PERCY CHARLES BONHAM (OWNER OF THE BARGE "MAGGIE,") (PLAINTIFF). } APPELLANT;

AND

THE SHIP "HONOREVA" (DEFENDANT) ..... } RESPONDENT.

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*May 18, 19.
*Oct. 16.

ON APPEAL FROM THE QUEBEC ADMIRALTY DIVISION OF THE EXCHEQUER COURT OF CANADA.

Admiralty law—Navigation of canal—"Narrow channel"—Marine Department Regulations, rule 25—Starboard course—Fairways and mid-channels—"Canada Shipping Act," R.S.C. 1906, *c.* 113, *s.* 916 *—Collision—Liability for damages—Canal Regulations, rule* 22*—Right of way.*

The steamboat "Honoreva" was under way going up the Soulanges Canal and approaching a bridge across the channel which was swung open when she was about 300 feet below it. The steam tug "Jackman" was then observed descending the canal, with the current, at a greater distance above the bridge and also under way. The "Honoreva," in attempting to pass first through the abutments of the bridge (a space of about 100 feet in width), and keeping a course in mid-channel, came into collision with the barge "Maggie," which was being towed by the "Jackman," and the barge was injured and sunk. In an action for damages against the "Honoreva" she counterclaimed for damages sustained by her owing, as alleged, to the negligent navigation of the tug-and-tow.

Held, that the vessels thus navigating the canal were, at the place where the collision occurred, in a "narrow channel;" that article 25 of the rules of the Marine Department respecting the passage of vessels, which requires them when safe and practicable to keep to the starboard in fairways and mid-channels, applied to the navigation of the vessels in question, and that the "Honoreva," having failed to obey that rule, was in fault within the meaning of section 916 of the "Canada Shipping Act," R.S.C., 1906, chap. 113; that there was no negligence proven on the part of the tug-and-tow, and that the "Honoreva" was, therefore, solely liable for the damages resulting from the collision.

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*PRESENT: Sir Charles Fitzpatrick C.J. and Davies, Idington, Anglin and Brodeur JJ.

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Per Davies and Anglin JJ.—Under sub-section *b* of article 25 of the rules of the Marine Department, the down-going tug-and-tow had the right of way, notwithstanding that the up-going vessel may have been closer to the bridge when it was opened, and that the tug-and-tow were not obliged to stop and make fast to posts until the up-going vessel had passed, as is required by the 22nd rule of the "Canal Regulations" in regard to vessels approaching a lock.

APPEAL from the judgment of the Exchequer Court of Canada affirming the decision of Dunlop J., in the Quebec Admiralty Division of the Exchequer Court of Canada, by which the plaintiff's claim for damages was dismissed with costs, and the defendant's counterclaim, on a reference for reconsideration, was maintained.

The circumstances of the case are stated in the judgments now reported.

J. A. H. Cameron K.C. for the appellant.
Heneker K.C. and *Chauvin K.C.* for the respondent.

THE CHIEF JUSTICE.—I concur in the conclusion reached by Mr. Justice Idington.

DAVIES J.—I concur in the opinion stated by Mr. Justice Anglin.

IDINGTON J.—This is an appeal against the judgment of the Exchequer Court maintaining a judgment of Mr. Justice Dunlop in favour of respondent.

The appellant sued as owner of the barge "The Maggie" sunk and lost or damaged by reason of a collision with the respondent in the Soulanges Canal when being towed by the tug "Frank Jackman" down said canal and about to enter the Red River bridge, crossing said canal.

It seems quite clear that the collision took place west of the bridge and, according to respondent's

factum, when her stern was opposite the "West Rest Pier."

The respondent was moving westerly and the tug-and-tow easterly.

The bridge is a swing bridge and when opened rests with either end on a cement pier. The easterly one is known as the "East Rest Pier" and the westerly one as the "West Rest Pier."

The entire distance between the easterly side of the "East Rest Pier" and the westerly side of the other is a little over three hundred feet. The entire length of the bridge is a little over two hundred and twenty feet. It swings on a pivot half way between these piers. It is less than forty feet in width and occupies in itself but little space.

The water channel between the cement walls on either side of the canal underneath the bridge and its sweep of space in opening or closing and between these piers is one hundred and two feet in width—or a few feet less in width than the general width of the canal for a long distance on either side of the bridge.

The water is of the same depth between the cement walls belonging to the bridge structure and that in the bottom of the canal on either side thereof.

In fact, the only practical difference in the channel passing under the bridge and that in the part after the bridge is passed, is that the cement walls are about perpendicular and the bank of the rest of the canal slopes up on each side thereof from the bottom of the general depth of the water. In considering this case and the draught of the respondent and circumstances herein the difference is of little consequence.

The rule of the road applicable to the case of meeting vessels is article 25, sub-sec. (*a*) which reads as follows:—

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Article 25 (*a*). 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,

enforced, as it seems to me, by article 17 of the "Canal Rules and Regulations," which reads as follows:—

17. In all cases of vessels meeting in a canal, their passing shall be governed by the then existing rules and regulations of the Marine Department respecting the passage of vessels; and any violation of such rules shall subject the owner or person in charge of the offending vessel to a penalty of not less than two dollars and not exceeding twenty dollars.

The observance of these rules on the part of the respondent would have avoided the collision in question.

A little regard for the rights and safety of others on the part of respondent would also have avoided the collision.

There never perhaps can be framed rules that will serve the infinite variety of circumstances arising in navigation and hence due care and use of a little common sense must be held binding upon all concerned as well as the due observance of the written law.

Whether any two vessels should ever attempt to meet and pass each other in such a place as between the walls and piers at and under this bridge must depend largely on the size and structure of the craft involved in the movement.

No one would pretend that two row-boats or two small launches or small tug-boats without any tow should never attempt to pass each other in that part of the canal simply because there was a swing bridge overhead.

Nor do I imagine that two such vessels as respondent, or as she and the tug and tow in question, should try to do so.

Having outlined the situation and what I con-

ceive to be the law applicable, there are a few outstanding contentions set up which I wish to dispose of without pretending to enter upon all the points of dispute raised herein.

The appellant claims that his vessel had the right of way because there is a current and he was moving with the current.

I am not inclined to dispute his contention in a proper case but his tug-and-tow failed to reach the place where they might have asserted such a right and they failed to signify, either by what some assert is the usual practice or in any other way, the intention to claim what I assume, without expressing any definite opinion, might have been their right.

Moreover, counsel at the trial did not in launching this case found anything upon that pretension. All involved therein seems to me should be set aside from consideration herein.

The respondent's pilot and others pretend they did not see the tug-and-tow till within three hundred feet. All I need say is that, in my opinion, if they did not they should have seen them earlier, as it was broad daylight and no reason why a proper lookout should not have observed the tug-and-tow when a mile away as those on the latter, with probably less chance of observation, did see respondent at that distance.

I can find no excuse therefor unless I find it in the anxiety for dinner or laziness. Nay, more, if a proper lookout had been kept the pilot in charge should have known the situation better and governed himself accordingly.

If he had done so he would not or should not have persisted in keeping to the centre line of the narrow channel when it was so easy to have kept to the star-

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board without running the slightest risk or inconvenience.

If he had tried to get into a position where he would have been enabled to observe the letter of the law when he reached the place where the collision took place, he would then have put his vessel on the starboard side of the channel and there would have been no such collision as took place unless there had been more unjustifiable conduct on the part of the tug-and-tow than appears.

The letter of the law, to say nothing of the reasonable conduct called for under the the circumstances on the part of the pilot had he realized as he should have done the actual situation, demanded that the respondent ought to have been at her point of progress where the collision took place on her own side of the channel.

For these reasons I think the appeal should be allowed and the respondent be condemned to pay damages.

The case of *Davies* v. *Mann*(1) is, strangely enough, relied upon by respondent.

I should rely upon it as furnishing that law of reason and common sense (which ought to be identical) which forbade the respondent, if due care and proper outlook had been kept, from running down this tug-and-tow even if, by the folly of their managers, tethered like the donkey in the wrong place.

My difficulty in the case begins there, however.

At common law the respondent in such a case would be cast for the whole damages.

Can we find anything in the conduct of the tug-and-tow to blame?

Giving due heed to the excuses put forward for

(1) 10 M. & W. 546.

being placed where they were I cannot quite excuse them for taking all the risks they did.

It seems impossible to be quite sure whether the effect of the movement of respondent in the water produced all the results in the movement of the tow which are described.

It would have been so easy after whistling its intentions, by a single blast, of going to starboard for the tug to have tried to remain still for a few minutes or to have got to the starboard side and tried to remain so still, when it had evidently lost its chance of priority in entering the bridge area that I cannot acquit it of all blame.

I think it was the minor offender. It was smaller than respondent and the insolence of the stronger, who will not be just, cannot be too often rebuked and made to bear the consequences of disregarding the rights of others.

I shall be governed by others of this court taking my view of respondent's action in allotting the relative shares to be borne of the damages.

The counterclaim of course fails, in my view, and no need for entering upon the law bearing upon the case in that regard.

I may, however, remark that those disposed to take the case of the ships "*A. L. Smith*" and "*Chinook*" v. *Ontario Gravel Freighting Co.* (1), for their guide, should observe that there the tug-and-tow were both owned by and under the direction of one common owner.

ANGLIN J.—An outstanding and most material fact, found by the learned trial judge, affirmed on appeal to the Exchequer Court and supported by the evidence

(1) 51 Can. S.C.R. 39.

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of the witnesses for the defence as well as that of the witnesses for the plaintiff, is that, when the collision which forms the subject of this action occurred, the up-coming steamship, the "Honoreva," was in mid-channel. If she was rightly there—if she had an exclusive right of way—if it was the duty of the down-going tug-and-tow at their peril to have avoided her, then the judgments in appeal are well founded. They rest on this basis, held by the learned trial judge, and affirmed by the learned judge of the Exchequer Court, as a matter of law and upon the construction of the rules deemed applicable to the circumstances. If, on the other hand, the down-going tug-and-tow had right of way, or if both vessels were equally entitled to the right of passage through the bridgeway, then the "Honoreva" was at fault in holding the mid-channel and the judgments in her favour cannot be supported.

If the judgments in appeal depended on findings of fact, made upon conflicting evidence, I would be disposed not to interfere with them. In regard to several questions of fact, however—some of them important, others probably not vital—I am, with great respect, of the opinion that conclusions have been reached which indicate a grave misapprehension of the evidence. For instance, the learned trial judge states:—

> The "Honoreva," when she was about to enter the opening of the bridge and when it was not possible for her to stop or to turn back, observed a steamer towing a large barge coming in the opposite direction.

The plaintiff's witnesses agree in stating that they saw the "Honoreva" when she appeared to be six or seven arpents (1150-1300 feet) below the bridge, they themselves being about the same distance above. The defendant's pilot, Daignault, says that the "Honoreva" was 300 feet below the bridge when he saw the down-

coming tug immediately on the opening of the bridge. He adds that the tug was then a quarter of a mile, or 1,320 feet, above the bridge, the two boats according to this estimate being over 1,600 feet apart. Yet the learned trial judge says:—

> The pilot, Daignault, swears that the tug was about 300 feet away when it was first seen by those on board the "Honoreva."

Daignault adds that he concluded, when he first saw the tug on the opening of the bridge, that he would have time to pass through before the tug and barge would enter. He says he did not tie up to the right side of the canal below the bridge because he believed he had time to pass through; and that if he had anticipated the boats meeting in the bridgeway, he would, as a prudent man, have waited below the bridge. He went on because he was convinced that he had time to pass through. From this evidence it is abundantly clear that the "Honoreva" could have stopped below the bridge after her pilot saw the approaching tug-and-tow.

When the bridge was opened the "Honoreva" was ascending the canal in mid-channel at a speed of about four miles an hour. She probably slowed down to 2½ or 3 miles an hour while passing through the bridge. The tug-and-tow were descending at a speed of about 5 miles an hour and maintained that speed. I have no doubt that the "Honoreva" was in fact considerably nearer to the bridge than were the tug-and-tow and that the estimate of witnesses for the plaintiff as to the distance of the "Honoreva" below the bridge when they first saw her is erroneous. I accept Daignault's statement that she was then about 300 feet below the bridge.

The learned judge further holds that Daignault would have seen the tug sooner if the latter had

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whistled to have the bridge opened. He might have heard such a signal, although those on board the tug did not hear the like signal given by the "Honoreva;" but, according to the evidence, the bridge until opened probably obstructed the view and would have prevented the tug-and-tow being seen from the "Honoreva;" and Daignault says he saw the tug as soon as the bridge was opened.

In the fifth paragraph of the statement of defence, it is stated that chief officer Denwoodie of the "Honoreva" was on the forecastle head on the lookout. No doubt he should have been there. There is no suggestion that there was any other lookout. Denwoodie gives this evidence:—

Q. Did you see the accident? A. No.
Q. Where were you? A. I was getting dinner in the saloon.
Q. Therefore you know nothing about the accident? A. No.
Q. You were downstairs? A. Yes.

The failure of those in charge of the "Honoreva" to see the tug earlier, if the bridge did not prevent it, was probably due to this absence of lookout. The tug is blamed for not having signalled for the opening of the bridge. But it was opened on the signal of the "Honoreva" given when she was 500 feet below the bridge and while the tug was still over 1,300 feet above it. There was no obligation upon her to give an unnecessary signal.

Shortly after the opening of the bridge, signals were exchanged between the two vessels to indicate upon which side they intended to pass one another. The learned judge states:—

The "Honoreva" blew one blast of her whistle notifying the "Jackman" that she wished to pass her port to port, at the same time putting her helm to port. This latter signal was answered properly by the "Jackman."

The fact, as deposed to by the plaintiff's witnesses

and also by the pilot Daignault, is that the "Jackman" first signalled by one blast of her whistle for a starboard course and that the "Honoreva" by a like signal replied accepting that course. There is no evidence that the "Honoreva" first signalled for a starboard course. If, as the learned judge says, and plaintiff's witnesses thought was the case, the "Honoreva" put her helm to port when the signal for a starboard course was given (a fact which the "Honoreva's" witnesses deny), she must have reverted to the mid-channel course very shortly afterwards, because the testimony of Daignault and of all the other witnesses is explicit that in passing through the bridge she held the mid-channel. If the helm of the "Honoreva" was momentarily put to port, as the learned judge finds, that fact affords an explanation of the statement of the plaintiff's witnesses that, if the "Honoreva" had held the course then taken, or the course they properly assumed she had taken, in view of her response to the "Jackman's" signal, the passage could have been safely effected and the collision would not have happened. Indeed, Vernier, the captain of the tug, appears to have been under the mistaken impression that the "Honoreva" had gone to starboard when she answered the tug's signal, had maintained a starboard course when coming through the bridge piers and, as he puts it, "sheered" to mid-channel only very shortly before the collision. According to the evidence of Daignault the "Honoreva" maintained her mid-channel course until she was clear of the bridge, and her helm was then put to port. Very shortly afterwards—according to the evidence of the assistant engineer, Stewart, either a couple of seconds before or a couple of seconds after the collision (he puts it both ways)—the engines of the "Honoreva," which had

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been at "dead slow forward" were reversed to "full speed astern." The effect of the change of helm and reversal of engines probably was to deflect the bow of the "Honoreva" slightly to starboard at the moment of the collision and to throw her stern somewhat to port. This accounts for the fact that the vessel was struck 30 feet abaft her stem. But, as deposed to by the bridge keeper, Sauvé, and other witnesses, the "Honoreva" still occupied the mid-channel at the moment of the collision. The learned judge of the Exchequer Court says that this testimony of Sauvé corroborates the evidence for the "Honoreva." As the learned trial judge puts it:—

> The "Honoreva" proceeded to pass through in mid-channel. The "Honoreva" had not only entered the bridge but had *practically* passed through before the collision occurred.

It may, therefore, be taken as conclusively established that when the collision occurred the "Honoreva" was still in mid-channel.

In order to make the situation clear it is advisable to state a few other material facts which the evidence seems to place beyond doubt.

The "Honoreva" was 240 feet long by 36 feet wide and, as laden, drew about 14 feet.

The tug "Jackman" was 65 feet long and between 13 and 14 feet wide. The barge "Maggie" was 175 feet long, 26 feet, 4 inches wide. She was light. The distance between the stern of the "Jackman" and the bow of the barge was between 20 and 35 feet. The Soulanges Canal has a uniform width at the bottom of the channel of 100 feet, and its banks a slope of two feet to one. The approximate depth of water is between 16 and 17 feet. At the Red River bridge the width at top and bottom alike is 100 feet clear between piers.

There is a current down the Soulanges Canal of about one mile an hour. There were at the time of the collision, and there still are tying-up posts on the north, or right bank ascending, below the Red River bridge. At the date of the collision there were no tying-up posts on the south, or right hand side descending, above the Red River bridge; such posts have since been placed there.

The tug "Jackman" passed clear of the "Honoreva" which was struck 30 feet abaft her stem by the barge "Maggie," whose captain says:—

Il m'a frappé en joue de ma barge, à peu près trois (3) pieds en avant de mon bateau de côté.

The force of the collision drove the "Maggie" against the south pier of the bridge with such violence that she received injuries which subsequently caused her to sink.

Since the "Honoreva" was in the mid-channel, if not slightly to the south of it, she occupied at least 18 feet of the 50 feet of channel south of the centre line. It follows as an indisputable physical consequence that the port side of the tug was more than 18 feet to the south of the centre line of the channel and the port side of the barge nearly that distance south of the centre line when the collision occurred. This bears out the statement of the captain of the tug that he had placed his helm to port and taken the starboard side of the canal from the moment that he signalled to the "Honoreva" his intention to take that course. The evidence of the captain of the tug is that at the moment of the collision the tug was 6 or 7 feet from the south pier of the bridge and the captain of the barge says that the barge was 8 or 10 feet north of the line of the face of that pier. There is no contradiction of these statements. The tug had already entered the piers of the bridge

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when the collision occurred; the barge was still some 25 feet above them. As the learned trial judge finds,

> The "Honoreva" * * * had practically passed through before the collision occurred.

When about 150 feet away from the "Honoreva," the tug, already well to the starboard side of the canal, turned still farther to the right, but the barge did not immediately take the new direction, possibly owing to there being but a single tow line. In the effort to pull away from the "Honoreva" the tug also increased its speed. The barge maintained its course for a few seconds—up to the time of the collision, the defence witnesses insist—a circumstance which accounts for the fact that at the moment of collision, while the starboard side of the tug was within 6 or 7 feet of the south pier, the starboard side of the barge, although she was wider, was still from 8 to 10 feet north of the pier line. But it also shews that the course maintained by the barge had kept her port side from 13 to 15 feet south of the centre line of the channel. Yet the case has been treated in both the lower courts as if the tug-and-tow had maintained a mid-channel course until collision was imminent and had then first sought to pass to the starboard side of the channel. The learned judge of the Exchequer Court says:—

> I think it is evident the captain of the tug miscalculated the space between the "Honoreva" and the port shore and ported her helm too late and then to make up for her negligence put on extra speed preventing the tug from colliding but throwing the barge to port.

The captain of the tug states that, although already well to starboard, he turned still farther to starboard, when a short distance from the "Honoreva" because he then realized that she was persisting in her mid-channel course and that collision was inevitable unless he could succeed in bringing the tug and barge farther to the

south. With the "Honoreva" occupying 18 feet of the 50 feet of channel to the south of the centre line, there was left for the barge, 26 feet, 4 inches wide, only 32 feet of clear way to pass through.

Apart from the fact that there were no tying-up posts on the south side of the canal above the bridge, which affords most cogent evidence that down-going vessels were not expected to stop, there is uncontradicted testimony, if, indeed, it be necessary, that, whereas it is comparatively easy to stop a steamer ascending against the current, it is more difficult to stop a down-going steamer, and that when the down-going steamer is accompanied by a tow it is dangerous to attempt to stop or even to slacken speed. Had the "Jackman" slowed and thus lost control of her tow in the current, a very strong case of negligent navigation might have been made against her. The learned trial judge speaks of a "common custom and rule" that:—

> No two vessels are allowed to cross each other in going through the opening of the bridge, which is the narrowest part of the canal; the first one arriving has the right to proceed through the bridge, the other being tied up or at least remaining a sufficient distance to enable the first vessel to get clear of the bridge, which, it appears by the evidence, the "Jackman" did not do.

I find no such rule in the record and no evidence of any such custom. Testimony bearing upon this particular matter is given by the bridge-keeper, Hector Sauvé, an independent witness, who says:—

> Q.—Lorsque deux (2) bateaux viennent en sens inverse, est-ce que c'est l'habitude pour les bateaux qui remontent le courant d'accoster plus bas que le pont? R.—C'est presque toujours ce qu'ils font; surtout la nuit.
>
> Q.—Ils laissent passer le bateau qui descend, et passent après? R.—Oui. Ils s'en rencontrent quelqu'un; mais la plus grande partie attendent en bas; ils se rangent à côté, ils arrêtaient complètement; il y en a d'autres qui passaient pareil.
>
> Q.—Mais la prudence est de modérer en bas? R.—Ils peuvent passer la même chose.

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Although the pilot Daignault urges that because the tug-and-tow were so much farther above the bridge the "Honoreva" had the right of passage, he also says that if two vessels are about the same distance from the bridge the down-going boat has the right of passage.

Daignault says that his object was to pass through the bridge and clear it before the tug-and-tow entered and that it was because he thought he had time enough to do this that he proceeded instead of tying-up below. Yet he also states that when about to enter the bridge he reduced the speed of his vessel from about 4 miles an hour to dead slow—2¾ miles an hour—although he then realized that the tug-and-tow were coming down fast—he thought at more than 5 miles an hour. Daignault also makes the following statement:—

Q.—Juste avant la collision, avez-vous cru que la collision était possible, avez-vous craint qu'il y aurait collision? R.—Non monsieur.

This makes it clear, if further proof were needed, that the tug and barge were well to the starboard side of the canal, because Daignault of course knew the "Honoreva" was in mid-channel. He also gives the following answers:—

Q.—A quel moment avez-vous donné le signal de faire vitesse en arrière sur votre bateau? R.—Du moment que j'ai vu que la barge venait sur nous autres.

Q.—Et, est-ce qu'à ce moment-là vous aviez tourné votre gouvernail de manière à diriger votre navire à droite? R.—Oui, monsieur.

Read with the evidence last quoted, this would indicate that the helm of the "Honoreva" was put to port only when Daignault at the last moment realized that a collision was imminent. Moreover, although Daignault swears that the reverse signal was given at the same time—he says a minute and a half before the collision—it was obeyed only a second or two before, or a second or two after, the collision according to the evidence of Stewart, who was then in

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charge of the engines. Stewart was not qualified to act as an engineer—a direct violation of the statute, 8 Edw. VII., ch. 65, sec. 20, amending R.S.C. 1906, ch. 113, sec. 631, sub-sec. 1.

Finally, it was stated by Henry Newbold, the engineer of the "Honoreva," and by David Fitzpatrick, her captain at the date of the trial, both witnesses for the defendant, that there was plenty of water to permit of the "Honoreva" having passed quite close to the north pier of the bridge, that it was quite safe and practicable for her to have kept to the starboard side and within 5 feet of the north pier, in passing through the bridge. This evidence is uncontradicted. She was in fact 32 feet, if not more, south of the north pier.

Under section 24 of chapter 35 of the Revised Statutes of Canada, 1906, the "Railways and Canals Act,"

> The Governor in Council may, from time to time, make such regulation as he deems proper for the management, maintenance, proper use and protection of all or any of the canals.

Regulation 17, enacted by the Governor in Council under this statute, provides that:—

> In all cases of vessels meeting in a canal their passing shall be governed by the then existing rules and regulations of the Marine Department respecting the passage of vessels.

Article 25 of the—

> RULES for NAVIGATING the GREAT LAKES, including GEORGIAN BAY, their connecting and tributary waters, and the ST. LAWRENCE RIVER as far east as the lower exit of the LACHINE CANAL and VICTORIA BRIDGE of Montreal,

adopted by order-in-council, 20th April, 1905, and amended 18th May, 1906, is as follows:—

> (*a*) 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.
>
> (*b*) In all narrow channels where there is a current and in the Rivers St. Mary, St. Clair, Detroit, Niagara and St. Lawrence, when two

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steamers are meeting, the descending steamer shall have the right of way and shall before the vessels shall have arrived within the distance of half a mile of each other give the signal necessary to indicate which side she intends to take.

Section 916 of the Revised Statutes of Canada, ch. 113, (The "Canada Shipping Act"), enacts that—

> If in any case of collision it appears to the court before which the case is tried that such collision was occasioned by the non-observance of any of such regulations (for preventing collisions and for distress signals, of which the foregoing article 25 is one) the vessel or raft by which such regulations have been violated shall be deemed to be in fault unless it can be shewn to the satisfaction of the court that the circumstances of the case rendered a departure from said regulations necessary.

If, as I think, the Soulanges Canal is a narrow channel, the "Honoreva" was guilty of a breach of paragraph (*a*) in having failed to keep to the starboard side of the fairway or mid-channel after the approach of the tug-and-tow became known. There is nothing to indicate that it was not safe and practicable for her to do so.

In passing through the bridgeway the "Honoreva" was undoubtedly in a narrow channel where there is a current. She was meeting the descending tug-and-tow. The latter under clause (*b*) had the "right of way." In reasonable compliance with clause (*b*) the tug signalled for a starboard course. The "Honoreva" accepted that course by responding with a like signal. It was her clear duty thereafter to have taken and kept the starboard side of the channel. In distinct contravention of clause (*b*) she maintained a mid-channel course up the moment of the collision. She did so at her peril. There is no room for doubt that the collision between the "Honoreva" and the "Maggie" was occasioned by the non-observance by the "Honoreva" of the regulation contained in article 25. There were no circumstances in the case rendering a departure from that regulation necessary. On the contrary, the

evidence of the defence witnesses themselves is that, instead of maintaining a mid-channel course with her starboard side 32 feet to the south of the north pier of the bridge as she did, the "Honoreva" could with perfect safety have passed through the bridegway within 5 feet of the north pier and in such a manner that she would have been well to the starboard side of the fairway or mid-channel. She could, while keeping the starboard side, have maintained a space of about 14 feet between her and the north pier. Her non-observance of article 25 clearly occasioned the collision. Had she obeyed it no collision would have occurred. She must, therefore, be deemed to have been in fault under section 916 of the "Canada Shipping Act."

Regulation 22 of the Canal Regulations, passed under the authority of section 24 of the "Railways and Canals Act" above quoted, is as follows:—

(*a*) It shall be the duty of every master or person in charge of any vessel on approaching any *lock or bridge* to ascertain for themselves, by careful observation, whether the lock or bridge is prepared to allow them to enter or pass, and to be careful to stop the speed of any such vessel in sufficient time to *avoid a collision with the lock or its gates, or with the bridge or other canal works;* any violation of this regulation shall subject the owner or person in charge of such vessel to a penalty of not less than five dollars, and not exceeding two hundred dollars.

(*b*) All vessels approaching *a lock,* while any other vessel going in the contrary direction is in or about to enter the same, shall be stopped and be made fast to the posts placed for that purpose, and shall be kept so tied up until the vessel going through the lock has passed. Any violation of this provision shall subject the owner or person in charge of any such vessel to a penalty of not less than four dollars and not exceeding twenty dollars.

Paragraph (*a*) of this article relates to both locks and bridges, but is has to do not with the safety of vessels passing through them, but with the safety of the structures themselves, its purpose being, as the paragraph states,

to avoid collision with the lock or its gates or with the bridge or other canal works.

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This paragraph has no application to the present case. Paragraph (*b*), on the other hand, applies only to vessels approaching a lock, and has no application to vessels approaching a bridge. The distinction between the language of the two paragraphs is marked. In the present case we are dealing not with vessels approaching a lock but with vessels approaching a bridge. Yet the learned trial judge would appear to have applied paragraph (*b*). He says the "Jackman" violated rule 22 in that:—

> She should have slowed down at a reasonable distance from the bridge or tied at the posts provided for that purpose.

He apparently entirely overlooked the fact that there were no "posts provided for that purpose" to which the "Jackman" could have tied. Again he refers to "the rule" that—

> No two vessels are allowed to cross each other in passing through the opening of the bridge which is the narrowest part of the canal. The first one arriving has the right to proceed through the bridge, the other one being tied up or at least remaining at a sufficient distance to enable the first boat to get clear of the bridge, which it appears from the evidence the "Jackman" did not do.

This misapprehension as to the application of rule 22 is the foundation of the learned judge's judgment, which rests upon his view that because the "Honoreva" was about to enter the bridgeway, clause (*b*) required that the down-going "Jackman" and her tow should have been stopped, made fast to posts and kept tied up until the up-going vessel had cleared the bridge. Not only is there no such rule applicable to the case of a bridge, but, according to the evidence of the bridgeman, Sauvé, who was in the best position to know about it, although both vessels had the right to pass through simultaneously, and vessels do frequently so pass through the bridge in opposite directions, the more usual practice is for the up-going vessel to tie up below

the bridge and await the passage of the down-going boat.

The pilot, Daignault, on his own admission, saw the down-going tug-and-tow when he was in a position to have stopped the "Honoreva" and tied her up and allowed the tug-and-tow to pass. He chose not to do so. He says he proceeded because he thought he had time to get through the bridge and clear it before the tug-and-tow would enter. He perceived that "the tug was coming down quickly." Elsewhere he says he thought its speed exceeded 5 miles an hour. Nevertheless he had the speed of the "Honoreva" changed to "dead slow" and, in direct violation of article 25 of the rules of the road, he still maintained his course in mid-channel.

Daignault says that sometime after replying to the "Jackman's" signal for a starboard course he gave three short blasts of his whistle by which he intended to call upon the tug to moderate its speed, but that the tug did not reply. Those upon the tug deny having heard any such signal. Assuming that it was given, Daignault must have known the difficulty and danger of slackening the speed of a down-going tug-and-tow owing to the current and, having received no response, he should not have assumed that the tug captain would attempt anything of the kind. He should have made allowance for the tug's encumbered condition. The *"Independence"*(1), at pages 115-6. Without asserting that it was the duty of the "Honoreva" to have tied up below (but see *Montreal Transportation Co. and The "Norwalk"*(2), at pages 441-2; *The "Talabot"*(3), at page 195; *The "Ezardian"*(4); *"Earl of Lonsdale"*(5)),

(1) 14 Moo. P.C., 103.
(2) 12 Can. Ex. R. 434.
(3) 15 P.D. 194.
(4) [1911] P. 92.
(5) Cook's Adm. Rep. 153.

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or questioning her right to have proceeded through the bridgeway simultaneously with the tug-and-tow, if those in charge of her saw fit so to proceed they were bound to conform to article 25 of the rules of the road by keeping to the starboard side of the fairway. To do so was safe and practicable and they had themselves assented to the adoption of that course. There were no circumstances which excused, still less rendered necessary, a departure from the regulation. They maintained the mid-channel course at their own peril. They thereby put themselves in fault and must be held answerable for the consequences.

On the other hand, was there fault on the part of the tug-and-tow which contributed to the collision? Their right to pass through the bridge is clear. In doing so their duty was likewise prescribed by article 25—it was to keep to the starboard side of the fairway. That they did so seems, upon all the evidence, to be beyond question. From the moment that the tug entered the bridgeway the facts in evidence prove that neither tug nor barge was at all near the mid-channel. The "Honoreva," by wrongfully occupying the mid-channel, took up 18 feet of the waters which should have been left open for the passage of the tug-and-tow. The latter were thus obliged to attempt the difficult feat of passing the up-coming steamer with a clear way only 32 feet wide, although the width of the barge was 26 feet, 4 inches. Assuming that she should succeed in exactly maintaining the middle of the 32 feet thus left to her, there would be only 2 feet, 10 inches on the port side between her and the "Honoreva" and only 2 feet, 10 inches on the starboard side between her and the bridge pier. Fitzpatrick, captain of the "Honoreva," gives this evidence:—

Q.—How close to the pier or wharf would it have been safe to go? A.—Within 10 feet—within 5 feet, but as a general rule the farther off the safer you are.

The "Honoreva" had no right to force the tug and barge into a position where they had only 32 feet of water in which to navigate. Complaint is made that the tug went farther to starboard when only 150 feet from the "Honoreva" and that the barge, owing to its having a single tow line, did not immediately follow but maintained its course or even sheered slightly to port. Assuming this to be the case, the manœuvre of the tug was made when collision seemed imminent and in an attempt to escape. The "Honoreva," whose fault created the critical situation, cannot complain of the failure of this manœuvre. The captain of the tug did the best he could in an emergency which he had no reason to anticipate the "Honoreva" would create. The tug-and-tow were already so well to starboard that pilot Daignault, who of course knew that his own ship was in mid-channel, did not expect a collision until immediately before it occurred. Why should the captain of the tug have anticipated it earlier? In fact, notwithstanding the very small margin of safety left to him, he appears to have taken the step he did to avoid or minimize the impending collision before anything was done on the "Honoreva" for that purpose.

Complaint is also made of the speed of the tug. But there is no evidence that this was excessive. On the contrary, the evidence is that she was travelling at the rate of about 5 miles an hour, whereas the canal regulations appear to contemplate a speed up to 7⅓ miles an hour.

Again it is charged that the tug was at fault in not slackening speed in answer to the signal of the "Honoreva." Upon the evidence I incline to the view that that signal, if given, was not heard. Not

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only has no specific rule been cited which imposed an obligation on the tug to slacken her speed, but had she in doing so lost control of the barge, as might not improbably have happened owing to the current, she would have laid herself open to a charge of negligent navigation.

Under such circumstances the statutory rule requiring that steamships approaching one another so as to involve risk of collision shall slacken speed, or stop and reverse if necessary, cannot be invoked.

It is further urged that there was no person at the helm of the "Maggie." There is some suggestion of this in the defence evidence—but it is rather a surmise than a statement of fact. The pilot, Daignault, merely says that he "did not remark anybody at the wheel of the barge." There is nothing more. On the other hand, the evidence of Captain Castonguay is perfectly clear and satisfactory on this point. He took the wheel from Laferrière when the tug signalled for a starboard crossing. His evidence is corroborated by Josephus Thauvette who had given over the wheel to Laferrière a short time before. The barge probably did not at once take the new direction given it by the tug just before the collision. But this does not prove either the entire absence of a man at the wheel, or that, if there, he neglected his duty, or that anything he could then have done would have prevented the collision.

On the whole in my opinion, the only proven fault which clearly contributed to causing the collision was the flagrant breach by the "Honoreva" of the provisions of article 25 of the rules of navigation, which required her to keep the starboard side of the fairway. While the utmost skill may not have been displayed in the management of the tug and the barge when colli-

sion was imminent, while it may be that if there had been a bridle between them as well as a tow rope, the collision would have been avoided (I think this extremely doubtful), there is not, in my opinion, any sufficient proof of fault such as would impose liability upon them. Marsden on Collisions, p. 3; *The "Cape Breton"* v. *Richelieu and Ontario Navigation Co.*(1), at page 591; *The "Arranmore"* v. *Rudolph* (2), at page 185.

I would for these reasons set aside the judgment of the learned judge of the Admiralty Court, and the confirmatory judgment in the Exchequer Court, and would direct that judgment be entered for the plaintiff declaring him entitled to the damages for which he sues and the costs of this action as well as of the appeals to the Exchequer Court and to this court, condemning the defendant and its bail in such damages and costs, and directing that an account should be taken by the registrar of the Admiralty Court, assisted by merchants, of the amount of such damages, with the usual provisions for report, etc. The counterclaim should also be dismissed with costs throughout.

BRODEUR J.—I am of opinion that this appeal should be allowed with costs and that the "Honoreva" should be held entirely liable for the collision.

Appeal allowed with costs.

Solicitor for the appellant: *J. A. H. Cameron.*
Solicitors for the respondent: *Heneker, Johnson & Lemesurier.*

(1) 36 Can. S.C.R. 564.
(2) 38 Can. S.C.R. 176.