

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 (P. C. Appeals Nos. 5 and 6 of 1913); delivered the 1st August 1913.

PRESENT AT THE HEARING :

LORD ATKINSON.

LORD MERSEY.

LORD MOULTON.

LORD PARKER OF WADDINGTON.

Nautical Assessors :

REAR-ADMIRAL ROBERT N. OMMANNEY, C.B.

COMMANDER W. F. CABORNE, C.B., R.N.R.

[DELIVERED BY LORD MERSEY.]

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 the 24th September 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 the 24th September 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 $1\frac{1}{2}$ 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 recognised 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 realised 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 realising 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 realise 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 "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 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 (Mr. Justice Davies) after an examination of the evidence came to the conclusion that no blame attached to the "Montcalm." The third judge (Mr. Justice Idington) 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 (Mr. Justice Duff) contents himself with saying that he concurs in the dismissal of both appeals. The last and fifth judge (Mr. Justice Anglin) 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 Mr. Justice Davies, and that accordingly these appeals ought to be allowed and with costs here and below. They will humbly advise His Majesty accordingly.

In the Privy Council.

THE CANADIAN PACIFIC RAILWAY
COMPANY

v.
THE STEAMSHIP "KRONPRINZ
OLAV."

THE STEAMSHIP "MONTCALM"
v.
JOHAN BRYDE.

DELIVERED BY LORD MERSEY.

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