

To be substituted for copy Judgment previously issued. The words "wished to pass green to green or by a one-blast signal that she" have been inserted in line 10 of the last paragraph on page 6.

Privy Council Appeal No. 53 of 1930.

S.S. "Leopold L. D."	-	-	-	-	-	-	-	<i>Appellant</i>
								<i>v.</i>
The Hochelaga Steamship Company, Limited	-	-	-	-	-	-	-	<i>Respondents</i>
Louis Dreyfus and Company	-	-	-	-	-	-	-	<i>Appellants</i>
								<i>v.</i>
S.S. "Hochelaga"	-	-	-	-	-	-	-	<i>Respondent</i>
The Hochelaga Steamship Company, Limited	-	-	-	-	-	-	-	<i>Appellants</i>
								<i>v.</i>
S.S. "Leopold L. D."	-	-	-	-	-	-	-	<i>Respondent</i>
S.S. "Hochelaga"	-	-	-	-	-	-	-	<i>Appellant</i>
								<i>v.</i>
Louis Dreyfus and Company	-	-	-	-	-	-	-	<i>Respondents</i>
								<i>(Consolidated Appeals)</i>

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 4TH DECEMBER, 1931.

Present at the Hearing :

VISCOUNT DUNEDIN.
LORD BLANESBURGH.
LORD MERRIVALE.

Nautical Assessors :

CAPTAIN A. R. H. MORRELL.
CAPTAIN W. R. CHAPLIN.

[*Delivered by* LORD MERRIVALE.]

The litigation between the parties ensued upon a collision between the appellant's steel screw steamship, the "Leopold L. D.," hereinafter called the "Leopold," and the defendants' steel screw steamship, the "Hochelaga," in a narrow channel in

the river St. Lawrence, below Quebec, in clear weather, at about 2.42 a.m. on November 17th, 1926. The "Leopold" is a vessel of 5,140 tons gross tonnage, 400 feet in length. She was outward bound with a cargo of grain for Naples. The "Hochelaga's" gross tonnage is 4,681 and her length 375 feet, and she was bound up river, laden with coal. The casualty occurred in fine, clear weather; the wind was a south-westerly breeze, "force 5," and the tide the last of the flood.

At the place of collision the St. Lawrence has a width of many miles. The fairway of South Channel, where the vessels were being navigated, is, however, limited by shoals on each hand. It appears to be well lighted and buoyed, and is direct in course, so that vessels situated as were the "Leopold" and the "Hochelaga," navigating up and down stream, have each other continuously in view for several miles.

Following the collision, the owners of each vessel brought an action alleging the other solely to blame. In trying these actions the Judge in Admiralty was at the disadvantage that the bulk of the evidence adduced consisted of the notes of what had been sworn to by numerous witnesses at an inquiry before the Wreck Commissioners of the Dominion. The master of the "Hochelaga" and the pilot of the "Leopold" were, however, called as witnesses. In some particulars wherein the learned Judge and the appellate tribunal have taken somewhat divergent views of the facts this matter is necessary to be borne in mind.

Some outstanding facts in the case were not in dispute before this Board. The collision occurred in about mid-channel. The "Leopold" had proceeded down river on a mid-channel course with a heading of N. 37 E. mag., which she kept till the vessels were perhaps five lengths apart. After the vessels were in view and aware of each other at a couple of miles distance, until presently before they collided the "Hochelaga" was well over on the southern side of the channel—her port side. The width of the deep water available for the two vessels between shoals on either hand is about two cables. In an available waterway of 1,200 feet the "Leopold" approached the "Hochelaga," steaming down in mid-channel, until they were some 2,000 feet apart, and the "Hochelaga"—well aware of the situation—came up river well away on the port side. This they both did in face of the explicit rule laid down in Article XXV of the Regulations for Preventing Collisions at Sea. Article XXV runs thus:—"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."

It was beyond doubt safe and practicable for each vessel to keep to starboard, but neither did. They came into collision and the damage caused was of great amount.

Before the trial Judge there was evidence on the part of the "Hochelaga" that the "Leopold" was seen at a distance of eight or nine miles, that when she was one or two miles off;

coming on in mid-channel, the "Hochelaga" gave a port helm signal of one short blast, ported half a point and steadied; that when she was half or three-quarters of a mile off the "Hochelaga's" master again blew a port helm signal, put his helm hard-a-port and came half or three-quarters of a point more to starboard: and that at about 1,500 feet apart he blew one short blast, put his helm hard-a-port, and kept it there till the collision. Of the helm signals so given the last was the only one heard on the "Leopold." The wind would very likely have prevented them being heard. The master of the "Hochelaga" stated a place of collision 400 or 500 yards to northward of mid-channel, which was consistent with his evidence as to helm action, but was not accepted.

The case for the "Leopold" at the trial was that she came down river, steering by compass on a mid-channel course, that she saw the "Hochelaga" at three miles off, that the "Hochelaga" came up on the south side of the river, with the vessel's lights green to green, that no helm signals were heard from her until the vessels were 1,500 or 1,600 feet apart, and that the "Hochelaga" then suddenly changed her course and came under a hard-a-port helm, showing her red lights only, with the result that, although the "Leopold" put her helm hard-a-port and her engines at full speed astern, collision was unavoidable.

The trial Judge found that the collision took place about mid-channel, that the "Hochelaga" was to blame for keeping "well to the south side" of mid-channel; that the "Leopold" continued her mid-channel course, "thinking that it was the intention of the 'Hochelaga' to meet green to green," that "under the circumstances" it was not practicable for the "Leopold" to try to "keep" to her starboard side of the channel, and so it was good seamanship that her master should keep to mid-channel, and that she was under no obligation to give to the "Hochelaga" any other helm signals than the one short blast she in fact gave at 1,500 or 1,600 feet distance.

The learned Judge was also advised by his assessors that, if the "Leopold" was seen not to be responding to port helm signals of the "Hochelaga" as the vessels advanced, the "Hochelaga" should have reduced her speed or crossed to her starboard side while she could certainly do so in safety. The "Hochelaga," he found, 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," rendering the collision unavoidable. The "Hochelaga's" fault was thus found to be the proximate cause of the collision, and the learned Judge accordingly held the "Hochelaga" alone to blame.

In the Supreme Court the five learned Judges who heard the appeal were unanimous in dissent from the conclusions of the learned trial Judge. Anglin C.J., Mignault J., and Smith J. doubted whether the whole liability of the collision ought not to have been placed upon the "Leopold," but in view of the finding

of fact at first instance that the "Hochelaga" was at all material times on the wrong side of the channel, they accepted the judgment of Newcombe J. (concurring in by Lamont J.) that there was contemporaneous negligence of the two vessels from the time when they were four or five lengths apart, that they were jointly liable, and equally to blame, and should therefore bear in equal shares the damage caused by the collision.

The owners of the "Leopold" appealed to His Majesty in Council for reinstatement of the original judgment on the ground, broadly stated, that the "Hochelaga" was alone to blame for the collision. Before this Board, when the appeal came on for hearing, counsel on behalf of the "Hochelaga" applied—pursuant to notice—for leave to present an appeal on behalf of the "Hochelaga" on the footing that the "Leopold" ought to have been found to have been alone to blame. Leave was given as prayed.

On the hearing of these cross-appeals there was little dispute, if any, either as to the main facts of the case or as to the rules. The controversy was virtually limited to the effect of the facts in determining liability for the collision in view of the rules of navigation contained in the Regulations. In fact, there were stages in the discussion when it was necessary to recall the governing consideration that the actions were in truth actions for negligence, and that since the enactment of the Maritime Conventions Act, 1911, the exceptional presumption of liability for damage in collision cases upon mere proof of non-observance of the Regulations is no longer in force.

The gist of the reasoning upon which judgment was given in the Court of first instance in favour of the "Leopold" was that, in spite of the narrow channel rule, her master, "thinking it was the intention of the 'Hochelaga' to pass green to green"—that is, on the wrong side—was therefore warranted in determining to keep to mid-channel, contrary to Regulation XXV; and that, "seeing the 'Leopold' was not altering her course," the "Hochelaga" should have checked her speed or given more port helm and got across the bow of the "Leopold." The learned Judge said also that, "as the 'Leopold' was not intending to change her course, she was not called upon under Regulation XXV to give a whistle signal." In other words, she was proceeding down river and intending to proceed in mid-channel or on her port side of mid-channel contrary to the Regulations, and so was not called upon to give a signal which involved compliance with the Regulations.

The reasons for the judgment of the Supreme Court whereby the vessels are held jointly to blame are clearly assigned in the judgment of Newcombe J. Its salient conclusions are expressed in the following sentences:—

"The Rules of the Road, usage and good seamanship required that the ships should pass, each on her starboard hand of the channel. The

'Leopold' seems nevertheless to have concluded not to mind these considerations. One would have thought that, although the 'Leopold' did not hear the first two starboard blasts of the 'Hochelaga,' the careful lookout which the case required would have enabled her to discern the starboard movements of the 'Hochelaga' which accompanied these blasts, and that, in any case, being confronted by a green light a little on her starboard bow, even if these were not observed, the 'Leopold' 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."

Their Lordships in the Supreme Court manifestly gave a degree of weight to some of the evidence of the "Hochelaga's" master substantially greater than that given by the learned Judge who saw and heard the witness.

Counsel on behalf of the "Leopold" not only maintained the soundness of the conclusions of the learned trial Judge. One of them, Mr. Wilmer, challenged as contrary to good seamanship, and, indeed, contrary to the Regulations, the view expressed in some passages of the judgments of the Supreme Court, that since the "Leopold," with knowledge of the position of the 'Hochelaga,' was adopting a course not sanctioned by the Regulations, he should have warned the "Hochelaga" of it. He specified these observations: "It would be prudent for her to shift her helm and notify her course by sending down a timely signal to indicate her intention," and, again, "If the '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. . . . She remained silent until the collision could not be avoided." The "Leopold," Counsel said, did not intend to change her course or go to starboard: therefore it would have been a breach of the Regulations for her to give a signal meaning "I am directing my course to starboard." Further, it was argued (as to the suggested warning use of a ship's whistle) the signals directed by the Regulations constitute a fixed code and to have given by whistle or siren any other than those prescribed would have been an illegality.

That the Regulations provide no signal to warn an oncoming ship of an intended breach of rule by an approaching vessel simply emphasizes the peril involved in incurring unwarranted risks. Whether signals not expressly authorized by the Regulations are impliedly prohibited thereby is a question of construction of the Regulations. No instance was cited of any express judicial ruling to that effect. The Court of Appeal considered in the case of "*The Gulf of Suez*," [1921], P. 318, evidence which had been given of the use of a port helm signal by one of two approaching vessels to notify that, though not changing her course, she was porting her helm slightly to counteract the effect of the tide, and doubt was expressed as to whether

such a proceeding was not an infringement of the Rules. Lord Sterndale M.R. inclined to think it was an infringement. "The Regulations," he said, "have fixed what the meaning of the signals is, and I cannot think it is admissible for masters or pilots to use these signals with a different meaning." This related to a suggestion which had been made by Counsel justifying the signal on the ground that vessels were "talking to one another." Two short blasts had, in fact, been blown by each as port helm signals. "If she wanted to call the other vessel's attention," Lord Sterndale added, "probably the right thing for her to do on both occasions was to blow a warning blast." Again, "A blast given more or less as a warning signal, as is often done in the river," was the subject of discussion in the Admiralty jurisdiction in *The Buccari* (35 Lloyd's List Rep. 29).

The House of Lords considered in the case of *The Tovarisch* [1931], A.C. 121, a charge that the exhibition of a green pyrotechnic flare in order to attract attention, such user not being expressly sanctioned by Article XII of the Regulations, was therefore used in breach of the Regulations and the light by implication a prohibited light, and Lord Buckmaster, in stating the conclusions on which the judgment of the House proceeded, read the Regulation and said "This does not prohibit the exhibition of a green light. It permits any light except those that are specially referred to."

What appears upon consideration of the Regulations in the light of the authorities is that signals, other than those specified and prescribed, are given at the risk of the vessel which gives them. The Regulations prescribe signals for specific occasions. Use of them on any other occasion leaves those responsible open to the liability indicated by Lord Sterndale M.R. in "*The Gulf of Suez*." As to "warning blasts" and exchange of whistle notes other than the authorized signals, Regulation 29 may not be wholly irrelevant, but the manifest danger against which the seaman has to guard is that if that be done which is not prescribed it may be misunderstood or misrepresented.

Their Lordships took the opinion of their assessors as to whether when the "Leopold" in mid-channel saw the "Hoche-laga's" green light and realized that the vessels were approaching each other so as to pass in the narrow channel she ought as a matter of seamanship to have continued on her course so as to pass green to green without making any signal to the "Hoche-laga" of her intention to do so. The assessors had no doubt that she ought not. She was able to take off her way or at her pilot's discretion to signify by a two-blast signal after helm action that she wished to pass green to green or by a one-blast signal that she was ready to pass port to port. The assessors were well aware also that seamen upon occasion give whistle blasts which are not mistaken for the prescribed signals, and which are interchanged on the responsibility and at the risk of those who use them.

The assessors were further of opinion that proper precautionary action by both vessels should not have been postponed until the vessels were no more than 1,500 or 1,600 feet apart.

The real question as to the "Leopold" is whether her breach of Regulation 25 was a proximate cause of the collision or was in truth not contributory thereto by reason that without negligent navigation of the "Hochelaga" no damage would have ensued from it.

As to the "Hochelaga" the question is whether, knowing the position and course of the "Leopold," she was warranted in postponing her own transit to her starboard side of the channel to a point of time when she could not cross the bow of the "Leopold" without grave risk of collision. The "Hochelaga," like the "Leopold," held on too long on her unwarranted course, and her initial position was more faulty than even that of the "Leopold," for she was not in mid-channel but well on the wrong side of the river. The occurrence of the collision where it in fact took place demonstrates the danger which was involved.

Both vessels continued their erroneous action until neither could avoid collision, and both were rightly held to blame.

As to measure of blame and apportionment of damage no clearly ascertained facts were brought to their Lordships' attention upon which they find themselves warranted in departing from the decision of the Supreme Court.

Their Lordships will humbly advise His Majesty that both appeals should be dismissed.

There will be no order as to the costs of the appeals, save that the expenses of the nautical assessors and of printing the record will be divided equally between the parties.

In the Privy Council.

S.S. "LEOPOLD L. D."

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THE HOCHELAGA STEAMSHIP COMPANY,
LIMITED.

LOUIS DREYFUS AND COMPANY

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LOUIS DREYFUS AND COMPANY.
(Consolidated Appeals.)

DELIVERED BY LORD MERRIVALE.

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