

June 13.
 1911

QUEBEC ADMIRALTY DISTRICT.

THE CANADIAN PACIFIC RAILWAY COMPANY,

PLAINTIFF;

v.

THE STEAMSHIP "KRONPRINZ OLAV,"

DEFENDANT.

AND

JOHAN BRYDE,

PLAINTIFF;

v.

THE STEAMSHIP "MONTCALM,"

DEFENDANT.

Damages—Collision—Regulations 19, 21, and 27 International Rules of Road—Common Fault—Negligence.

On September 24, 1910, at about 4 o'clock a.m. the "Kronprinz Olav" and the "Montcalm" came into collision in a narrow channel in the St. Lawrence River at a point some 50 miles below Quebec. The night was clear and the weather fine with a light northerly wind, and the vessels sighted each other when about 6 to 9 miles apart. Both ships carried all regulation lights.

The "Kronprinz Olav", outward bound, kept to her side of the channel for a time, but shortly before the collision she starboarded her helm and threw herself across the channel. She failed to give right of way to the "Montcalm" and placed herself across her bows, at the same time giving two blasts, for cross signal. The "Montcalm" was then to her starboard side and she (Kronprinz Olav) kept full speed ahead until the collision. She was struck on starboard side abaft the bridge. She took none of the precautions required by ordinary practice of seamen and did not have sufficient competent officers on duty and failed to stand by after collision.

The "Montcalm" was coming up the river with a young tide and when about 3 miles away gave a one-blast signal, indicating she would keep to her starboard side. For a short time she necessarily showed her green light, owing to a curve in the channel, but kept on her side until within 3 minutes of collision, when the other gave her second cross signal, she was skilfully navigated and all her move-

ments were proper, but she failed to reverse her engines in time and the collision was contributed to by her negligent navigation immediately prior to the accident, and the fact of her not reversing engines in due time. She reversed her engines about one minute and a half after the cross signal, and about same time before collision.

Held,—That as both vessels were guilty of negligence they were at fault, and both were equally responsible for the accident.

Reporter's Note.—There was an appeal and cross appeal to the Supreme Court of Canada which affirmed the judgment of Dunlop, J. The "Montcalm" appealed to the Privy Council and, on August 1, 1913, judgment was delivered, exonerating her from all blame, and reversing the judgment of the Supreme Court, and confirming the dissentient opinion of Sir Louis Davies in the said Supreme Court.

The judgment of the Privy Council is reported at 14 D. L. R. 46, but it is thought advisable to have it printed here to complete the report. (see post p. 156).

THE Canadian Pacific Railway Company, owners of the "Montcalm," took action against the "Kronprinz Olav" for damage to its ship, in collision with the latter, and the owners of the "Kronprinz Olav" also took action against the steamship "Montcalm" for damages it suffered in the same collision.

The actions were consolidated and tried as one on February 16 and 17, 1911.

F. E. Meredith, K.C., and *A. R. Holden*, K.C., for the steamship "Montcalm" and its owners.

H. Mellish, K.C., and *R. O. McMurtry*, K.C., for the steamship "Kronprinz Olav" and its owners.

The owners of the "Kronprinz Olav," in their pleadings, allege in substance as follows:

(1) That he has suffered damage by reason of a collision between his steamship the "Kronprinz Olav" and the defendant steamship "Montcalm," which was solely caused by the negligent navigation of the "Montcalm"; (2) that about 3.40 a.m. on September 24, 1910, the "Kronprinz Olav" was pro-

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ceeding down the St. Lawrence River below the Stone Pillar light; the weather was fine, clear moonlight and wind light northerly; the tide about $1\frac{1}{2}$ miles per hour flood. She was proceeding on a course north-east by compass—variation $\frac{1}{4}$ point west at a speed of $11\frac{1}{2}$ knots, about midchannel, in the river, exhibiting the regulation masthead and side-lights for a steamer underway and keeping a good look-out; (3) under these circumstances those on board observed the mast head light and the green light of a steamship, which proved to be the "Montcalm" coming up the river diagonally 4 or 5 miles distant and a little on the port bow of the "Kronprinz Olav," whose course was thereupon changed half a point to starboard so as to bring her on the starboard side of the river channel: Notwithstanding this, the "Montcalm" continued showing her green light, and not exhibiting her red light for about 8 or 9 minutes, and crossed the bow of the "Kronprinz Olav" and came over to her own port side; to avoid an otherwise inevitable collision, the "Kronprinz Olav" then altered her course to port, indicating the same by two short blasts on her whistle at the same time, the "Montcalm" altered her course to starboard, without giving at the time any signal, and followed the "Kronprinz Olav" up under a port helm, and coming on at great speed, struck the "Kronprinz Olav" on her starboard side with the port side of the stern and port bow of the "Montcalm," thereby doing the "Kronprinz Olav" great damage; (4) the "Montcalm" improperly failed to keep to the starboard side of the midchannel and improperly failed to pass the "Kronprinz Olav" port side to port side; (5) the "Montcalm"

wrongfully crossed the bow of the "Kronprinz Olav"; (6) and thereafter wrongfully ported and came to starboard; (7) a good lookout was not kept on board the "Montcalm"; (8) and she wrongfully failed to indicate the change of her course to starboard by her whistle and (9) improperly failed to slacken her speed or stop or reverse her engines or to do so in due time; (10) the said collision was occasioned by or contributed to by the negligent navigation of the "Montcalm" and they claim (1) judgment against defendant and her bail for damages occasioned by reason of said collision and costs; (2) a reference to the Registrar assisted by merchants to assess the amount of said damages;

The owners of the "Montcalm" in their action in one case, and defence in the other, allege in substance, as follows:—

(1) That at about 3.55 o'clock a.m., on September 24, 1910, the steamship "Montcalm" of which plaintiff was and is owner, whilst on a voyage up the river St. Lawrence, was at about 50 miles below the City of Quebec; (2) she had her masthead light and optional additional white light, as well as her green and red starboard and port lights, all burning brightly, and a good lookout was being kept; (3) the wind at the time was a moderate north-west breeze and the weather was cloudy, but clear and fine, while the tide as at "young flood," running with the S.S. "Montcalm"; (4) she was proceeding up the winding river channel at about 11 knots, through the reach between the Upper Traverse Lighthouse and the Channel Patch Buoy, when she saw the white light of a vessel which turned out to be the "Kronprinz Olav" in the reach between the Stone Pillar

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and the Channel Patch Buoy, which was apparently about 4 miles away and on her way down the river; and the red light also became visible soon after; (5) the lights of the "Kronprinz Olav" were first seen about a point on the "Montcalm's" starboard bow, as was to be expected owing to the bend in the river channel at the Channel Patch Buoy and the consequent angle between the directions of the respective courses of the two vessels as they approached that buoy on different sides; (6) as the two ships approached each other in their respective reaches of the river channel after their lights became visible to each other, the "Montcalm" necessarily showed her green light to the "Kronprinz Olav" and the latter her red light to the "Montcalm" owing to the nature of the winding channel in that part of the river. As soon as the "Montcalm" got far enough along her reach of the channel to enable her to show her red light to the "Kronprinz Olav," the "Montcalm" did so by porting her helm and at the same time gave one short blast on her whistle. This brought the "Kronprinz Olav's" red light about $\frac{3}{4}$ of a point on the "Montcalm's" port bow, as the two ships were getting nearer the Channel Patch Buoy from above and below respectively. The "Kronprinz Olav" had been continually showing her red light, but shortly after this her green light suddenly appeared to those on board the "Montcalm" and her red light was shut out at the same time; and then the "Kronprinz Olav" blew two short blasts on her whistle. The "Montcalm" then repeated her one-blast signal and her helm was put hard-a-port, but the "Kronprinz Olav" again answered by two blasts and kept her helm hard-a-starboard. The

“Montcalm” repeated her one-blast signal again, which was again answered by two blasts from the “Kronprinz Olav,” which came right on, chasing the “Montcalm” out of the channel to the northward: the “Montcalm’s” engines were at once put full speed astern, but the “Kronprinz Olav” came on at full speed across the “Montcalm’s” bow and struck her a severe blow. The “Montcalm” then signalled by Morse lamp to see if the other ship needed assistance, but got no answer; and her master also hailed the “Kronprinz Olav” twice through the megaphone for the same purpose, but the latter went back to Quebec without answering; (7) the collision occurred some distance to the north of the Channel Patch Buoy, the starboard side of the “Kronprinz Olav” near the foremast striking the “Montcalm’s” stern, knocking it over from port to starboard and breaking the stem-bar; and the “Kronprinz Olav” then swung in and her starboard quarter injured the “Montcalm” amidships; (8) the “Kronprinz Olav” did not keep to her own side of the channel; (9) improperly cut across the “Montcalm’s” bows; (10) improperly starboarded her helm when the ships were getting nearer together; (11) did not follow the proper course in the river channel and ignored its requirements as the vessels were approaching each other; (12) improperly refused and neglected to give the “Montcalm” the right of way as the latter came up with the tide; (13) did not observe and obey the “Montcalm’s” one-blast signal, but improperly replied with a cross signal of two blasts; (14) did not stop and reverse in sufficient time, or at all; (15) did not have due regard to the local conditions and to the special circumstances due

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to the narrow, winding channel; (16) did not keep a proper lookout; (17) neglected the precautions required by the ordinary practice of seamen under the circumstances and disobeyed the International Rules of the Road applicable; (18) did not have sufficient or competent officers on duty; (19) nor sufficient or competent watch on duty; (20) that the collision and the damages and losses consequent thereon were occasioned by the negligent and improper navigation of those on board the "Kronprinz Olav"; and (21) plaintiff claims; (1) a declaration that it is entitled to the damage proceeded for; (2) the condemnation of the defendant and its bail in such damages and costs; (3) to have an account taken with the assistance of merchants and (4) such other or further relief as the nature of the case may require.

After referring to pleadings in both cases, the Hon. Mr. Justice Dunlop in his reasons as filed, gives the facts as follows:

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DUNLOP, D. L. J. A. (June 13, 1911), delivered judgment. (Recital of the pleadings is omitted).

"By Order of the Deputy Registrar of date November 28, 1910, in conformity with rule No. 156, the present two actions were joined for the purpose of proof and argument; that is to say, that one trial only was to be held upon the merits of the two actions, and that the proof so made should avail as proof in both cases to all items and purposes; and by consent of the parties it was agreed that all the evidence made before Captain Demers, Wreck Commissioner, upon the Government investigation into the cause of the collision that gave rise to the pres-

ent actions should be accepted by the Court and avail as evidence in the said Admiralty actions as fully and effectually in every way as though each and all of the said witnesses appeared and gave evidence for both of the parties to these actions but with the reservation that either or both of the parties to these actions shall have the right to make such additional evidence in the Admiralty trial by the same or other witnesses as they might hereafter deem expedient, as appears by the consent of record, dated at Montreal, November 25, 1910.

In case No. 268, the owner of the "Kronprinz Olav" claims \$15,000 from the Canadian Pacific Railway Company for damages caused to the said "Kronprinz Olav," by the steamship "Montcalm," the property of the C. P. R. Co., while on the other hand in case No. 271, the C. P. R. Co. claims from the steamship "Kronprinz Olav," the sum of \$25,000 as for damages alleged to be suffered by the "Montcalm," resulting from the collision in question.

The question at issue in the present case is as to whether the "Kronprinz Olav" or the "Montcalm" was liable for the damages resulting from the collision between the two steamships, which took place at or about 3.50 a.m. on September 24, 1910, when the "Kronprinz Olav" was proceeding down the River St. Lawrence below the Stone Pillar Light.

After a very careful examination of the very voluminous evidence and the able arguments submitted by the counsel of the respective ships, in these two actions, I am of opinion that the question involved in these two actions narrows itself down to the application of Rule 25 of the International Rules of the Road and Rules 19 and 21 read together. R. 27 must

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be read in conjunction practically with every one of the other rules. R. 25 is the narrow channel rule. R. 27 is the rule that requires every ship in obeying and construing these rules to have due regard to all the dangers of navigation and collision and to any special circumstances which might render a departure from the rules necessary in order to avoid immediate danger.

Rules 19 and 21 taken together are to the effect that a ship that has the other on her starboard side has the obligation of keeping out of the way of the other, and the other, under such circumstances, has to keep her course and speed. These appear to me to be the rules that are applicable to this case. The sailing instructions contained in the "St. Lawrence Pilot," issued by the English Admiralty, are of extreme importance, and a copy of this work has been filed in the present actions.

It must be remembered that the collision in question occurred in a narrow river channel and not in the open sea, and that the main thing, under such circumstances, is for each ship to obey R. 25 and keep her starboard side. Rule 25 reads as follows:

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

But of course if they have to round buoys and there is a certain amount of angle between the respective courses, and they are on the opposite sides of the buoys, the important thing is to keep their own side of the channel when passing the buoys. It makes no difference to the ship above the buoys whether the ship below them is on her starboard

side or port side. In these cases the evidence shows that the "Montcalm" was never on the wrong side of the fairway.

One of the members of the Wreck Commissioners' Court who heard the evidence, asked the pilot of the "Kronprinz Olav" whether he knew the course a ship would take coming from the upper Traverse to the Channel Patch Buoy. The pilot answered "yes," and added that it was "the same course as we took." Then a member of the Court said: "Why did you not wait? Why did you starboard?" (as it is proved the "Kronprinz Olav" did). "Why did you not wait then if you saw her green light on your starboard bow at some point? Why did you not wait and let her come round the buoy?" To these questions the pilot had no explanation to give.

As I said before, these cases have narrowed down practically to R. 25. There is no question of lights on either side, and I do not think there should be any question as to the lookout. The jurisprudence shows that where a ship is navigated wrongfully, then the question of the lookout is of great importance. It is proved that the pilot and officers on the bridge, and wheelsman and the master of the "Montcalm" all saw the "Kronprinz Olav" so clearly and knew so well what was happening, that no importance as regards the "Montcalm" should be attached to the evidence concerning the lookout, even if it were unfavorable, which it is not.

Reference on this point might be made to Marsden's "*Collisions at Sea*," a well known authority p. 474, 6th ed., where we read:—

"In another case it was held that the absence of a lookout on board a vessel will cause her to be held

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"in fault for a collision unless it is proved that the
"other ship was seen as soon as it was possible to
"see her and that the proper steps to avoid her were
"taken as soon as it was possible to take them."

When the collision in question occurred, the weather was fine and clear, wind light northerly, the tide about 1½ miles per hour flood; and the important thing for the "Kronprinz Olav" was to remain on her own side of the channel. If she had done so and waited a moment or two, the accident, in my opinion, might have been avoided.

The evidence discloses that the "Montcalm" was bound for Montreal. Her master, when he turned in the night before the collision, had left instructions to be called at Cape Goose, some 15 miles below the scene of the collision. He was called at that point and went up on deck, as his evidence shows, and seeing that it was a fine, clear night, he said to the bridge officer: "I am going to lie down on the settee. Let me know at once if you need me for any reason." Then he went back to his chart room and laid down. The pilot and the bridge officer, Carver, were on the bridge with the wheelsman, Polkinghorn, and it is proved that until about the time they reached the Lower Traverse, they had been steering entirely by compass. From that point on, the pilot, as he explains in his deposition, instructed the wheelsman as to the leading lights, while he, the pilot, at the same time used the compass. Then between the Upper Traverse and the Channel Patch Buoy is Buoy No. 61, an unlighted buoy which I believe they did not see that night, and which indicates the southern limit of the channel at a point nearly half way between the Upper Traverse and

the Channel Patch Buoy. The evidence shows the course they took from the Upper Traverse to Buoy No. 61. At Buoy No. 61 they starboarded their helm a little, made a course somewhat more to port, which course they kept until they got the Algernon Rock Light above them up stream open to the south of the Channel Patch Buoy Light. It is here where the important part of the navigation commences. I think that the movements of the "Montcalm" had been proper from the time when the "Kronprinz Olav's" lights were first observed until the moment when the "Kronprinz Olav" sounded the two-blast signal for the second time.

The Court avails itself of the valuable service of Captain James J. Riley, a mariner of experience, holding a certificate of competency as master from the British Board of Trade, No. 82599, now engaged in important public service, namely, Superintendent of Pilots and Examiner of Masters and Mates and Directors of the Nautical College, and upon whose judgment and opinion I shall find it my duty to rely, as to whom I have submitted the following questions and whose answers are appended thereto, namely:—

"Q. Could the steamers "Kronprinz Olav" and "Montcalm" under the circumstances of this case, "as disclosed in the evidence, by the exercise of "reasonable care on the part of the officers navigating them, have avoided the collision in question in "this case?"

"A. Yes. From the evidence given in this case, it "does not appear that all possible precautions were "taken by the navigating officers and crew of "the 'Kronprinz Olav.' They had the right-of- "way (see Rule 25) and should have kept it and

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"signalled their intention to do so; but failed in
 "this matter. When fear of a collision seized the
 "navigating officers and crew of the 'Kronprinz
 "Olav,' they failed to observe R. 25 and to comply
 "with RR. 27 and 29 in a seaman-like manner, and
 "instead of slowing down, and reversing if neces-
 "sary, they kept at full speed up to the time of the
 "collision. They saw the masthead lights of
 "the 'Montcalm' in line at the time or a little after
 "the first order was given to starboard, and after
 "this, they gave two orders to starboard, the last
 "one being a hard-a-starboard. They then ran
 "athwart the bows of the steamer 'Montcalm.'
 (See art. 19, Rules of the Road).

The navigating officers and crew of the Steamer
 "Montcalm" failed to comply with RR. 27 and 29
 with sufficient promptness. When the first cross
 signal was heard on board the "Montcalm" from
 the "Kronprinz Olav," and when first the green
 light was seen, the engines of the "Montcalm"
 should have been stopped and reversed at once; and
 the reversing signal should have been sounded.

I find certain material facts proved. Amongst
 others, that when the collision took place the night
 was clear and fine; that the vessels had seen each
 other when a distance of from 6 to 9 miles away;
 that for sometime before the collision, the "Kron-
 prinz Olav" was keeping to her own side of the
 channel, and the "Montcalm" was under a little
 starboard helm to get Algernon Rock Light clear of
 the Channel Patch Buoy. The "Kronprinz Olav"
 starboarded her helm and threw herself across the
 bows of the "Montcalm" in this narrow channel,
 with the dangerous channel Patch close to her. The

“Montcalm” reversed and went full speed astern about a minute and a half before the collision, and the “Kronprinz Olav,” which then had the “Montcalm” on her starboard side, continued at full speed ahead until the time of the collision, when the bow of the “Montcalm” struck the “Kronprinz Olav” abaft the bridge on the starboard side, causing considerable damage to both vessels.

The master of the “Montcalm” was on the deck of his vessel when she was some 15 miles from the scene of the collision and retired to his cabin, but was afterwards called when the officers on watch discovered that the “Kronprinz Olav” had altered her course and blown cross signals, and exhibited her green light. He was alarmed to find the masthead and green lights of the “Kronprinz Olav” in view; and on going on deck three minutes before the collision, he blew one blast to show that his ship’s course was being directed to starboard, and in about a minute or two afterwards, put his engines full speed astern and succeeded in reducing the ship’s speed ahead to about 9 knots at the time of the collision. The navigating officer and pilot of the “Montcalm” very plainly and clearly declare that before the “Kronprinz Olav” showed her green light, the two ships were red to red for an appreciable space of time.

The master of the “Montcalm” was on the bridge of his vessel with the navigating officer and pilot and wheelsman for about 3 minutes before the collision.

The master of the “Kronprinz Olav” was asleep in his bed and was called by his first officer about a minute before the collision took place. He had gone as far as his cabin door when he says he saw that the

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"Montcalm's" stem was about 40 or 50 feet away.

I think that the course steered by the "Montcalm" was a perfectly proper one in a narrow channel such as she was in; and this is corroborated by the statement of the pilot of the "Kronprinz Olav". I find also that the navigation of the "Montcalm" until shortly before the collision, was the usual navigation for a steamer coming up through the reach between the Traverse and the Channel Patch Buoy.

There is another uncontested fact, and that is that the "Kronprinz Olav" commenced by porting, knowing the channel was a narrow one and that the proper side for the "Kronprinz Olav" was the starboard side, and just about the time the masthead lights of the "Montcalm" came in line, showing she was straightening up to take her own side of the Channel Patch Buoy, the "Kronprinz Olav" starboarded. The chief officer of the "Kronprinz Olav" said that at the moment he saw the green light of the "Montcalm" and knew they had to pass port to port, he ported on that account, and after the green light of the "Montcalm" had got, as he thought, on his starboard bow, or perhaps a little ahead, which is more likely—at all events in some position where the "Montcalm" could port and take the next reach to go south of the Channel Patch Buoy the chief officer says he starboarded. This is an important fact. It does not seem to me to be of great importance whether the collision occurred due north of the Channel Patch Buoy, as contended by the witness of the "Montcalm", or due east of the said Buoy, as contended by the witnesses of the "Kronprinz Olav". The evidence shows that when the "Kronprinz Olav" starboarded, the steamships were at

least 3 miles apart. The speed of the "Montcalm" was about 12 knots and the tide was running young flood at the rate of about 1½ miles, which made her ordinary speed up to the time her engines were reversed about 13 knots. The master of the "Montcalm" went on the bridge about 3 minutes before the collision, and blew one whistle blast himself, and after so doing he ordered full speed astern about 1½ minutes before the collision. We will afterwards consider the effect of this manoeuvre.

The master of the "Montcalm" was on the bridge with his bridge officer, his pilot and his wheelsman. Hearing the second blast whistle, that is, the cross signal of the "Kronprinz Olav" and seeing the improper manoeuvre of the "Kronprinz Olav" in star-boarding as she did, he blew one blast of the whistle to show that he was putting his helm aport and obeying the Rules of Navigation, and immediately after, owing to the manner in which the other ship was going, he put the "Montcalm" full speed astern. The "Kronprinz Olav" blew cross signals a second and third time and came on at full speed, and her chief officer, notwithstanding the speed at which the "Kronprinz Olav" was going, himself cast the anchor, a most extraordinary step to take under the circumstances of this case.

As I have said before, as to the navigation of the ships, I have consulted the nautical assessor, a gentleman of great experience and thoroughly conversant with that portion of the river and its surroundings where the accident occurred, and in his answers to the questions submitted to him, declares that both vessels were in fault for the collision in question for the reasons in his said answers given;

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and I concur in the opinion arrived at by him, after a most careful consideration of the documents and the voluminous evidence taken in these cases.

Therefore, in my opinion, the damages must be equally borne by both ships, both being in fault, each ship being liable for one half the damages suffered by the two ships.

I find that the "Kronprinz Olav", her owners, officers and crew were in fault (1) because she did not keep to her own side of the channel; (2) she improperly cut across the bow of the "Montcalm"; (3) she improperly starboarded her helm when the ships were coming nearer together; (4) she did not follow the proper course in the river channel, and ignored the requirements as to vessels that were approaching each other; (5) she improperly refused and neglected to give the right-of-way to the "Montcalm" as she came up with the tide; (6) she **did not stop** in sufficient time or at all, and she did not have due regard to the conditions and the special circumstances due to the narrow channel; (7) she neglected the precautions required by the ordinary practice of seamen under the circumstances and disobeyed the International Rules of the Road; (8) she did not have sufficient and competent officers on duty; (9) after the collision she was in fault in not standing by to ascertain the condition of the steamer "Montcalm" with which she had collided;

I also find that the "Montcalm", her officers and crew were also in fault because (1) she improperly failed to stop or reverse her engines in due time; (2) that said collision was contributed to by the negligent navigation of the "Montcalm" by her officers and crew immediately prior to the accident by

their failure to have her engines reversed in due time, and the reversing signal should have been sounded.

I am consequently of opinion that both actions must be maintained only to the extent hereinafter mentioned, as I find that both ships were to blame; and I adjudge that the damages rising out of the said collision to the steamship "Kronprinz Olav" as well as to the steamship "Montcalm", shall be borne equally by the said two steamships, one-half by each vessel as provided by c. 113, s. 918 of the R. S. C., entitled "An Act Respecting Shipping in Canada" which reads: "918.—In any cause or proceeding for damages arising out of a collision between two vessels, or a vessel, and a raft, if both vessels or both the vessel and the raft are found to have been in fault, the rules in force in His Majesty's High Court of Justice, in England, so far as they are at variance with the rules in force in the Courts of common law, shall prevail, and the damages shall be borne equally by the two vessels, or the vessel and the raft, one-half by each." R.S. 79, s. 7.

And condemn the said steamship "Montcalm", her owners and her bail given on her behalf to pay to the plaintiff, owner of the steamship "Kronprinz Olav" one-half of the damages arising out of the said collision and further doth condemn the plaintiff owner of the steamship "Kronprinz Olav" and the said steamship "Kronprinz Olav" and her bail given on her behalf to pay to the C. P. R. Co., owner of the steamship "Montcalm" one-half of the damages arising out of said collision; and I order that an account should be taken and refer the same to

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the Deputy Registrar, assisted by merchants, to report the amount due for both claims, and that all accounts and vouchers in support thereof shall be filed within 6 months; and I further order and adjudge that the parties to the present suit shall respectively bear their own costs of said action.

Judgment of the Lords of the Judicial Committee of the Privy Council on the consolidated Appeals of *The Canadian Pacific Railway Company v. The Steamship "Kronprinz Olav"*; and of the *Steamship "Montcalm" v. Johan Bryde*, from the Supreme Court of Canada.

Present at the hearing: LORD ATKINSON, LORD MERSEY, LORD MOULTON, LORD PARKER OF WAD-
DINGTON.

Nautical Assessors: Rear-Admiral Robert N. Ommanney, C. B., Commander W. F. Caborne, C.B., R.N.R.

LORD MERSEY (August 1, 1913) delivered judgment of the Board:

These are appeals from a judgment of the Supreme Court of Canada affirming by a majority the judgment of the Deputy Local Judge in Admiralty at Montreal in two cross actions for damages by collision.

The collision happened on September 24, 1910, in the St. Lawrence River between two steamers named the "Kronprinz Olav" and the "Montcalm". Both vessels sustained damage and thereupon cross actions were commenced in which the owners of each vessel alleged that the other vessel was alone to blame. Before the trial took place a wreck inquiry was held in the course of which a large body of evidence was collected from the crews of both vessels. By agreement the notes of this evidence were used at the trial of the cross-actions, and they formed the only material before the learned judge. He saw none of the witnesses. The two cross-

actions were tried as one, and in the result the learned judge (who was assisted by a nautical assessor) found both ships to blame.

There were then cross-appeals to the Supreme Court which were heard before the Chief Justice and four other judges. Three of these five judges confirmed the judgment of the judge of first instance. One judge was of opinion that the "Olav" was alone to blame, and another judge was of opinion that the "Montcalm" was alone to blame. The result was that both appeals were dismissed. The present appeal to this Board is brought by the owners of the "Montcalm" only. The owners of the "Olav" no longer contest their liability. Thus the only question for the determination of their Lordships is whether any blame attaches to the "Montcalm" in relation to the collision. Blame is imputed to her on one ground only, namely, that she was guilty of negligence in failing to reverse her engines in proper time before the collision.

This narrowing of the issues between the parties makes it unnecessary to deal with the facts at any great length. The material circumstances are as follows: At 4 a.m. on the morning of September 24, 1910, the "Montcalm", a screw steamer of 5,500 tons gross register, was proceeding up the St. Lawrence River. At the same time the "Kronprinz Olav", of 3,900 tons gross register, was proceeding down the river. The night was dark but clear, the wind light and the tide

flood of the force of 1½ knots. Both vessels entered a narrow channel in the river in which it was the duty of each to keep to the side of the fairway on her own starboard side. The "Olav" did not observe this rule, but negligently made for the "Montcalm's" side of the channel, cutting across the "Montcalm's" bows. A collision became imminent and thereupon the "Montcalm" reversed her engines but unfortunately not in time to avoid the collision.

It is said on the part of the "Olav" that those in charge of the "Montcalm" ought to have recognized sooner than they did the danger created by the bad navigation of the "Olav" and by a timely reversal of the "Montcalm's" engines ought to have averted it.

In considering this question it is necessary to bear in mind that the onus of proving the alleged negligence rests on the "Olav" and that it is an onus which can only be discharged by clear and plain evidence. Very little of the evidence adduced at the trial bore upon this question of the reversal of the "Montcalm's" engines; and an examination of what evidence there was fails to support the charge. The narrative of the collision covers only a few minutes of time and according to the finding of the trial judge the "Montcalm" reversed and went full speed astern about one minute and a half before the collision took place. That the risk of collision had not been realized and was not apparent before this time seems to be clear from the evidence of the "Olav's" navigating officer Toft-Dahl. This witness appears not to have been in fear of a collision until one minute before the event, for it was not until then that he called his captain on deck, and even after this the "Olav" kept her speed, and continued to keep it until the moment of the collision. It seems to their Lordships impossible to say in the face of this

evidence that the captain of the "Montcalm" was negligent in not realizing before he did that the risk of collision was imminent; and even if he can be said to have miscalculated the time by some few seconds the very gross negligence in the navigation of the "Olav" was well calculated to confuse him and to cause the error. He was, moreover, fully justified in expecting that the "Olav" would realize the dangerous position into which she had brought herself and would try to remedy it by herself reversing.

It is worth while to examine shortly the grounds upon which the judges in the Courts below based their judgments in so far as they related to the alleged negligence of the "Montcalm". The trial judge expresses his opinion that the movements of the "Montcalm" had been proper from the time when the "Olav's" lights were first observed until the moment when the "Olav" sounded a two-blast signal for the second time. According to the evidence from the "Montcalm" (which there appears no reason to disregard) the engines were reversed almost at once after this signal. Yet the trial judge after expressing his opinion that there had been no negligence on the part of the "Montcalm" up to this point, seems then to have surrendered his judgment to the advice of the nautical assessor who sat with him and to have adopted and given effect to an expression of that gentleman's opinion that the "Montcalm" had failed to reverse with sufficient promptness. That the "Montcalm" did not reverse in time to avoid collision is, of course, true, but the learned judge seems to have thought that this bare fact was equivalent to proof of negligence. It was not so. It was consistent with proper care in the navigation of the ship, and in any event it fell very far short of proof of negligence. Turning then to the judgments of the learned judges

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in the Court of Appeal it will be found that the Chief Justice was not satisfied with the judgment of the Court of first instance and yet because of the imperfect evidence he felt himself unable to interfere with it. It can scarcely be said that this amounts to an expression of opinion that the "Montcalm" had been guilty of negligence. The next judge (Davies, J.) after an examination of the evidence came to the conclusion that no blame attached to the "Montcalm". The third judge (Idington, J.) made no reference to the question of the failure of the "Montcalm" to reverse earlier than she did. He appears to have been of opinion that the "Montcalm's" navigation was wrong from the first and he came to the conclusion that she was alone to blame. The advisers of the "Olav" do not seem to have concurred with this opinion for they had not the courage to attempt to support it at their Lordships' Bar. The fourth judge (Duff, J.) contents himself with saying that he concurs in the dismissal of both ap-

peals. The last and fifth judge (Anglin, J.) mentions the allegation of negligence on the part of the "Montcalm" in not sooner reversing, and says that there was an implied duty on her part to reverse when the "Olav's" second signal was given. The answer, however, to this observation seems to be that in truth this was when she did reverse.

Neither in the evidence nor in the judgments in either Court below are their Lordships able to find satisfactory ground for saying that the "Montcalm" was guilty of any negligence whatever contributing to the disaster. They think that the right view of the matter was taken by Davies, J., and that accordingly these appeals ought to be allowed and with costs here and below. They will humbly advise His Majesty accordingly.

Solicitors for owner of "Montcalm" — Meredith, MacPherson, Hague & Holden.

Solicitors for owners of "Kronprinz Olav" — Brown, Montgomery & McMichael.