

In the Privy Council.

UNIVERSITY OF LONDON W.C.1
31 OCT 1956
INSTITUTE OF ADVANCED LEGAL STUDIES

APPELLANT'S CASE

ON APPEAL

FROM THE SUPREME COURT OF CANADA.

15017

BETWEEN

S.S. "LEOPOLD L.D." (Defendant) Appellant

AND

HOCHELAGA STEAMSHIP COMPANY
LIMITED (Plaintiff) Respondent

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AND

LOUIS DREYFUS AND COMPANY (Plaintiff) Appellant

AND

S.S. "HOCHELAGA" (Defendant) Respondent

CASE on behalf of the APPELLANT

RECORD

1. This is an appeal by the owners of the "Leopold L.D." (hereinafter referred to as the "Leopold") from the Judgment of the Supreme Court of Canada dated the 26th September, 1929, allowing an appeal from the judgment of the local Judge in Admiralty rendered in the Exchequer Court of Canada (Quebec Admiralty District) on the 13th March, 1928. p. 347.

20 2. The litigation arose out of a collision between the Appellant's steamship "Leopold" and the Respondent's steamship "Hochelaga." The trial Judge (Mr. Justice Archer), who sat with Nautical Assessors, held the "Hochelaga" alone to blame. The Supreme Court of Canada (who apparently had not the assistance of Assessors) on appeal held both vessels equally to blame. The owners of the "Leopold" appeal from this decision of the Supreme Court. The question to be decided is whether the "Hochelaga" is alone to blame or whether both ships are to blame. There is no appeal by the owners of the "Hochelaga," and it is not now disputed that the "Hochelaga" was in fault for the collision.

3. The owners of each ship started an action against the other in the Exchequer Court of Canada (Quebec Admiralty District) for damage by the collision. The Writs, Preliminary Acts and Pleadings will be found at pages 1 to 20 in the Record. The two actions were subsequently joined for the purpose of trial and judgment.

p. 10. After the collision a Government Investigation into the cause of the collision was held by the Dominion Wreck Commissioner at Quebec on the 23rd November, 1926, and subsequent days and evidence was given by witnesses from each ship. The parties to the litigation subsequently consented and agreed that all the evidence made and exhibits produced before the Wreck Commissioner in connection with the Investigation should be part of the Court Record, and that the transcript taken of such evidence should be the official Record of the evidence in the Action, subject to the right of the parties to recall the witnesses and to call new witnesses. 10

A transcript of the evidence taken before the Wreck Commissioner will be found at pages 21 to 272 in the Record.

4. At the hearing before Mr. Justice Archer the Master of the "Hochelaga" and Pilot of the "Leopold" were called as witnesses and examined and cross-examined by Counsel.

pp. 272-284. A transcript of the evidence of the Master of the "Hochelaga" (Captain 20
Kenny) will be found at pages 272 to 284 in the Record, and a transcript of the evidence of the Pilot of the "Leopold" (Emile Pouliot) will be found pp. 285-295. at pages 285 to 295 in the Record. Certain documents put in either before the Wreck Commissioner or at the trial, and consisting of marked charts, sketches, photographs and log-books, will be found in the Exhibit Volume.

5. The collision took place on the 17th November, 1926, in the St. Lawrence River, and near to Channel Patch. A chart of this part of the St. Lawrence is in the pocket at the end of the Record. The time was at night, about 2.42 a.m. Each ship was exhibiting the regulation masthead and red and green side lights and was also showing the additional masthead light. The weather was fine and clear with a moderate S.W. breeze, and the tide was the last of the flood. 30

6. The "Leopold," a steel screw steamship of 5140 tons gross register and 400 feet long and 54 feet beam and drawing about $25\frac{1}{2}$ feet on an even keel, was steaming down the River on a voyage from Montreal to Naples with a cargo of grain. The "Leopold," which was in charge of a certificated Pilot, was following a down-river course in midchannel, and was making about 9 knots.

7. The "Hochelaga," a steel screw steamship of 4681 tons gross register and 375 feet long and 52 feet beam and drawing about 23 feet forward and 24 feet aft, was steaming up the river at a speed of about 40

9 knots. The "Hochelaga" was not carrying any Pilot, and was in charge of her Master.

8. There was at the trial a wide variance between the parties as to the precise place of collision with reference (a) to up and down river and (b) to midchannel. The "Leopold's" case was that the collision occurred above buoy 62 B and between that buoy and buoy 64 B, and in about midchannel. The "Hochelaga's" case was that the collision occurred below buoy 62 B and near buoy 61 B, and on the North side of midchannel.

9. There was also great variance between the parties as to the position of the two ships with relation to one another at a time when each first began to take account of the other. The "Leopold" said that she first noticed the lights of the "Hochelaga" about 3 miles distant a little on the starboard bow and that the lights of the "Hochelaga" which were visible to the "Leopold" were the two masthead lights and green light. The "Hochelaga" said that she first noticed the "Leopold" coming down in midchannel about 2 miles distant and bearing a little on the "Hochelaga's" port bow, and that the lights of the "Leopold" which were then visible were the 2 masthead lights and green light. Both ships therefore agreed that at a distance of 2 to 3 miles from one another the "Hochelaga" was on the starboard bow of the "Leopold," but disagreed on the point whether the "Leopold," having the "Hochelaga" on her starboard bow, was herself on the starboard bow of the "Hochelaga." In other words there was a dispute whether at a distance of 2 to 3 miles the ships were green to green or green to red. The Master of the "Hochelaga" admitted in his evidence that when he first noticed the "Leopold" the "Leopold" was in mid-channel. p. 283, l. 11.

10. At the trial there was a wide variance between the parties as to the navigation of the "Hochelaga" during the time that elapsed while the ships were approaching one another from a distance apart of about 2 miles.

The Master of the "Hochelaga" said that when the "Leopold" was $1\frac{1}{2}$ to $1\frac{3}{4}$ miles away, and showing her green light on the port bow of the "Hochelaga," he ported half a point and sounded 1 short blast, and when he noticed that the "Leopold" was not porting he put the helm hard-a-port, and sounded another short blast to the "Leopold," which was then about $\frac{3}{4}$ mile away. The helm of the "Hochelaga" was then steadied because the "Leopold" appeared to be swinging to starboard, but shortly afterwards the "Leopold" commenced to come back towards the "Hochelaga" and the "Hochelaga" blew another short blast (making 3 signals of 1 short blast in all) and put and kept her helm hard-a-port. The vessels were then about 500 yards apart. Shortly after the third port helm signal of the "Hochelaga" the "Leopold" sounded 1 short blast, and started to p. 273, l. 42.
p. 274, l. 25.
p. 274, l. 29.
p. 274, l. 49.

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p. 275, ll. 37-40. swing to starboard when about a ship's length away and for the first time opened her red light.

Up to the moment of impact the "Hochelaga" continued on with her engines working full speed ahead.

11. On the other hand the "Leopold's" case was that from the time when the two vessels were about 2 miles apart the lights of the "Hochelaga" were carefully watched, and it was seen that the "Hochelaga" was keeping a course to the South side of midchannel, and that her green light was gradually becoming broader on the starboard bow of the "Leopold," which maintained her course in midchannel. The "Leopold" kept on her course showing her green light to the green light of the "Hochelaga" until the vessels were about 500 yards distant and in such a position that they would pass about 600 feet clear of one another when suddenly the "Hochelaga" opened her red light and blew 1 short blast. The "Leopold" immediately put her helm hard-a-port, blew 1 short blast, stopped and reversed her engines, and sounded 3 short blasts, but the "Hochelaga" came on at full speed trying to cut across the "Leopold's" bows, and failing to do so struck the "Leopold's" stem and port bow with her port side. 10

It will be seen therefore that both sides agreed that the "Hochelaga" put her helm hard-a-port at a distance of about $\frac{1}{4}$ mile from the "Leopold" and kept her full speed until the moment of collision. 20

12. At the trial the two main issues were :

1. Whether the collision occurred to the North of midchannel or in midchannel.

2. Whether the vessels were approaching green to green until they were about $\frac{1}{4}$ mile apart, or whether they were approaching green to red from the time when they were about $1\frac{3}{4}$ miles apart.

p. 301, l. 1. On both these issues of fact the trial judge found in favour of the "Leopold." On the issue as to the place of the collision the trial judge in the course of his judgment said : "My assessors, when considering the different courses followed by the "Hochelaga" before the first blast of the whistle was given, and the subsequent courses, advise me that without a doubt the "Hochelaga" was well South of midchannel, and I am of the same opinion. The above goes to confirm, to a certain extent, the evidence given on behalf of the "Leopold," and I am inclined to accept the evidence given by Pilot Pouliot specially, and the other witnesses heard on behalf of the "Leopold," as more convincing than the evidence given on behalf of the "Hochelaga." . . . 30

"The collision could not have happened as described by the "Hochelaga's" crew unless the "Leopold," after being in midchannel, had suddenly altered her course to port, and chased the "Hochelaga" to the North 40

“ side of the channel. Nothing in the evidence could justify such a contention, and I am of the opinion that the collision took place about mid-channel a little above buoy 62 B and not as indicated by Captain Kenny and the “ Hochelaga’s ” witnesses.”

13. On the issue as to whether the vessels were approaching green to green or green to red, the trial judge found that “ the “ Hochelaga ” suddenly and at an improper time while she had the “ Leopold ” on her starboard bow, ported her helm and cut across the bow of the “ Leopold,” therefore rendering the collision unavoidable.” p. 302, l. 34.

10 14. The owners of the “ Hochelaga ” at the trial attacked the “ Leopold ” on the ground that she did not keep to her own starboard side of midchannel in accordance with Article 25 of the Collision Regulations. Article 25 is as follows :

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

The trial judge dealt with this point in his Judgment, and said : “ The “ Leopold ” was coming up in midchannel, and seeing that the “ Hochelaga ” was keeping well to the South of midchannel she continued her course, thinking it was the intention of the “ Hochelaga ” to meet green to green. I am advised that under the circumstances proven, and owing to the narrowness of the channel and the shoals in close proximity of midchannel course, the wreck buoy on the South side and the course followed by the “ Hochelaga,” it was not practicable for the “ Leopold ” to try to keep to that side of the midchannel which lay on her starboard side, but it was good seamanship to keep to midchannel.” p. 302, l. 9.

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15. A further point was made at the trial by the owners of the “ Hochelaga ” against the “ Leopold ” that she failed to sound 2 short blasts as an indication to the “ Hochelaga ” that she would pass her green to green.

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The trial judge also dealt with this point, and having found that the “ Hochelaga ” was not keeping to her own starboard side, but was keeping well South of midchannel, said : “ If the ships had kept their courses they would have passed each other at a distance of 600 feet. As the “ Leopold ” was not intending to change her course she was not called upon to give a whistle signal of 2 short blasts.” p. 302, l. 1. p. 302, l. 17.

16. The owners of the “ Hochelaga ” appealed from the Judgment of Mr. Justice Archer to the Supreme Court of Canada. The Appeal was heard on the 17th May, 1929, before the Right Honourable F. A. Anglin, Chief Justice, and Mignault, Newcombe, Lamont and Smith J.J. The Court of Appeal did not disturb the findings of fact of the trial judge or vary his Judgment in so far as he found the “ Hochelaga ” to blame. The Court

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of Appeal, however, found the "Leopold" also to blame on the ground that the "Leopold" committed a breach of Article 25 of the Collision Regulations.

17. In this regard the Court of Appeal accepted the finding of the trial judge that while the vessels were approaching one another the "Leopold" was in midchannel and the "Hochelaga" was to the Southward of midchannel.

p. 337, l. 21. 18. Newcombe, J., who delivered the cardinal judgment of the Court of Appeal, having assumed that the evidence of the "Hochelaga" was true and that she sounded a port helm signal on three different occasions 10
 p. 339, l. 16 *et seq.*
 p. 344, l. 30. at a time when she was showing her red light on the starboard bow of the "Leopold," then said: "It is said that the "Leopold" did not hear the
 p. 340, l. 23 *et seq.* "first two signals, and this perhaps is not surprising, seeing that the sound "would have to carry against a strong head wind; but the situation was "one which should have given the "Leopold" cause for solicitude and for "the exercise of some prudence."

Newcombe, J., then expressed his opinion that the "Leopold" if keeping careful look-out should have discerned the movements to starboard of the "Hochelaga" which accompanied her port helm signals, and that in any case, even if the movements of the "Hochelaga" to starboard were 20
 p. 340, l. 40 *et seq.* not observed by the "Leopold," the "Leopold," being confronted by a green light a little on her starboard bow, "should have realized that, since "she was adopting a course contrary to rule and usual experience, and "since the circumstances were suggestive of an inference that signals from "the "Hochelaga" might not be heard against the wind, it would be "prudent for the "Leopold" to shift her helm and notify her course by "sending down a timely signal to indicate her presumed intention, but "no such precaution was taken."

In a subsequent part of the judgment Newcombe, J., referred again to the question of the "Leopold" sounding some signal and said: "If the 30
 p. 343, l. 16. "Leopold" were in doubt, why did she not endeavour to come to an "understanding by the use of sound signals? It is in the interchange of "these that safety lies in such cases. By her own admission she remained "silent until the collision could not be avoided by compliance with the rule "of the road. The "Hochelaga" having received no warning of the "Leopold's" intention naturally assumed, and was bound to assume unless "the contrary became evident, that the "Leopold" would obey the rule."

19. The Appellants submit that the Judgment of the Supreme Court is wrong and that the "Hochelaga" ought to be held alone to blame for the following among other

REASONS.

- (1) BECAUSE the collision was solely caused by the "Hochelaga" suddenly porting across the bows of the "Leopold" when the vessels were approaching in a position to pass in safety starboard to starboard.
- (2) BECAUSE the "Hochelaga" was navigating up the channel on her wrong side, and continued so to do until by reason of the presence of the "Leopold" it was too late for her to attempt to get to her right side.
- 10 (3) BECAUSE the "Hochelaga" failed to ease stop or reverse her engines in due time or at all.
- (4) BECAUSE on the facts proved by the evidence or found by the trial judge the "Leopold" was not negligent.
- (5) BECAUSE the "Leopold," meeting the "Hochelaga," which was coming up in her wrong water but all clear starboard to starboard with the "Leopold," was not negligent in maintaining her course in midchannel, and in a position to pass the "Hochelaga" in safety starboard to starboard.
- 20 (6) BECAUSE the "Leopold" did not commit any breach of Article 25 of the Collision Regulations in as much as it was not under the circumstances safe and practicable for her to keep to that side of the fairway or midchannel which lay on her starboard side.
- (7) BECAUSE, even if the "Leopold" committed a breach of Article 25, such breach did not contribute to the collision.
- (8) BECAUSE the judgment of the trial judge was right.

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(Plaintiff) Appellant

AND

S.S. "HOCHELAGA."

(Defendant) Respondent.

CASE ON BEHALF OF THE
APPELLANT.

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