *Shenandoah* and *Crete* on the morning of the 25th June, 1899. The collision took place in the River St. Clair, opposite Botsford's Elevator, Port Huron, at or near the foot of what is commonly known as the St. Clair Rapids.

The *Carmona* is a British paddle wheel steamer one hundred and eighty-three feet long, and the *Shenandoah* is an American steam barge or propeller three hundred and twenty-eight feet long, and the *Crete* is an American tow barge three hundred feet long. The *Shenandoah* and her tow were coming up the river on their way to Duluth, loaded with coal; the *Carmona* was descending the river with passengers upon her regular voyage from the Sault St. Marie to Cleveland, intending to call at Sarnia on her way down the river. The time of the accident was about 1.30 a.m.; the weather had been clear and fine and there was no wind but a bank of fog covered the river from about the Grand Trunk Railway docks for some distance down the river. When the *Carmona* entered the river it was clear and she had no difficulty in getting the range lights, but when she reached the Grand Trunk docks she encountered the fog. The *Shenandoah* had had clear weather up the river until a little below the water works dock on the American side, or about five hundred yards below Botsford's elevator, when she too entered the fog. The collision took place opposite Botsford's elevator, which, as nearly as may be, is about four or five hundred yards down the river from the Grand Trunk Railway docks; in other words the fog bank covered approximately a thousand yards of the river. The collision took place between the vessels about the centre of the fog.

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The plaintiff's case, as made upon the pleadings' charges that the cause of the collision was the negligent navigation of the *Shenandoah*, and alleges that the *Carmona* did everything possible to avoid the collision. The defence sets up that when first seen the *Carmona* was coming rapidly down the river, and apparently heading for the docks on the American side. The night is alleged to have been very foggy, with no wind; that the *Carmona* had no lights, or such inferior lights as to be invisible to those on the *Shenandoah*. It also alleges that the latter vessel was properly navigated, and had all her regulation lights duly burning. As soon as the *Shenandoah* saw the *Carmona*, the former's helm was put hard aport and several sharp danger whistles were blown. It is further alleged that the *Carmona* was uncontrollable, and, after clearing the *Shenandoah's* bows, reversed her engine and backed stern first into the *Shenandoah* striking the latter on the port side aft; the *Carmona's* engines were then started ahead and she crossed the tow-line of the barge *Crete*, cutting the same in two, and struck the starboard bow of the *Crete*. The allegation is then repeated that the *Carmona* was then controllable, was not kept on her course as required by law, and was negligent in attempting to run down the St. Clair Rapids during the heavy fog prevailing at the time. The defence avers that the collision was caused by some or all of the matters and things therein alleged, or otherwise by the default of the *Carmona* or those on board her, and was not caused or contributed to by anything done by the *Shenandoah* or those in charge of that ship. The defendants then counterclaim for their damages for injuries caused by the collision and for the breaking of the tow-line by the *Carmona*, and the consequent delay and damage to the *Crete* and

Grenada (another tow barge), which latter vessel it is alleged went ashore.

The plaintiffs in reply deny the allegation of the counterclaim and allege that any loss or damage suffered by the *Shenandoah* and *Crete* was solely due to their own negligence and that the plaintiffs were guilty of no contributory negligence whatever.

No action was taken by either vessel against the other at the time, but in August, 1901, the *Crete* got upon a shoal or bar at or near the lime-kiln crossing in the Detroit River, in Canadian waters, and the plaintiffs hearing of this fact issued process out of this court and had her libelled for damages for the collision. The case came on for trial before me at Windsor, on the 17th, 18th and 20th days of January, 1902. As usual in such cases a large number of witnesses were examined on behalf of the plaintiffs and defendants, and the usual dispute arose as to which vessel was in fault and responsible for the collision. The argument of counsel was heard on the 1st of February at Toronto. At the argument it was arranged that the shorthand notes of the evidence should be extended before my judgment should be considered; the lengthy transcript took the reporter five or six weeks to prepare, and my judicial engagements in other courts during March and April have prevented my considering the matter earlier.

I find upon the evidence that the *Carmona* had a full crew and was properly manned, and that her proper lights were burning, and that she was upon her regular trip between the Sault St. Marie and Cleveland on the night in question. The weather had been clear and bright on the lake, and when she passed the lighthouse beyond the mouth of the river that she picked up, without difficulty, the range lights, one of them being at the entrance to the river, another at the

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freight sheds and the third at the Botsford elevator. After getting into the river and as the *Carmona* was making the turn in the river after passing the freight sheds, the fog bank appeared ahead and in a moment it surrounded the vessel. The *Carmona*, before entering the fog, and inside the lighthouse, had passed another steam vessel, port to port, going out of the river. The *Carmona* came down the American shore following the trend, at first keeping about three hundred feet out, but when the fog came up so thick as to obscure and shut out the shore lights, the master altered his course so as to get closer to the shore in order to pick up the land-marks and loom of the land. Just prior to the collision the *Carmona's* course would take her to within fifty or sixty feet of the bank. Before entering the river her engine had been checked down to five or six miles an hour; and on entering the fog a second check was given and the engine reduced in speed to about two miles an hour. The second check meant that the engineer was standing at the engine, working it with a hand bar. This speed would give a reasonable steerage way only. The current of the river varies at different points; at some points it is said to be six or even seven miles an hour; but at the point of collision, about opposite Botsford's elevator, it is said to be between four and five miles an hour. On the night of the collision, as I have said, there was no wind to affect the current and the current therefore may be assumed to have been normal. Captain Stevenson, the master of the *Shenandoah*, states that the current opposite Botsford's elevator would be between four and five miles an hour. Before entering the fog the master of the *Carmona* had heard fog signals down the river, but he states these would not indicate with certainty whether the vessel giving them were coming up or going down. The

men were at the wheel and the master, Captain Cameron, was on the bridge. After entering the fog the *Carmona* commenced to sound regular fog-signals and just as Botsford's elevator loomed up, the *Carmona* being then perhaps seventy-five feet from the shore, Captain Cameron and his mate saw a light ahead, two head lights and a green light, over his port bow, nearly abeam; this would indicate that the *Shenandoah* (whose lights they were) was approaching him nearly stem on. He immediately stopped his engine and reversed while his mate sounded a port whistle—one blast. The *Shenandoah* answered with two blasts. The *Carmona* immediately repeated the single blast and a danger signal—three or four short blasts. The *Shenandoah* ported her wheel, and when the bows of the two boats were almost abreast of each other, blew a port signal. The *Carmona* by reversing her engine practically stopped her way and the two steamers passed within ten or fifteen feet of each other, the *Carmona's* engines still backing. The mate of the *Carmona* sung out, "Stop backing, or you will back into the steamer;" and at the same moment Saunders, a sailor, called out, "There is a tow-line." The master stopped the engine backing and took a turn or two ahead. The port quarter of the *Carmona*, however, grazed and touched the side of the *Shanandoah* but doing no special damage to either vessel. Just as the engine started ahead came the warning about the tow-line and the engine was instantly stopped, when suddenly the *Crete*, which was being towed about four or five hundred feet behind the *Shenandoah*, loomed up dead ahead, showing both her port and starboard lights but with her stem pointing towards the American shore; she was coming directly into the *Carmona*; the latter's engines were immediately reversed again at full speed, but the vessels came together. The *Crete*

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struck the *Carmona* on the starboard bow, buckling it to starboard. The *Carmona* struck the *Crete* on the bluff of her starboard bow. After passing the *Shenandoah*, the *Carmona* had apparently got foul of the tow-line of the latter vessel, it passing under her port guards, and she apparently followed along the line to within 75 or 100 feet of the *Crete's* bow when the tow-line parted. Immediately after the contact with the *Crete*, the *Carmona's* rudder became jammed and she could not use her helm. At the instant of contact the *Carmona's* engine was still reversing, but she had apparently not yet got stern way. After the collision the engine was stopped, and the current then carried the *Carmona* down the stream and she drifted past the starboard side of the *Crete* and then across the tow-line between the *Crete* and the *Grenada* and past the port side of the *Grenada* till she brought up on a mud bank below the *Grenada*. The *Crete*, when the tow-line between herself and *Shenandoah* parted, promptly dropped her anchor, and the *Grenada* hung in the stream. The *Carmona* did not touch the *Grenada* in passing. It was speedily ascertained that the *Carmona* was not leaking badly, the damage done being well above the water-line. She signalled for a tug, and one came in a few moments and pulled her off the bank and towed her over to Sarnia. An examination of her condition was made at Sarnia and an hour or two later she proceeded down the river to Detroit, discharged her passengers and went upon the dry dock for repairs.

The master of the *Shenandoah* states that he first came into the fog a little below the water works; that he checked down his engine to a speed of between two and three miles an hour over the ground, and later checked the engine down again to a speed of perhaps not more than half or three quarters of a mile against

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the current. He had made up his mind, he says, to tie up at Botsford's elevator dock till the morning; he had not given out the order but had told his men to stand by the lines. When he got abreast of the elevator, however, he found another vessel lying there and he decided to proceed further up the river and tie up at Grand Trunk docks. He thinks his vessels were about 150 feet out in the river, outside of the vessel tied up at the elevator dock, in other words out in the stream about 190 to 200 feet from the face of the dock. He could make out the face of the dock and the elevator 150 feet away, but he could not make out his own tow 500 feet down the river behind him. He had blown fog-signals as he came up the river after encountering the fog. He had heard several fog-signals ahead of him up the river, and later, the sound of paddle-wheels, and by the sound this appeared to him to be a vessel several thousand feet, or say, about half a mile distant. He answered the fog-signal and also blew a danger signal, and a moment later, he says, and before the *Carmona* came in sight, he blew a starboard signal. To this the *Carmona* replied by a port signal; he states he at once announced it by a port signal and a danger whistle; and by the time he gave the danger signal the *Carmona* suddenly appeared about 300 feet above him almost head-on and starboarding rapidly. He then quickly ported his wheel and cleared her. He is quite positive he heard no other signal from the *Carmona* (save a fog signal which he heard before any passing signals had been given) except the one port signal and this was in reply to his first passing starboard signal. On the other hand the master of the *Carmona* and several of his witnesses are equally positive that the first passing signal given by either vessel was the *Carmona's* port signal, followed by the reply from the *Shenandoah* of a starboard signal. That then

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the *Carmona's* port signal was repeated and later adopted by the *Shenandoah*, and a port signal given by that vessel just as the bows were passing each other. Captain Cameron avers that he followed both his port signals with danger whistles, and upon giving his own first port whistle had stopped and reversed his engine. Each master, therefore, charges the other with crossing signals.

After carefully considering this conflict of testimony, in which both masters were supported by several witnesses, I find as a fact that the *Carmona* blew the first port whistle and that it was answered by the *Shenandoah* with a starboard signal; that the *Carmona* instantly repeated the port signal, which was answered later by a port signal, thus indicating that the upbound vessel would comply with the signal and pass to port. The *Carmona* stopped and reversed; the *Shenandoah* kept on, porting her wheel half a point. Captain Stevenson says that the *Carmona* when she passed his stem was twenty or twenty-five feet to port of him (reversing her engines had stopped her way or given her sternway) and when she had gone about one hundred feet from his bow she backed into him, grazing his vessel. Then the *Carmona* stopped backing, and took a turn or two ahead, drifting past and clearing the *Shenandoah*. The collision with the *Shenandoah*, however, is not the one especially complained of; neither vessel was appreciably injured by the contact. The subsequent collision with the *Crete* caused the chief damage. The fact of fouling the line between the *Shenandoah* and *Crete* was evidenced by marks along the braces under the guard of the *Carmona* from the point of their commencement near the bow aft as far as her paddle-boxes. After the slight contact with the *Shenandoah* the *Carmona's* engine had only taken a couple of turns ahead before the lights of

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the *Crete* appeared. The engine, as I have said before, was instantly stopped, and reversed at full speed, but this manoeuvre did not prevent the collision. Fouled with the tow-line, carried down by a five mile current, the *Crete* moving up stream, bow towards shore, a collision between the two vessels became inevitable. In going slightly ahead to avoid the *Shenandoah* she had got to perhaps within fifty or sixty feet of the shore; ahead of her, lying at the dock, was a vessel occupying a portion of this fifty or sixty feet of space; she had lost steerage way by backing and was virtually pocketed. In trying to keep out a little to avoid the vessel at the dock, she fouled the *Crete*'s tow-line and as the *Shenandoah* continued to move up stream the *Crete* approached her at the speed the *Shenandoah* was making.

In reference to the position of the *Shenandoah* just before the collision the defendant's witnesses say that their vessel was from 150 to 200 feet from the shore. This is disputed by those on the *Carmona* who say that the *Shenandoah* was very little, if any, more than 100 feet from the shore. It is fortunate under all the circumstances that the collision did not do more damage. It is equally fortunate that the injuries were all above the water-line. One of the witnesses on the *Carmona*, the second mate, states that as they were passing the *Shenandoah* he heard the latter signal to the engineer to go ahead at full speed. The master of the *Shenandoah* positively denies giving any such signal; his engineer, however, was not called, and no satisfactory explanation was made for his absence. It would not perhaps have been unreasonable to have given such a signal had its object been to endeavour to pull his barges out further into the stream before the *Carmona* reached them. The course of the *Shenandoah* had been changed half a point according to her

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master's statement, with the object of giving more sea room to the *Carmona* to pass him to port; as far as the *Shenandoah* was concerned this change of course had cleared the *Carmona*, except the slight contact due to the sternway acquired by the *Carmona* from reversing her engines. Although the *Carmona's* engine took a turn or two ahead she was moving with a five mile current and the *Crete* was approaching her at whatever speed the *Shenandoah* and her barges were making up stream, and she struck the *Crete* with considerable force. The period of time between coming in contact with the *Shenandoah* and the collision with the *Crete* was so brief that the *Carmona*, without steerage way, was practically helpless to avoid the *Crete*, notwithstanding that she had reversed her engine the instant she discovered that vessel directly in her course. The *Crete* was uninjured by the collision; with a bluff bow, and deeply laden, she withstood the shock and beyond the knocking off of a little paint she sustained no injury. The value of the tow-line broken exceeded many times the pecuniary injury occasioned to her hull. As soon as the line broke the *Crete* let go her anchor. Singularly enough, as before remarked, after drifting past the starboard side of the *Crete*, the *Carmona* drifted across the second tow-line, between the *Crete* and *Grenada*, without breaking it, and passed on the port side of the *Grenada* until she took the ground below both barges.

It is said by several witnesses on the *Carmona* that at the time of the collision the *Crete* was apparently under a starboard helm and heading towards the American shore, while the *Grenada* appeared to be under a port wheel and pointing more directly out into the stream. This is positively denied by the master of the *Crete* and his mate, who were the only two of the crew of that vessel called as witnesses.

The master was at the wheel at the stern of the vessel when the collision occurred. He swears he paid no attention to the starboard signal first given by the *Shenandoah*, but waited for an answer from the approaching vessel before acting; that he next heard an answer of a port whistle from the approaching vessel, and then a port signal from the *Shenandoah*. He then immediately ported his wheel about half a point. This movement, according to the same witness, would throw the *Crete's* head out about twenty-five feet to starboard from the course he had been steering, yet the *Carmona* struck him on his starboard bow, and drifted by him on his starboard side and a moment or two later passed his consort 500 feet down stream on her port side. The way on the two barges could not have entirely ceased for a moment or two after the line between the *Crete* and the *Shenandoah* had parted; the *Carmona*, her engines stopped, drifting in the current, would take about a minute to pass the *Crete*,

$$\frac{5280 \times 5}{60} = 440 \text{ feet per minute.}$$

The actual course of the *Carmona* seems to point to the conclusion that the *Grenada* and the *Crete* could not have been in a direct line with each other or steering the same course; the *Grenada* must have been further out in the stream than her sister barge. Had it been otherwise, the *Carmona* would doubtless have also collided with the *Grenada* and passed her to starboard. This conflict of testimony illustrates how widely witnesses will differ in their account of the same occurrence. The fact is, however, admitted that the *Carmona* passed one barge to starboard and the other barge to port. This, to my mind, strongly supports the testimony of the plaintiff's witnesses in their statement that one barge was heading towards the Ameri-

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can shore while the other was pointing out into the stream. It is to be noted that the trial took place two and a half years after the collision. It is in evidence that the crew of the *Carmona* immediately on the arrival of that vessel at Detroit were taken before a notary and they made sworn statements as to the facts relating to the collision; the plaintiff's witnesses had, therefore, a means of refreshing their memories by reference to their former statements. The crews of the *Shenandoah* and *Crete*, on the other hand, not hearing of any action taken, had probably dismissed the matter from their minds, and at the trial, in 1902, were compelled to rely solely upon recollection for the incidents of what had become to them a remote occurrence. The recrudescence of the case, two and a half years later, was the last thing they could probably have anticipated after such a lapse of time. Other features in the evidence given for the defence at the trial calls for comment. The master of the *Shenandoah*, apparently in part explanation of his close proximity to the elevator dock on the night in question in the fog, swore that he had formed the intention to land at that dock and tie up till the fog lifted; he and his mate both stated that orders had been given to the crew to stand by the lines so as to prepare for the landing. This important fact ought certainly to have been communicated to the defendant's solicitor and by them to have been incorporated in the prelimiary acts filed by the defendants; but no statement of the intention to land is mentioned in the defendant's preliminary acts filed nor is it set out in their statement of defence. In answer to the question in the preliminary acts, "the course and speed of the ship when the other was first seen" the defendants say "up the St. Clair Rapids, well over on the American side of the channel, going very slowly." Preliminary acts

are instituted for two reasons: To get a statement of the facts from the parties of the circumstances *recenti facto*, and to prevent the defendant shaping his case to meet the case put forward by the plaintiff. In practice it has been found very useful, and neither party is allowed to depart from the case he has set out in his preliminary acts (1). If the *Shenandoah* was truly making for a dock this would reasonably account for her proximity to the American shore, apart from any evidence of an alleged customary track. Another statement in the defendants' preliminary acts was that the *Shenandoah's* wheel was put hard aport as soon as the *Carmona* appeared on the *Shenandoah's* port bow. But the master, in the witness box, gives a very different account of what was done with the wheel; he swore that after he had answered the *Carmona's* port signal by a port signal he put his wheel to port half a point, and as soon as he had cleared the *Carmona* he immediately steadied his wheel. The defendants' preliminary acts and statement of defence are also silent as to any crossing signals given by either vessel save, it is stated in both, that the *Shenandoah* had blown several sharp danger whistles.

In the preliminary acts of the plaintiffs, in answer to the question: "The measures which were taken, and when, to avoid the collision?" the answer is: "Engines reversed and one blast sounded. The *Shenandoah* answered with two blasts. The *Carmona* blew one blast and an alarm whistle." The plaintiffs in both their preliminary acts and statement of claim charge that the collision was due to the negligent navigation of the *Shenandoah* and her tow the *Crete*; and aver that everything was done on the part of the *Carmona* to avoid the collision. The defendants, in their preliminary act assign, as constituting the negligence of the

(1) *The Vortigern*, Swab. 518.

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Carmona causing the collision, the absence of lights on the *Carmona*, that the *Carmona* was not under control, was on the wrong side of the channel, did not exercise proper precautions in coming down the rapids in such a fog; and in their statement of defence they charge the absence of lights on the *Carmona*, or such inferior lights as to be invisible to those on the *Shenandoah*; that the *Carmona* was uncontrollable, and was not kept on her course as required by law, and was negligent in attempting to run down the St. Clair Rapids in the heavy fog which prevailed at the time of the collision; and aver proper action on the part of the defendants' vessel, and that the collision was not caused or contributed to by any default of the defendants.

As this collision took place in American waters, the rules to be observed by vessels using the American side of the river will be those prescribed by the American law for the navigation of inland waters. These rules were put in at the trial and spoken of as the "White Law." The Act of Congress is entitled "An Act to regulate navigation on the Great Lakes and their connecting and tributary waters" (1). The first of these rules, important in the light of the issues raised in the present case, is rule 24: "That in all narrow channels where there is a current, and in the rivers St. Mary, St. Clair, Detroit, Niagara and St. Lawrence, when two steamers, are meeting the descending steamer shall have the right of way and shall, before the vessels shall have arrived within the distance of one half mile of each other, give the signal necessary to indicate which side she elects to take." In the present case the *Carmona*, therefore, had the right of way under the rule; and I find, as a fact, that as soon as she sighted the *Shanandoah* she sounded a port signal to indicate the side she elected to take. It is true that it is contended that this signal was not heard by the

(1) Statutes at Large Vol. 28 cap. 64. p. 645.

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Shanandoah. In a dispute between vessels as to what signals have been given by either vessel the evidence of witnesses upon the vessel giving the signal, if no circumstances are shown which would go to impeach their credit or truthfulness, is to be preferred to the evidence of witnesses equally credible upon the other vessel, who also testified that the alleged signal was not given by the first vessel (1). It may be the fact that such signal from the *Carmona* was not heard on the *Shenandoah*, but the rule provides for giving the signal, and the vessel which gives the signal cannot be held responsible because those on the approaching vessel did not hear it. The *Campania* (2). If the fact of giving the signal is satisfactorily proved the rule to that extent has been obeyed. The *Carmona's* whistle was in working order, for the fog whistles sounded by it further up the river had been heard by those on the *Shenandoah*. If the *Shenandoah* did hear the first port whistle then the *Shenandoah* was in serious fault in not crossing signals by sounding a starboard signal after receiving a port signal (3). If the *Shenandoah* did not hear the port signal of the *Carmona*, but heard the approaching paddle-wheels and heard no passing signal, her master was justified in sounding a starboard signal if he desired the approaching vessel to pass him to starboard; and when he heard the port signal sounded after he had given the starboard signal his following port signal would be, as far as he was concerned, a cross signal. If he had thought it was not safe to accept the port signal he did hear he should have sounded a danger whistle and stopped or reversed his engine, and not replied to it by a port signal. He said he did not sound a danger signal, but admits he first sounded a port signal in reply. He thus indi-

(1) *The Milwaukee*, Brown's Ad Cas. 313.

(2) [1901] P. D. 289.

(3) Rule 26.

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cated to the *Carmona* that he would give her the port side, and in doing so he undertook the responsibility of keeping out of her way. If the port signal was given by the *Shenandoah*, as stated by her master, as soon as he sighted the *Carmona*, under Rule 20, the *Carmona* was bound to keep her course. The *Shenandoah* by adopting the passing signal of the *Carmona* (3) was bound on approaching the *Carmona*, if there was any apparent danger, to slacken speed or stop and reverse; but she did none of these things. The evidence of the different witnesses establishes the fact that the *Shenandoah* and her barges were proceeding at a very moderate rate of speed over the ground, possibly less than a mile an hour—the master puts it at not more than half a mile an hour—against the current. One would think, working against a five mile current, there would be no difficulty or danger in stopping his engine, even if there was danger from his tow-line by reversing. By his own admission the master of the *Shenandoah* must be held to have been in fault; he got, according to his testimony, a cross signal from the *Carmona*, and he then sounded a danger whistle; but he did more, he crossed his own first signal by a reply which invited the *Carmona* to keep on her course to starboard and so pass him port to port. Rule 26 of the American rules regulates his procedure in such a contingency and directs him to reduce his speed to bare steerage way, and, if necessary, to *stop and reverse*, not *or reverse* as in Rule 21. Now, applying these same rules to the *Carmona*, what appears to have been her conduct? She was coming down the river having the right of way; she gave, as I have found, the first passing signal (a port signal) and her signal was crossed by a starboard signal of the *Shenandoah*. The *Carmona* immediately stopped her

(3) Rule 21.

engines and reversed and sounded a danger whistle and then repeated her port signal; this was answered an instant later by the *Shenandoah* with a ratifying port signal, and the *Carmona* kept on her course to starboard. At question 76 of his examination in chief Captain Stevenson puts the position this way:

"76. Q. What did you do after you heard one blast in answer to your two?.—A. Shortly after he blew the one, he came in sight; and I seen how he was going, and I answered his one whistle, and ported my wheel.

"77. Q. You answered the one with one whistle?—A. Yes.

"78. Q. That was the first you saw of him, just about the time he blew his one blast?—A. Shortly after, yes.

"79. Q. Then what did you do?—A. I ported my wheel.

"80. Q. What did you do with your whistle if anything?—A. I blew an alarm whistle, a danger signal.

"88. Q. What was the next thing that took place?—A. The steamer appeared in sight heading about on to us, and rapidly swinging to starboard. I ported quick, and got clear of him."

It was equally the duty of the *Shenandoah* in taking measures to avoid the *Carmona* to consider the safety of her tow as well as her own safety. It has been held that the taking of a step which would clear the towing ship, if she were unencumbered, might be held to be a fault contributing to the collision if in the taking of such a step, though clearing herself, she should bring about a collision with her tow. The *Arthur Gordon* and The *Independence* (1). The *Kingston by the Sea* (2).

(1) Lush. 270. (2) 3 W. Rob. 152.

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The giving of the starboard signal followed by a port signal was confusing to her tow and if the giving of such a port signal contributed in any way to bringing about the collision between the *Crete* and the *Carmona*, the *Shenandoah* is responsible under the rules. Again, if the *Carmona* by keeping her course, was likely to collide with either of the barges in tow, it appears to me that the observance of Rule 21 demanded that the *Shenandoah* should have stopped her engine even if she could not safely have reversed. She did not stop, but kept on at the rate of speed over the ground she had been pursuing, and therefore increased to that extent the weight of force of the impact between the *Crete* and the *Carmona* which followed. The object of Rule 21 of the American rules (Rule 23 English) is to obviate as well as minimize the results of a collision (1). In the same case it is laid down that the burden of shewing why she did not comply with the rule, and stop and reverse, is thrown upon the steam-ship which was by the rules bound to keep out of the way of the other.

It is important now to consider for a moment what effect upon the movement of the tow barges was produced by the *Shenandoah* sounding the starboard signal followed immediately by a cross port signal. The position of the *Crete* and *Grenada*, at the time of the collision and immediately thereafter, throws some light upon the matter. I may say I discredit the statement of the master of the *Crete* that he paid no attention to the first starboard signal given by the *Shenandoah*. The latter position of the two barges, as indicated by the *Carmona's* course in passing them, convinces me that the *Crete*, immediately before the collision, had been carrying a starboard helm, while

(1) Stoomvart Maatschappy Nederland v. Peninsular & Oriental Nav. Co., 5 App. Cas. 876, 902, 903, 904.

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the *Grenada* below her had apparently followed the last signal and had ported its helm and was, therefore, further out in the stream. The force of the current against the bows of the barges was sufficient to cause them to obey their rudders. I am satisfied that the *Crete* obeyed the *Shenandoah's* first starboard signal and the *Grenada* the later port signal.

If the *Carmona*, in descending the river, made her election of the side she would take, by giving the first passing signal, the fact that the *Shenandoah* did not hear it cannot put the *Carmona* in fault. If the *Shenandoah* in good faith thought she herself had given the first passing signal, then she could only justify crossing her own signal as an act *in extremis* and rather as a warning to her tow that as necessary to protect herself, for by slightly porting her wheel without more she had been able to clear the *Carmona*.

According to the rule the *Shenandoah's* duty I repeat was to keep clear of the *Carmona*, as the latter had signalled her choice to keep the port side. Judged by these rules the *Shenandoah* was alone in fault and solely responsible for the collision. To combat this view and displace the force of the navigation rules laid down by the American statute, the defendants at the trial set up the defence that in navigating the St. Clair Rapids a local custom prevails which supersedes the rule, and a number of witnesses were called to prove the alleged custom. For many years past, they deposed, it has been the almost invariable practice or custom for vessels coming up the St. Clair Rapids, especially steamers having tows, to keep close to the American bank from a point a little below Botsford's elevator to the mouth of the river, or at least to a point above the Grand Trunk freight sheds and dock, while the descending vessels came down out in the stream passing the up-bound vessels starboard to starboard.

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It was urged that the custom was well known to all navigators in these waters, and therefore, it was urged that the *Carmona* was in fault in coming down the river on the night in question so close to the shore, especially in a fog; for she was thus placing herself in the well-known customary track of up-bound vessels; and that as the *Carmona* on entering the river had heard fog-signals below, she was guilty of culpable negligence in thus choosing her course close to the American bank, and the collision which followed, under all the circumstances, was the result of her own negligence in contravening this local custom. This particular defence is not hinted at in the statement of defence, though in the preliminary acts filed by the defendants; amongst the negligent acts charged against the *Carmona*, it is said that she was on the wrong side of the channel.

Seven witnesses, chiefly masters of vessels who had navigated the St. Clair River and the Upper Lakes for many years, were called to give evidence of the existence of the alleged custom; two or three of them were very positive that such a practice had to their personal knowledge prevailed in navigating the St. Clair Rapids for at least thirty or forty years, ascending vessels hugged the shore and descending vessels kept further out in the stream, passing up-bound vessels starboard to starboard. One of the witnesses, however, Captain Basset, a local man and a tug captain residing at Port Huron, with twenty-eight years experience, put it thus: "As a general rule a steamboat going up with a tow always makes the land very close on the Ameri-" can side, and if she meets a down bound boat she " always give her the starboard side; that is the gene-" ral rule." He gives the current as the reason for the custom—stating that if a down bound boat makes the shore closely it sets him in to the shore and the

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up-bound boat with a tow has a better chance for keeping away. The current is not as strong in close to the shore as it is in the centre; and he declares this practice or custom is, generally, known to navigators. In cross-examination, however, he said that in a fog a down-bound vessel generally takes the course next to the American shore through the rapids; that is because they can pick up points, docks and elevators, along that shore and know where they are; and down vessels proposing to turn at Butler Street for Sarnia also keep close to the American shore. He adds that at the date of the collision there were no land marks which would serve as guides on the Canadian side of the river at this point, opposite the rapids. This witness thus gives conflicting answers, namely: that under conditions of fog, vessels, both in going up and coming down, keep close to the American shore, especially down vessels intending to turn at Butler Street for Sarnia. In clear weather the alleged custom prevailed, and the descending vessel should keep to starboard of up-bound vessels. Several other masters who had sailed in these waters for many years spoke of the custom much as contended for by the defendants, and spoke of its having been in existence for all the years they had sailed in the river. Captain Davidson, the owner of the *Shenandoah*, admitted that it was impossible for a down bound vessel to come down through the rapids in a fog and steer by the compass; if it were attempted, the cross currents would place the vessels in a very short time either ashore or on the middle ground, or into some vessel; and his view of the course to be taken by a down-bound boat in case of fog was either to not enter the river at all, or if they did so and encountered fog to tie up at the first dock, or to drop anchor in the stream and not attempt to come down. Up-bound vessels by hugging the

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shore might probably safely ascend. He added if a fog struck his vessel coming up the river before getting into the rapids he would tie up at Sarnia, or some other point, and wait for the fog to disperse rather than attempt to go up the river.

Captain Cameron of the *Carmona* and his first and second mate, the former holding a master's certificate, on the other hand declare that they never knew or heard of this alleged custom of the river and they had been navigating it for years. Captain Bassett rather limited the custom to steamers having tows and did not make out clearly that the practice prevailed between steamers unencumbered; but several other of the masters examined declared that it applied to all vessels ascending and descending the river at this point. In point of numbers the witnesses for the defendants exceeded the plaintiffs' witnesses on this point, and their testimony supported the contention of the defendants that at the St. Clair Rapids a practice or custom appeared to exist for up-bound vessels to keep to the west side of the river and close to the bank, and for down-bound steamers to keep out in the stream and pass up-bound vessels to starboard.

There is no corresponding statutory rule in the American regulations to Rule 25 of the English Navigation Rules.

The English rule reads as follows:—

"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."

For the period between the years 1862 and 1880, Rule 25 did not exist in the English rules of Navigation, and hence we have some English cases upon the question of the practice or course of conduct to be observed by vessels traversing rivers—in the absence

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of a statutory regulation on the subject, regulated since 1880 by Rule 25. The first of these cases, the *Velocity* (1), held that a down vessel, pursuing a customary track in the river in the absence of express regulations, was not in fault in keeping on her course, and where the up-vessel departed from a course which would have carried her safely by, and a collision ensued the latter vessel was held solely in fault. The ground for so holding the *Velocity* not in fault being that she was pursuing the customary track of vessels coming down the river, and the approaching vessel ought to be held to be aware of the custom and should not have assumed, because he saw the port light of the *Velocity* for a moment due to a bend in the river, that that vessel intended to cross the river and thus depart from the customary track along the north shore. The court did not hold that a custom binding on all vessels had been actually proved, but held that where the collision was due to the up-vessel crossing into the customary track of the down-vessel, while if she had kept up the river *on the course she was following* when she sighted the down-vessel she would have passed clear, the ascending vessel was alone in fault for the collision. The court also stated with emphasis, "Even supposing the *Carbon* (the up-vessel) to have excusably mistaken the course (i.e. the intention to cross the river) of the *Velocity*, how can she recover unless she shew that the *Velocity* was in fault." This case was followed and commented on in the case of the *Esk* and the *Niord* (2) in the same volume. The repeal of the section of *The Merchant Shipping Act* corresponding to the present English Rule 25 allowed (the court said in both cases), "Vessels navigating the river were now at liberty to go on whichever side of it they pleased, taking care of course to observe

(1) L. R. 3 P. C. 44. (2) L. R. 3 P.C. 436.

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the regulations for preventing collisions." The general principles laid down in the *Velocity* were approved and followed in the *Ranger* and the *Cologne* (1).

I think, therefore, that the *Shenandoah* was not in fault (assuming the alleged custom in the St. Clair River at this point to have been satisfactorily established) in taking her course close to the American bank, for she was in the customary track of up-bound vessels. I do not, however, for a moment hold that she had the exclusive right to that side of the river; but she was not guilty of negligence in being where she was on the night in question. The *Carmona* in coming down in a fog on the west side of the river must be taken to have been aware (if such a custom existed, that it was the customary track of up-bound vessels, and she was, therefore, bound to exercise unusual care and precaution in following this course, and if a collision took place she alone would be held in fault if the other vessel did all in her power to avoid the collision which ensued.

As between the two vessels, if the custom prevail, and be held to supersede the statutory rule, the *Carmona* was on the wrong side and the *Shenandoah* was on the right side; but the important question remains to be determined: Did the *Shenandoah* do all the law required to keep clear and avoid a collision? Rule 24 is the Statutory rule that differs from the alleged custom. Rule 24 enacts that the descending vessel shall have the right of way, but must indicate by signal the side she elects to take, and this choice must be made when the vessels are within half a mile of each other. This rule, however, could not be complied with where the vessels, by reason of fog, failed to see each other until they arrived within three or four hundred feet of each other, therefore the giving of the port

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

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signal by the *Carmona*, when within three or four hundred feet from the *Shenandoah*, could hardly be considered to have been a signal under Rule 24. There was imminent danger of collision the moment the two vessels sighted each other. They were approaching each other end on or nearly end on; the evidence of both masters, in my judgment, establishes this fact. The *Carmona* was slightly closer to the American shore than the *Shenandoah*. So far as I can see the *Carmona*, when their position was apparent, did everything possible to avoid the collision.

A five mile current was driving her forward, and a vessel was approaching her at an unknown rate of speed. It would have been the worst of judgment to have attempted to cross the latter's bows and go to starboard. Rule 17 applied, and the *Carmona* did what the rule commanded. She reversed at full speed and gave a port signal and a danger signal, and having the right of way kept on her course (1). What did the *Shenandoah* do to avoid a collision? Her master alleges that he did not hear the first port signal claimed to have been given, but he heard a paddle wheel steamer approaching him; he sounded a starboard signal and a danger whistle; in answer he got a port signal and almost immediately he sighted the *Carmona* coming towards him and on or nearly end on. He at once sounded a port whistle and ported his wheel. *He did not stop or reverse.* Did he hear the first port signal? I have no doubt whatever that it was given. I am unable to find as a fact that he actually heard it. Brown, one of the owners of the *Carmona*, says that the *Shendandoah's* starboard signal in reply to the first port signal was almost a continuation of the whistling of the *Carmona*; it followed so quickly. Captain Cameron, the master of the *Carmona*, in answer to

(1) Rule 20.

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question 103, "What interval was there between the one blast of the *Carmona* and the two by the *Shenandoah*?" answered: "There was very little I think when he—" the *Carmona's* mate—"stopped his first blast, the first one, the other fellow was blowing." From this it would appear that it is quite possible that the signals were practically simultaneous, and that Captain Stevenson may not have picked out the port signal, as he has sworn. Getting no passing signal from the approaching vessel the *Shenandoah's* master was justified in giving a passing signal. His starboard signal indicated his intention to pass to starboard. A moment later the situation became critical, for he suddenly saw the *Carmona* bearing down upon him swinging rapidly to starboard so as to take his port side; he decided to go to port, and put his wheel over half a point. Was this action calculated to take his tow out of danger? Had he put his wheel hard aport and, seeing his own vessel would clear, had gone ahead at full speed, he might have materially changed the course of his tow and possibly have prevented the collision with the *Crete*; or having ported and cleared his own steamer he could have stopped his engine and so diminished the shock of a collision with the *Crete* if one was inevitable. The giving of the conflicting signals of starboard and port confused his tow and as I have already found caused one to carry a starboard helm and the other a port helm. He ported only half a point for a moment then steadied his helm. Having cleared the *Carmona* with the *Shenandoah* he kept on his way up the river.

I find that the *Shenandoah* was in fault in not having adopted any effective measures to avoid a collision. Had the *Shenandoah* committed no fault the *Carmona* would have been without recourse for the damage she sustained. The speed of the *Carmona* for some time

before the collision of about two miles an hour faster than the current, I find was moderate—barely enough to give her proper steerage way. As soon as she sighted the *Shenandoah* at a distance of three or four hundred feet, she at once stopped her engine and reversed at full speed. She gave the correct signals followed by danger signals. Her way was stopped, and she had even acquired steerage way to such an extent that she touched with the *Shenandoah*. The turn or two ahead her engine subsequently made, when her master saw she was backing into the *Shenandoah*, was necessary to avoid injury to that vessel and his own. The *Carmona* reversed again at full speed when she discovered the *Crete*, and had that vessel not been out of her course and headed towards the American bank, the collision would probably not have occurred with the *Crete*. Unless the single circumstance of the *Carmona* coming down the course on the west bank, close to the shore, assuming it to be the customary track of up-bound vessels, amounts to negligence, and that such negligence contributed to the collision, I do not see wherein she was to blame.

The St. Clair River is an international highway, and therefore a custom which varies or conflicts with the regular rules of navigation should be strictly proved by the party setting it up. The custom should be universally known that any departure from it would be considered as unusual and extraordinary (1). I have already adverted briefly to the evidence offered in support of the alleged custom. More witnesses affirm the custom than negative it; but is the evidence so overwhelming as to justify the court in holding that it supersedes statutory Rule 24, which gives the descending vessel the right of way and choice of course? As put by the learned judge in the *Milwau-*

(1) *The Vianna* Swab. 405.

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kee (1). "There is no rule that vessels navigating rivers must in all cases when meeting keep to the right of the centre of the navigable channel. Vessels navigating rivers in this country, like vehicles on the highway, may use any part of the channel they see fit, observing in all cases when meeting and passing other vessels, the ordinary rule of navigation." Again, in reference to a local custom, it is said in the *Newport News* (2): "There should be no doubt of its actual existence known generally to persons engaged in the business to be affected and the proof should be clear and conclusive."

I think that upon a river like the St. Clair traversed as it is annually by thousands of vessels, and used by two nations, a custom which in effect superseded a statutory rule ought to require the most conclusive and cogent proof; and as it is sought to make it binding upon foreign as well as domestic vessels, the proof should include some convincing evidence that a knowledge of the alleged custom existed amongst mariners generally, and extended to mariners sailing on vessels carrying the foreign flag and habitually traversing this busy river. After the most careful consideration of the testimony, I have arrived at the conclusion that the evidence offered to support the existence of the alleged custom falls short of satisfying the conclusive proof demanded by the dicta expressed in both American and English cases (3).

I am of opinion upon the evidence, and after a careful consideration of the American Rules of navigation in force in the St. Clair River and the American and

(1) Brown's Ad. 313.
(2) 105 Federal, 389.
(3) The *Unity* (Swab. 101). The *Hand of Providence* (Swab. 107). The *Velocity* (L.R. 3 P.C. 44). The *Promise*, and H. M. S. *Topaze* (2 Mar. Law. Ca. O. S 38.). The *Duke of Sussex* (1 Wm. Rob. 270). The *Pavonia* (26 Fed. 106). The *James Bowen* (52 Fed. 510). The *Newport News* (105 Fed. 389). The *Vanderbilt* (6 Wall. 225).

English cases, to which I have been referred, that the *Shenandoah* was solely in fault for the collision set out in the pleadings, which occurred between the *Carmona* and herself, and also with the *Crete* her tow, on the morning of the 25th June, 1899.

As to the damages, I find that the *Carmona* is entitled to recover for the cost of the repairs made upon her at Detroit amounting $1,054. These I fix at $1,054.

She is also entitled to recover for the cost of maintaining her crew, for the time she was delayed at Detroit while the repairs were being executed, which I fix at $100 per diem for eight days; expenses of sending passengers to Cleveland, $50, and interest at 5 per cent. from 25th June, 1899, to 31st May, 1902. The plaintiffs' evidence as to loss of profits is so unsatisfactory that I can allow nothing in respect of alleged loss of profits. I make the same remark and finding as to the claim for advertising. The amount of these items, with interest, makes the total damages for which the plaintiffs are entitled to judgment, the sum of $2,183.25 and full costs of suit.

I find, therefore, the collision in question in this case was occasioned by the fault or default of the master and crew of the steam-ship *Shenandoah*; and I find that the plaintiffs are entitled to damages in consequence thereof. And I further find against the defendants' counterclaim, and order that the same be dismissed with costs; and I direct that the said ship, the *Shenandoah*, the defendants and their bail be condemned in the sum of $2,183.25 for damages and the plaintiffs' costs.

Judgment accordingly.

Solicitor for plaintiff: *J. W. Hanna.*

Solicitor for defendant: *F. A. Hough.*