

1905

THE STEAMSHIP "CAPE BRETON"

*May 16-19. AND OWNERS (DEFENDANTS) APPELLANTS;
 •Oct. 3.

AND

THE RICHELIEU AND ONTARIO
 NAVIGATION COMPANY, OWNERS
 OF THE STEAMSHIP "CANADA" } RESPONDENTS.
 (PLAINTIFFS) }

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA,
 QUEBEC ADMIRALTY DISTRICT.

*Admiralty law—Navigation—Narrow channel—Rule of the road—
 Look-out—Meeting ships—Collision—Special rule of port—Sorel
 harbour regulations—Lights and signals—Negligence—Evidence—
 Damages—Practice—Improper comments in factum—Appeal to
 Privy Council—Order for bail.*

A pilot in charge of a ship, or a man at the wheel, is not a sufficient look-out within the rules of navigation for preventing collisions in narrow channels. Judgment appealed from (9 Ex. C.R. 67) affirmed.

Where meeting ships are in collision and one of them has neglected to observe the regulations, there must be evidence of gross dereliction of duty or want of skill in navigation in order to make out a case for apportionment of damages against the other ship.

Where a ship navigating a narrow channel has no proper look-out and neglects to signal her course at a reasonable distance, thus perplexing and misleading a meeting ship, the former is alone responsible for all damages caused by collision, even if, in the agony of collision, a different manœuvre on the part of the other ship might have avoided the accident. Judgment appealed from (9 Ex. C.R. 67) reversed, Girouard J. dissenting.

Commentaries in the appellants' factum relating to a judgment of the Wreck Commissioner's Court, which did not form any part of the record, were ordered to be struck out, with costs to the respondents.

See note at p. 592, respecting appeal to Privy Council.

*PRESENT:—Sir Elzéar Taschereau C.J. and Sedgwick, Girouard, Nesbitt and Idington JJ.

APPEAL from the judgment of the Exchequer Court of Canada, Quebec Admiralty Division (1) by which both ships were held to be at fault and were condemned for one-half the damages caused to each, respectively, by a collision in the River St. Lawrence near the Harbour of Sorel.

1905
SS. "CAPE
BRETON"
v.
RICHELIEU
AND ONT.
NAV. CO.

The action was brought by the respondents, owners of the "Canada," for \$150,000 damages suffered by her, on account of the collision, occasioned, as was alleged, by negligence and want of skill in the navigation of the "Cape Breton." The appellants made a cross-demand for \$6,211.40 for damages sustained by the "Cape Breton" by reason of the same collision. The trial took place before Mr. Justice Routhier, who rendered the judgment appealed from (1) by which both ships were held to be in fault and the appellants were condemned to pay to the respondents one-half of the damages arising out of the collision to the steamer "Canada," while the respondents were condemned to pay to the appellants (as counter-claimants) one-half of the damages suffered by the "Cape Breton," the parties, respectively, to pay their own costs.

The appellants now appeal from that part of the judgment whereby they are held to be in any way to blame for the collision in question, and are condemned to bear part of the damages caused thereby or any costs incurred in consequence thereof.

The material facts of the case and questions at issue on this appeal are sufficiently stated in the judgments now reported.

At the hearing the respondents moved to strike out portions of the appellant's factum which referred to, reproduced and commented upon the judgment of the

(1) 9 Ex. C.R. 67.

1905

SS. "CAPE
BRETON"

v.

RICHELIEU
AND ONT.
NAV. CO.

Wreck Commissioners' Court, a document which did not form a part of the present case on the appeal. Counsel were heard for the motion and contra.

Harris K.C., F. Meredith K.C. and Aimé Geoffrion K.C. (Holden with them), for the appellants, relied upon the decisions in The Turret Steamship Co. v. Jenks(1); The "Cuba" v. McMillan(2); The "Vic-

*NOTE:—The text of the Privy Council judgment referred to (not officially reported) delivered 20th March, 1901, is as follows:

ON APPEAL FROM THE SUPERIOR COURT SITTING IN REVIEW, PROVINCE OF QUEBEC.

THE TURRET STEAMSHIP COMPANY V. WILLIAM G. JENKS, AND OTHERS.

PRESENT.—The Lord Chancellor, Lord Macnaghten, Lord Davey, Lord Robertson, Lord Lindley.

THE LORD CHANCELLOR.—In this case their Lordships have had the opportunity of considering the matter without reserving judgment. Unlike a great many cases of the sort, the surrounding circumstances as well as the direct evidence make the cause of the collision particularly clear. The "Turret Age" was going up and the "Lloyd S. Porter" was coming down the River St. Lawrence. According to the rules which deal with narrow channels such as that which, in one sense in any event, both vessels were in, speaking broadly, each vessel ought to keep to its own side of the road.

Their Lordships will not stay for a moment to consider the question who was in or who was out of the channel. It is clear, according to the evidence, that the "Lloyd S. Porter" in disregard of that rule was coming down on her wrong side. The result was that the vessel that was going up and which was on its proper side was placed according to the whole of the evidence in considerable difficulties. It is idle to speak of the recognition by either vessel of the other as big or little. It is at night. All that the parties can see at a reasonable distance (such a distance as would be necessary to avoid the danger of collision) is the lights by which they are guided if they see them and if they look out for them. So far as the "Turret Age" is concerned there appears to have been a very careful look-out. There was no doubt that the pilot was there giving directions and observing what was being done. If one looks at the evidence of what

(1) 36 Can. Gaz. 609 [*]

(2) 26 Can. S.C.R. 651.

tory”(1); *The “James Mackenzie”*(2); *The “Thingvalla”*(3); *Wilson, Sons & Co. v. Currie*(4); *The “Arabian” v. The “Alma”*(5); *The “Ngapoota”*(6);

1905
SS. “CAPE
BRETON”
v.
RICHELIEU
AND ONT.
NAV. CO.

was done on board the other vessel, the “Lloyd S. Porter,” it is impossible to doubt that there really was no look-out at all. The only person who purports to be looking out at all is the helmsman who comes on deck about fifteen minutes before the collision. He receives one direction to keep the vessel so as to avoid the buoy and then he is left to be guided by whatever he may choose to consider a fulfilment of that direction. It is probably fair to suppose that the point of light that he does select is one which, in the then condition of things, would enable him to clear the buoy. That is all he does and that is the only direction given to him and the only thing that he purports to do. On the other hand, the “Turret Age” is encountered by a vessel which, if it is performing the manœuvres that it ought to perform, will keep clear of them. They proceed, and their Lordships think that they had a right to proceed, upon the fair belief that the vessel which they saw was going to perform the proper manœuvres for the purpose of avoiding any difficulty or danger. Suddenly and without any warning the vessel that they

were meeting changes her course and suddenly starboards. The whole point of the controversy between the parties resolves itself into a question of whether, upon that sudden manœuvre made by the “Lloyd S. Porter,” there was time to avoid the collision by any counter-manœuvre that could be made by the “Turret Age.”

Their Lordships have had the advantage of a nautical assessor to whom they have propounded the questions: First, “Whether or not the ‘Turret Age’ was right in keeping to the north side of channel?” And he is of opinion that she was right in keeping to the north side. Their Lordships have also asked him: “Whether, in his judgment, there was time, under the circumstances proved, by any manœuvre on the part of the ‘Turret Age’ to avoid the collision?” He is of opinion that there was no time to avoid the collision under the circumstances.

Putting those two propositions together, with the circumstances that have been referred to, it would seem to be clear that the one vessel, because she was a light vessel and because she did not care about great

(1) 168 U.S.R. 410.

(2) 2 Stu. Vice Ad. R. 87.

(3) 42 Fed. Rep. 331; 48
Fed. Rep. 764.

(4) [1894] A.C. 116.

(5) 2 Stu. Vice Ad. R. 72.

(6) [1897] A.C. 391.

1905
SS. "CAPE
BRETON"
v.
RICHELIEU
AND ONT.
NAV. CO.

The "Bywell Castle" (1); *The "Tasmania"* (2); *The "Nor"* (3); *The "Sarah Thorp" v. The "America"* (4); *The "Glannibanta"* (5); *The "Maud Pye"* (6); *The "Rabboni"* (7); *The "Bold Buccleugh"* (8); *Ward v. The "Ogdensburg"* (9); *The "Ottawa"* (10); *The "Shenandoah" and The "Crete"* (11).

Where fault on the part of one vessel is established by uncontradicted testimony and such fault is of itself sufficient to account for the disaster, it is not enough for such vessel to raise a doubt with regard to the management of the other vessel. There is at least

depth of water, was so loosely and vaguely steered that she might have been in or out of the channel, without there being any wilful misrepresentation in what the witnesses have said. Their Lordships think the more reasonable hypothesis would be, considering what she was steering for and where she was coming from, that she was in the channel; up to a certain time, on the north side of it. The position of the wreck afterwards does not seem to be conclusive as to where she was at the moment of the collision because there would be certainly the question both of wind and stream to be considered; but undoubtedly it brings it all within a very narrow compass.

In the result, their Lordships

are of opinion that the "Lloyd S. Porter" was wholly and solely to blame and they will, therefore, humbly advise His Majesty to allow the appeal, to reverse the judgment of the Superior Court, in Review, with costs, and to reverse the judgment of the Superior Court, and order judgment to be entered for the appellants in their action and also in the cross-action which was brought by the respondents with the costs of both the action and cross-action, and to remit the case to the Superior Court for the assessment of the damages to be paid by the respondents.

The respondents must pay the costs of the appeal.

Appeal allowed with costs.

- (1) 4 P.D. 219.
- (2) 15 App. Cas. 223.
- (3) 30 L.T. 576.
- (4) 44 Fed. Rep. 637.
- (5) 1 P.D. 233.
- (6) Stockton Vice Ad. Rep.

101.

- (7) 53 Fed. Rep. 952.
- (8) 1 Pritchard's Adm. Dig. 221.
- (9) 29 Fed. Cas. 199.
- (10) 3 Wall. 268.
- (11) 33 Can. S.C.R. 1.

some presumption adverse to its claim, and any reasonable doubt with regard to the propriety of the conduct of such other vessel should be resolved in its favour. *The "Samuel Dilleway"* (1); *The "Parkersburg"* (2); *The "Atlas"* (3); *The "Young America"* (4); *Chamberlain v. Ward* (5).

1905
 SS. "CAPE
 BRETON"
 v.
 RICHELIEU
 AND ONT.
 NAV. CO.

The "Canada" should have kept to her starboard side of the fairway, but in any event, even if she had had a right to starboard her helm the last time, she was bound to indicate by the proper signal to the "Cape Breton" her intention to do so before leaving her own side of the fairway and the "Canada" should in any event have stopped and reversed before the collision. Regulations, arts. 25, 28 and 23; *The "Clydach"* (6); *The "Victory"* (7); *"River Derwent"* (8); *The "Bermuda"* (9).

The presumptions are always against a vessel failing to comply with the narrow channel rule. Marsden on Collisions (5 ed.) pp. 343, 379, 440, 443; (4 ed.) pp. 383, 539, 542; Spencer on Collisions, pp. 192, 222, 316, 324; *City of New York* (10); *The Mexico* (11); 25 Am. & Eng. Enc. 992. See also Kay on Shipmasters and Seamen (2 ed.) pp. 512, 532.

Angers K.C., *Pentland K.C.* and *A. H. Cook K.C.* (*Archer* with them), for the respondents. When the collision, from any cause, could not be avoided, both vessels were bound to take such action as might best aid to avert collision. The "Canada" did so, while the

(1) 98 Fed. Rep. 138.

(2) 5 Blatchford 247.

(3) 10 Blatchford 459.

(4) 30 Fed. Cas. 872.

(5) 21 How. 548.

(6) 5 Asp. 336.

(7) 168 U.S.R. 410; *per* Fuller C.J. at p. 416.

(8) 64 L.T. 509; *per* Halsbury L.C. and Herschel L.J.

(9) 11 Fed. Rep. 913.

(10) 147 U.S.R. 72.

(11) 84 Fed. Rep. 504.

1905
SS. "CAPE
BRETON"
v.
RICHELIEU
AND ONT.
NAV. CO.

"Cape Breton" failed to do so and was negligently and unskilfully navigated. Further, the well-known rule of prudent seamanship was infringed when the "Cape Breton" put her helm hard-a-port and reversed full speed astern with a right-handed propeller, to a green light.

The trial judge, before whom all the witnesses were heard, believed the pilots of the "Canada," but did not credit the pilot of the "Cape Breton." He came to the conclusion that the three lights and then the green light of the "Canada" were seen at a much earlier period and a much great distance than the "Cape Breton's" witnesses pretend, and that the collision was largely due to the error of her pilot in determining at first to pass port side to port side and obstinately persisting in that resolution though having reason to know, and in fact knowing, that the approaching vessel was about to enter the Harbour of Sorel in the manner provided by regulation 33, which provides that:

Unless it is otherwise directed by the Harbour Commissioners of Montreal, ships and vessels entering or leaving the Harbour of Sorel shall take the port side, anything in the preceding articles to the contrary notwithstanding.

He held also that the helm of the "Canada" was not altered after passing the last buoy until the whistle of the "Cape Breton" was first heard; and he accordingly determined that the "Cape Breton" was to blame in each of the three respects above mentioned.

The learned judge further held that the "Canada" was also to blame; that she was not provided with the proper look-out; that the lights of the "Cape Breton" were properly exhibited and burning efficiently and should have been seen by the people on board the "Canada," at least a mile off, and would have been so

seen had there been an efficient look-out. He held, further, that the "Canada" should have blown two blasts of her whistle at an earlier period than she actually did, viz., when slightly starboarding on passing the third buoy and directing her true course on Sorel. And for these various acts on her part he held the "Canada" also to blame.

1905
SS. "CAPE
BRETON"
v.
RICHELIEU
AND ONT.
NAV. CO.

As to the look-out, two men thoroughly familiar with the navigation of that portion of the St. Lawrence were in the wheel house, one managing the wheel as pilot and the other as look-out, provided with powerful binoculars for use if required. There was no other look-out. The services of the pilot in a proper position for seeing and conversant with the lights which he was likely to meet were in fact and in law those of a proper look-out and more likely to be serviceable than, in the present instance, the knowledge of the look-out forward of the "Cape Breton."

The appeal should be dismissed with costs for the following amongst other reasons: 1. Because the side lights of the "Cape Breton" were not exhibited as required by law after she had raised her anchor and proceeded on her course immediately before the collision and because such lights were, if in their places, immediately before the collision so placed after the vessel was under way, and were not burning brightly and efficiently as provided by the regulations. 2. Because no proper and efficient look-out was kept on board the "Cape Breton." 3. Because the "Cape Breton" ported her helm from time to time improperly in view of the position and approach of the "Canada." 4. Because the "Cape Breton" neglected to sound a blast of the whistle as by law obliged when she ported her helm at the distance of

1905
 SS. "CAPE
 BRETON"
 v.
 RICHELIEU
 AND ONT.
 NAV. CO.

about a mile. 5. Because the people of the "Cape Breton" knew that the "Canada" was steering her course; for her port, the Harbour of Sorel, and improperly determined to pass across her course and to the south of her, in contravention of the established regulations. 6. Because the "Cape Breton" after porting twice sounded one blast of her whistle and put her helm hard-a-port improperly, a manœuvre which immediately led to the collision. 7. Because in putting her helm hard to port, the "Cape Breton" was also put full speed astern with a right-handed propeller, making the collision inevitable. 8. Because the evidence as found by the learned judge establishes that the "Cape Breton" improperly neglected to ease or stop her engines at any time before whistling.

Besides the authorities mentioned in the notes furnished by the trial judge, we submit the following: "Starboard Side," Marsden (4 ed.) p. 514; Todd & Whall, Practical Seamanship, p. 281; "Stopping and Reversing," art. 23, Moore's Rule of the Road at Sea, p. 51; "Slacken Speed," *The "Beryl"* (1); *The "Benares"* (2); Marsden (3); *The "Germany"* v. *The "City of Quebec"* (4); *The "Martha Sophia"* (5); *The "Hope"* (6); "The Course," Marsden (7); *The "Bougainville"* (8); "Sound Signals," art. 28; *The "Mourne"* (9); *The "Uskmoor"* (10); *The "Agra"* (11).

We refer, also, to *The "Princess Royal"* (12); *The "Liberty"* (13); *The "Leverington"* (14); *The "Eliza"*

(1) 9 P.D. 137.

(2) 9 P.D. 16.

(3) (4 ed.) p. 491.

(4) 2 Stu. Vice Ad. Rep. 158,
 at p. 166.

(5) 2 Stu. Vice Ad. Rep. 14.

(6) 1 W. Rob. 154, at p. 157.

(7) (4 ed.) p. 517.

(8) L.R., 5 P.C. 316.

(9) [1901] P.D. 68.

(10) [1902] P.D. 250.

(11) L.R. 1 P.C. 507.

(12) Cook, Vice Ad. Rep. 247.

(13) 2 Stu. Vice Ad. Rep. 102.

(14) 11 P.D. 117.

Keith" (1); *The "Lorne"* (2); *The "Perim"* (3); *The "Quebec"* (4); Spencer on Collisions, p. 93, sec. 26; *The "Stanmore"* (5); *The "Emma"* (6).

1905
SS. "CAPE
BRETON"
v.
RICHELIEU
AND ONT.
NAV. Co.

THE CHIEF JUSTICE.—This case, as it comes to us, lies within a narrow compass though, judging by the length of the argument at bar, counsel on both sides must be presumed not to have been of that opinion.

The respondents' contention, that the "Cape Breton," on the occasion in question, had committed a breach of the regulation which requires side lights on a steamer under way, having been dismissed by the local judge in admiralty, and they not having appealed from that dismissal, nor from the judgment holding them liable upon various grounds for half of the damages caused by the collision, the only point for our determination upon this appeal is whether or not, by the evidence adduced at the trial or as an inference of fact therefrom, they have proved their contention that by error, want of skill or culpable negligence the "Cape Breton's" crew contributed to the said collision so as to render their owners liable jointly with them for the other half of the said damages, as they were held to be by the judgment now appealed from by the said owners.

That question must be answered negatively. The "Canada" is alone to blame for this collision.

There is, in the record, no evidence that the "Cape Breton's" crew were guilty, on the occasion, of any wrongful manœuvre at all, so that, as I view the case, there is no room in it for the application of the law on

(1) Cook Ad. 107, at p. 120.

(4) Cook Vice Ad. 37.

(2) 2 Stu. Vice Ad. Rep. 177,
at p. 181.

(5) 10 P.D. 134.

(6) 3 W. Rob. 151.

(3) Marsden (4 ed.) p. 514.

1905
 SS. "CAPE
 BRETON"
 v.
 RICHELIEU
 AND ONT.
 NAV. CO.

The Chief
 Justice.

collisions whenever caused or contributed to by errors of judgment committed *in extremis*.

The respondents' contentions rest on a palpable error. They assume that the "Cape Breton's" crew were aware of the fact that the "Canada" had no proper look-out and did not see their side lights. But there is no foundation whatever for that assumption. It is the contrary that the "Cape Breton's" crew assumed, and, in law, were bound to assume. *The Dorchester* (1). And having no reason whatever to doubt when they first sighted the "Canada," that she, seeing their regulation lights (as they believed she did), would act lawfully and keep her course in the North Channel, her crew were not in fault for not stopping and reversing sooner. *Wilson, Sons & Co. v. Currie* (2); *The Free State* (3). They were justified up to the last moment in relying upon the "Canada" obeying the ordinary rules, by which both were bound, instead of doggedly and recklessly persisting, as she did, in unlawfully attempting to force them to disregard those rules. *Turrett v. Jenks* (4), in the Privy Council, 1901. A mere apprehension, had there been room for it, that the "Canada" would persist in starboarding her helm would not, under the circumstances, have been a valid reason for the "Cape Breton" to leave the south side of the channel, assuming always, as she rightly did, that the "Canada" had her (the "Cape Breton's") red light in sight as soon as the latter had the former's light in sight. To justify a departure from a rule of the road in such a case it must appear with perfect clearness, amounting almost to certainty, that adhering to the rule would have brought on a collision, and violating the rule would have avoided

(1) 121 Fed. Rep. 889.

(2) [1894] A.C. 116.

(3) 91 U.S.R. 200.

(4) Note p. 566, *ante*.

it. See *per* Dr. Lushington, in the *Boanerges* v. *The Anglo-Indian* (1). Of course, if the "Cape Breton" instead of sounding a first blast and porting her helm had, at that moment, sounded two blasts and starboarded her helm, or had stopped and reversed, it is now evident that there would have been no collision. But there was no reason whatever then for her to do either one or the other, and "being wise after the event" cannot be a guide for our decision. The question is: Was the possibility of a collision then present? Could her pilot then foresee any immediate danger of it? The "Canada's" own manœuvring answers "No." She would herself, had she seen the "Cape Breton's" red light in time, either have stopped or ported her helm; and the "Cape Breton" could reasonably remain certain up to the last moment, not being aware of the fact that she had no eyes to see her (the "Cape Breton's") red light that she, the "Canada," would either stop, or port, in time, not attempt madly to cross her bow as she did.

Certainly, as argued by the respondents, the "Cape Breton" would not, in law, have been justified in standing upon her right obstinately, recklessly and regardless of the safety of the "Canada" if, by any manœuvre whatever, she could have prevented a collision. But, when charging her with want of skill and negligently failing to adopt measures to avoid a collision, it was incumbent upon the "Canada" to prove, without any doubt, not only that her crew had it in their power to adopt safe measures to avoid it, but also that they must necessarily have been perfectly convinced, in time to avoid it, of the imminent danger of it. See *per* Dr. Lushington, in "*The Legatus*" v.

1905
 SS. "CAPE
 BRETON"
 v.
 RICHELIEU
 AND ONT.
 NAV. Co.
 The Chief
 Justice.

(1) 2 Mar. Law Cas, (Asp.) 239.

1905
 SS. "CAPE
 BRETON"
 v.
 RICHELIEU
 AND ONT.
 NAV. CO.
 The Chief
 Justice.

"*The Emily*" (1). And that proof is entirely wanting. It is only when it was too late to avoid the collision that the "Canada" shewed her green light to the "Cape Breton." When the "Cape Breton" sounded her first blast, she had the "Canada's" red light in sight. So that the possibility of any danger at all could not then have come to her pilot's mind.

The sole cause of the accident is that the "Canada's" crew did not see the "Cape Breton's" red light till after the "Cape Breton's" first blast, when she ought to have ported her helm, as the "Cape Breton" rightly depended upon her doing so. And the reason why they did not see that light is presumed, in law, to be because they did not in fact have a proper look-out. R.S.C. ch. 79, sec. 6. "*The Englishman*" (2). And the principle in such cases, where there has been a departure from an important rule of navigation, is that if it is at all possible that the non-observance of the rule has caused the accident then the party in default cannot be excused. *Emery v. Cichero* (3); *McCabe v. Old Dominion S.S. Co.* (4). Here, there is no room for doubting that if the "Canada" had seen the "Cape Breton's" red light before hearing her first blast, she would either have kept to the north side of the channel, or, before starboarding her helm to take her course towards Sorel, would have sounded two blasts. *The "Cuba" v. McMillan* (5); "*The Victory*" (6). If the "Canada" had ported her helm when she heard the "Cape Breton's" first blast, the weight of the evidence is that the collision would have been avoided. However that may be, it is clear that if the

(1) Holt's Rule of the Road
 217.

(2) 3 P.D. 18.

(3) 9 App. Cas. 136.

(4) 31 Fed. Rep. 234.

(5) 26 Can. S.C.R. 651.

(6) 168 U.S.R. 410.

"Cape Breton" had continued on her same course or starboarded her helm when she heard the "Canada's" two blasts, she could not have prevented the collision. R.S.C. ch. 79, sec. 5. The "Canada's" manœuvring had then rendered it inevitable.

1905
SS. "CAPE
BRETON"
v.
RICHELIEU
AND ONT.
NAV. CO.

The Chief
Justice.

There was then no possibility for the "Cape Breton" of avoiding the collision, (says Hamelin, her pilot): To starboard her helm then would have made matters still worse, (says McNeil, her first mate): When the "Canada" sounded her two blasts there was no possibility of avoiding a collision, (says Bromley, her look-out).

And any reasonable doubt on this point, were there any, must be solved in favour of the appellants. The respondents were deliberate transgressors of the law; on them—I repeat it—was the burden of proving clearly that the appellants' crew might, by ordinary skill and prudence, have avoided the collision. They have failed to do so. *Emery v. Cichero* (1); *Valentine v. Cleugh* (2); *The "City of New York"* (3); *The "Chicago"* (4); *The "Teaser"* (5). The weight of the evidence is the other way. Had the "Canada" been a few feet further north, so as to sink the "Cape Breton" instead of the "Cape Breton" sinking her, the "Cape Breton" could not have been found guilty of negligence or of wrong manœuvring. Such a plea by the "Canada" in that case in answer to the "Cape Breton's" claim would have been equivalent to saying to her, "Why did you not starboard your helm and sink us both?" *The "Agra" and "Elizabeth Jenkins"* (6). With logic of the same force she now says to her: "You blundered because you should have given us a chance to sink you with us."

(1) 9 App. Cas. 136.

(2) 8 Moo. P.C. 167.

(3) 147 U.S.R. 72.

(4) 125 Fed. Rep. 712.

(5) 127 Fed. Rep. 305.

(6) 4 Moo. P.C. (N.S.) 435.

1905.
 SS. "CAPE
 BRETON"
 v.
 RICHELIEU
 AND ONT.
 NAV. CO.
 ———
 The Chief
 Justice.

Rule 33 as to Sorel Harbour has no possible application. The "Cape Breton" was not going to Sorel and the "Canada" knew it. It is not the case, as the respondents' contentions on this point would necessarily lead to, that every ship going from Montreal to Quebec or England has to pass through the Harbour of Sorel. Then, when the "Canada," with a meeting ship in sight, coming almost end on, which she knew was not going to Sorel, changed her helm at a point arbitrarily chosen by herself, two miles away from Sorel, to direct her course to port, presumably intending to force that ship to meet her under the Sorel rules instead of the St. Lawrence rules, which, up to that moment, governed them both, it was incumbent upon her to sound the two regular blasts. When the "Cape Breton's" pilot saw her closing upon him, but not sounding two blasts, he was led to think that she did not intend to put herself across the "Cape Breton's" bow. On the contrary, by not then sounding two blasts she warned the "Cape Breton" to keep her course in the South Channel; yet she would now say to her: "You ought to have crossed over to the North Channel; I deceived you, but you were wrong to believe me." The respondents' contentions, based on this Sorel rule, are, however, only an afterthought. The simple reason that the "Canada" directed her course towards Sorel so far away from it without previously signally to the "Cape Breton" her intention to do so, is that she did not then see her, and she did not see her because she had no proper look-out. Had she seen her she would have steadied her course up the river and steered towards Sorel only after passing her. Her pilot admits it.

Great stress has been laid by the respondents on the flash of the "Canada's" green light that the "Cape

Breton" is proved to have had in sight for a moment, when still a mile, at least, away from her, not ceasing herself to shew her red light to the "Canada." But that is a piece of evidence which seems to tell more in favour of the appellants than in their favour. By the fact that the green light was immediately shut out from the "Cape Breton's" sight, the red one and the white one only remaining in sight, the "Cape Breton's" crew had reason to believe that this momentary flash of it was due either to the sinuosities of the channel or to the sheering of the "Canada" in the current. Had the "Canada," having the "Cape Breton's" red light in sight, or presumed by the "Cape Breton's" crew to have had it in sight, and herself then not ceasing to shew her red light to the "Cape Breton," intended then to change her course and make for the south shore, she would before doing it, as already remarked, have reasonably been expected by the "Cape Breton" to sound the two regular blasts. And by not doing so at that moment, the "Cape Breton's" crew rightly assumed that the "Canada" intended to observe the rule of the road and meet her port to port, she not having signalled a contrary intention. There certainly was then no immediate danger of collision, no reason for either ship to stop and reverse, and for the "Cape Breton" to then starboard her helm, with the "Canada's" red light in sight, would have been a flagrant breach of the rules.

The appeal is allowed; decree to be entered for appellants on the action and on the cross-action, with costs on both in both courts against the respondents; case remitted to the Exchequer Court, Quebec Admiralty District, for the assessment in the usual way of the damages to be paid by the respondents.

The "Rules of the Road" now in force in Canada,

1905
SS. "CAPE
BRETON"
v.
RICHELIEU
AND ONT.
NAV. CO.
—
The Chief
Justice.
—

1905
 SS. "CAPE
 BRETON"
 v.
 RICHELIEU
 AND ONT.
 NAV. CO.
 —
 The Chief
 Justice.

which govern the case, are those promulgated by the Order in Council of the 9th of February, 1897, page LXXXI—Statutes of 1897 (D.).

The motion by the respondents to strike out of appellants' factum their commentaries upon the judgment of the Wreck Commissioner's Court is allowed with costs. That judgment does not form part of the record and could not legally have been received in evidence.

SEDGEWICK J. concurred in the judgment allowing the appeal with costs and remitting the case back to the court below to have damages assessed; also in the order striking out irrelevant matter in the appellants' factum.

GIROUARD J. (dissenting).—The principles of law governing cases of collision are well known and easily understood, but their application to the special circumstances proved has always been difficult. The evidence on both sides in this case form two immense volumes, and there is a big volume of exhibits consisting of photographs, maps and plans, which were explained by the witnesses to the local judge in admiralty of Quebec (Routhier J.) of great experience in cases of this description; and this may account for the absence of nautical assessors; whose attendance was not even suggested by either party.

Before reversing the judgment of Mr. Justice Routhier, I would certainly refer the case to the court below in order to obtain the opinion of one or more nautical assessors as to whether there was time for the "Cape Breton," on the evidence, to avoid the collision—a course which seems to be in accord with the decision of the Privy Council on the appeal of the *Tur-*

rett Steamship Company, Limited v. Jenks and others (1), decided in 1901, relied upon by the appellants, and in the still more recent case of *The "Empress of India" v. The Imperial Chinese Government* (2), decided in August last, but not yet reported. Their Lordships even referred the question to nautical assessors to report to themselves. I doubt that this court, having only a statutory constitution, can go so far, but we certainly can send the case back to the court below for the purpose of obtaining that information. Little reliance can be placed upon the opinions of experts examined as witnesses who almost invariably support the views of the party who retains their services.

1905
STEAMSHIP
"CAPE
BRETON"
v.
R. AND O.
NAVIGATION
Co.
—
Girouard J.
—

Of course we had the explanations of the volume of exhibits by counsel, but no one will contend that they are as valuable as those made by the witnesses. Furthermore, the trial judge has entirely, and apparently for good cause, discredited some of the witnesses of the appellant, especially pilot Hamelin, and expressed a preference for others.

Unfortunately, (he says), the questions of fact are a great source of embarrassment in this cause by reason of the great number of witnesses heard and of the astonishingly conflicting evidence produced by them. Several of the witnesses seem to believe it is their duty to swear contrary to what the witnesses of the adverse party have affirmed and that they are called in court but for that purpose.

Under the circumstances I do not feel inclined to interfere with his findings of fact, and I think the soundness of his rulings of law cannot seriously be questioned. I do not intend to review the facts of the case. This gigantic work has been exhaustively done by the learned judge in his reasons for judgment, which cover nearly thirty pages of the printed case. He has

(1) 36 Can. S.C.R. 566, *note*.

(2) See 45 Can. Gaz. 447.

1905
 SS. "CAPE
 BRETON"
 v.
 RICHELIEU
 AND ONT.
 NAV. CO.

so fairly summed up in a few pages the whole situation as it existed when it was yet time for the "Cape Breton" to avoid the accident—which seems to be the only point dividing this court—that I cannot do better in concluding than reproduce them:

Girouard J.

Let us now go into a more detailed examination of the course of the "Canada" and of the "Cape Breton" and let us see what mistakes were made on both sides which led them to the collision. I say at first that the two vessels perceived one another from a distance and that having ascertained they were coming closer, the "Cape Breton" had the right to believe they would meet according to rule 18, that is to say, each keeping to the right, red light to red light. Here is this rule 18; it reads as follows:

"When two steam vessels are meeting end on or nearly end on so as to involve the risk of collision each shall alter her course to starboard so that each may pass on the port side of the other."

Well, the "Cape Breton" evidently relied on this rule and thenceforth she had the right to follow the right of the channel, that is to say the south according to rule 25, which says:

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

It is simple and consistent with the law.

With respect to the "Canada" the question of the course to be taken became on the contrary complex. She was going to Sorel and the lights of the Harbour of Sorel were already visible at the horizon on her left side; consequently, two different courses were open to her to meet the "Cape Breton," and in taking into consideration the general practice followed by her she might have thought she had to choose between two conflicting rules,—rule 18 which told her as well as the "Cape Breton": "Meet to your right"; and rule 33, applicable to the Harbour of Sorel, which told her: "Meet to your left."

Rule 33 says this:

"Unless it is otherwise directed by the Harbour Commissioners of Montreal, ships and vessels entering or leaving the Harbour of Sorel shall take the port side, anything in the preceding articles to the contrary notwithstanding."

The first of these courses, that is to say according to rule 18, was certainly, in my opinion, the safest, because it is the general rule, the rule known to all mariners, and a great number of them even know of no other rule with respect to meeting one another.

I have had proof of this in a number of cases that have come before me.

In following it the meeting would have taken place in perfect security, and without lengthening in a perceptible measure the course towards Sorel.

But the "Canada" was in the habit, as the other boats of the plaintiff company were, to take the direction of the Harbour of Sorel, immediately after having passed the last black buoy and even occasionally between the two black buoys, so as to follow the tangent, instead of a line more or less angular, and the mariners in charge of this vessel did not dream of departing from this habit and this practice.

Evidently it never struck them,—First, that this practice was, perhaps, not known to all mariners; and,—Secondly, that the vessel to meet might not have known the "Canada" and not be aware that she was going to Sorel; and finally, that the Sorel wharf was still two miles distant, and that the extent of this harbour is determined by no law, unfortunately, and has no measurement nor known boundaries, and that rule 33 was, perhaps, not applicable to this part of the river where they were then and where the meeting was to take place.

No doubt of this kind seems, however, to have crossed their minds, and when they had passed the last black buoy they changed their course and inclined towards the south, applying thenceforth rule 33, and preparing to meet on the left the steamer which was coming towards them.

Seemingly, with perfect security, they probably said: "The officers on the steamer coming to meet us must know who we are, and where we are going, and they must know, as we do, rule 33 of the Harbour of Sorel." But it was presuming too much on the knowledge and information possessed by the officers of the "Cape Breton," and it was taking as unquestionable their contention that from that place and from the moment they left the ship channel, they were entering the Harbour of Sorel, which is not absolutely certain. It was wanting to impose on the other vessel a local and not a universal practice. Undoubtedly, we can say: "It was not only a practice and a habit, it was rule 33, and even with respect to the habit, it is just to take it into account." So, if one refers to Marsden, on page 370, we read this:

"But though the regulations are the paramount rules of navigation, yet where the usage of the place and the business and courses of particular vessels are obvious and well-known, no seaman has a right to neglect the knowledge he has of the probable movements of other ships with reference to such usage."

Spencer, at page 44, sec. 22, says this:

"Where well-known usage has sanctioned a particular method of navigating local waters, it is competent for the court to

1905

SS. "CAPE
BRETON"

v.

RICHÉLIEU
AND ONT.
NAV. CO.

Girouard J.

1905

SS. "CAPE
BRETON"

v.

RICHELIEU
AND. ONT.
NAV. CO.

Girouard J.

admit evidence of such usage, and if it be proved that the matter is regulated by general usage, the court may, in its discretion, hold the vessel to conform to such usage."

Different from a general principle, usage is of an exceptional application in the discretion of the court, which is bound to weigh the circumstances and to take usage into account.

Well then, I say this: In this situation, and weighing all the circumstances of the evidence, I think that the obligation was upon the officers of the "Canada" to signal the "Cape Breton" of their intention to pass on the left instead of passing on the right.

It is a general principle, if a steamer follows a course that may appear extraordinary to the other steamers, though justified by special reasons, she does it at her risk and peril, and if she wishes the other steamers to be informed of it she must signal her intentions, because the others have a right to presume that her course will be conformable to the ordinary rules. There is occasion in this case to apply rule 28, because both vessels were following a course they thought authorized by the regulations.

Rule 28 says this:

"When vessels are in sight of one another, a steam vessel under way in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, viz:—One short blast, to mean:—'I am directing my course to starboard.' Two short blasts, to mean:—'I am directing my course to port.' Three short blasts, to mean:—'My engines are going full speed astern.'"

I say that the "Canada" in such a case, should have blown two blasts to say:—"I am going to port side and not to starboard."

When two steamers mutually perceive each other going in opposite directions, and going to meet one another, and there is any doubt as to the direction of one of them, rule 28 becomes obligatory, and they must mutually signal each other by blasts of the whistle to inform each other and naturally they must signal each other when it is still in time and not wait until it is too late. In the present case both steamers are in fault in this respect. As soon as the "Cape Breton" saw the "Canada" change her course, a manœuvre which suddenly shewed her green light for an instant, (this is proved by the officers of the "Cape Breton") she should have understood that the "Canada" was directing her course towards the south, or at least that her course was uncertain, and she should have then, from that moment, have blown a blast of the whistle. Likewise, the "Canada," which was preparing to meet differently from the requirements of rule 18, should have informed the "Cape Breton" of it by two blasts of the whistle. The "Canada" was all the more obliged to do it, as she was following a course which was familiar to her, but which was not to the "Cape Breton," and of which the "Cape Breton" could ignore the reason.

I therefore say that, under these circumstances, and to avoid the collision which they should have foreseen, the two steamers should have exchanged blasts of the whistle to mutually inform each other of their respective courses, and that they should not wait till it was too late as did the "Cape Breton."

There were still other manœuvres which the circumstances commended them to use to avoid the collision, and which I blame them for neglecting. I cite to this effect Spencer on Collisions, p. 93, sec. 26, intituled:—"Where lights are doubtful," and who says what follows:

"Keeping a steamer under way at full speed when there is uncertainty as to the meaning of the lights carried by another vessel is negligence *per se*."

The author cites four precedents in support of this doctrine. At p. 193, sec. 80, he says:

"Under the rules, the obligation to reduce speed arises whenever there is any uncertainty as to a vessel's own position or the movements or course of an approaching vessel sufficiently near at hand to render her a menace to the other's safety.

"Where uncertainty of position or of course is coupled with dangerous proximity, both vessels should reverse and come to a stop, until all uncertainty as to each other's situation is determined."

Five precedents are cited in a foot-note in support of this doctrine.

Let us apply these two rules of conduct, which are based upon reason and jurisprudence to the facts proved on both sides in this case, and we should, I think, conclude therefrom that neither the "Canada" nor the "Cape Breton," complied with these rules.

In the first place, the officers of the "Canada" contend that up to the last minute the "Cape Breton" shewed neither red nor green light.

Till the first blast of the "Cape Breton's" whistle, they swear having seen only her white light, which would not have been sufficient to inform them as to the steamer's course.

If this be true, they must then have been in great uncertainty with respect to the meaning of this white light, which was moving all the same, and which was drawing nearer and on the course they were following, and the danger of being drawn nearer was being added to this uncertainty. What were they then to do? The text writers and jurisprudence answer: "They should at first reduce speed, reverse and come to a stop until all uncertainty had ceased. Now they did neither one thing nor the other. Therefore, they are in fault."

Did the "Cape Breton" behave better? Her officers tell us they were going down the river at full speed. On leaving Sorel, they perceived the white light on the "Canada's" mast and her

1905

SS. "CAPE
BRETON"

v.

RICHELIEU
AND ONT.
NAV. CO.

Girouard J.

1905
 SS. "CAPE
 BRETON"
 v.
 RICHELIEU
 AND ONT.
 NAV. CO.

—
 Girouard J.

saloon lights. They say they did not know it was the "Canada," but they saw the lights of an upbound steamer. She was still four miles distant at the time. Then they saw her red light, and they ported their helm to meet on the right. This is not what I blame them for. That was all right. Thus the "Canada's" red light indicated she was directing her course towards the north to meet on the right and the "Cape Breton" was directing her course towards the south.

But one thing which should have astonished the officers of the "Cape Breton" is, that while shewing her red light, the "Canada" was also remaining almost in a line with the "Cape Breton" which, nevertheless, kept her helm to port and was tending obliquely towards starboard.

All of a sudden the "Canada" shewed her green light. McNeill and Hamelin said it was but a flash which did not last long. I have serious doubts upon this point and there are many reasons to believe that from that very moment the "Cape Breton" must have seen the three lights and that afterwards she must have seen but the green light when the "Canada" had changed her course after passing the second black buoy. Be it as it may, the sudden appearance of this green light, and the fact that the "Canada" was drawing near the south, instead of getting away towards the north were sufficient to give rise in the minds of the officers of the "Cape Breton" to serious doubts as to the meaning of the green flash and upon the true course of the "Canada."

But are these doubts mere hypotheses, or did they exist in the minds of the officers McNeill and Hamelin? Yes; these doubts did exist.

I find the proof of the same in their testimonies, and I also find it in the log-book, where this uncertainty is recorded. It is sufficient to see upon this point the citation of the log-book in Captain Reid's evidence. Here follows what we read there:—

"A few minutes before the collision the "Canada's" mast-head and port side lights were shewing at about one point or one and a quarter off our port bow. The pilot finding the "Canada" was closing in on him, ported and kept to starboard. A little later on, the pilot asked me: 'What does he mean. I am keeping to starboard and he is closing in on me?' Then the pilot ported and blew one blast of the whistle. The "Canada" answered by blowing two blasts. The wheel was put hard-a-port, the pilot again blew one blast, and ordered the engines stopped and full speed astern."

This is what we find in the log-book.

As we see, the pilot was noticing that the "Canada's" light was always at one point or one and a quarter points on the port bow, notwithstanding that the "Cape Breton" was going full speed to starboard. In spite of having ported his helm, the "Can-

ada" was always closing in on him. What does this mean, he said to the other officers. What is the steamer doing? I am going more and more to starboard and she pursues me.

Therefore Hamelin was in doubt. He no longer understood the "Canada's" intentions, the meeting of the flash of the green light, and the course the "Canada" was following.

In this condition of uncertainty, he should: (1) Reduce his speed; (2) Reverse and come to a stop until he could understand what course the "Canada" was following. He did neither one nor the other of these two things, and made the same mistake as the "Canada."

There is more, and that must have increased pilot Hamelin's uncertainty. It is the fact that he was then a few hundred feet outside of the channel to the south and that he was consequently deviating from the course generally followed by steamers and from the one he had himself intended to follow in leaving Sorel. Since he wanted to pass north of the black buoy, as I heretofore said, and that if the "Canada" obstinately kept barring his way, he himself shewed the same obstinacy in placing himself across the "Canada's" way. Such a course followed by two steamers toward the south outside the channel must have appeared to him at least, strange, and increased his uncertainty.

The "Canada" could at least say: "I am here because I am going to Sorel," but she, the "Cape Breton," (which was going down to Quebec), why was she out of the main channel; and why did she persist in wanting to pass south of the "Canada," while her ordinary course towards Quebec was north and free?

In my opinion the appeal should be dismissed with costs. I am not satisfied that the judgment appealed from is wrong. Before reversing, I would certainly require the opinion of competent and disinterested experts and, for that reason, I would agree that the case be sent back to the court below for the purpose of getting the opinion of three nautical assessors upon the question as to whether there was time, under the circumstances proved, by any manœuvre on the part of the "Cape Breton," to avoid the collision; costs then to follow final decision.

NESBITT J.—The action is one by the Richelieu Company in respect of a collision which occurred about 2.35 a.m. of the 12th June, 1904, between the

1905
SS. "CAPE
BRETON"
v.
RICHELIEU
AND ONT.
NAV. CO.
Girouard J.

1905

SS. "CAPE
BRETON"

v.

RICHELIEU
AND ONT.
NAV. CO.

Nesbitt J.

steamers "Canada" and the SS. "Cape Breton" in the St. Lawrence River about two miles below Sorel, which lies at the mouth of the Richelieu. The case was argued at great length, the evidence being voluminous, but I have concluded the essential facts are within small compass.

The "Cape Breton" had been anchored over night in the River St. Lawrence opposite the Harbour of Sorel. She had weighed anchor and had proceeded about two miles down the River St. Lawrence when the collision occurred. The "Canada" was on her way up the river from Quebec. The River St. Lawrence flows in a northeasterly direction so that the "Cape Breton" had the south shore on her starboard side and the "Canada's" starboard was towards the north shore. The boats came into collision on the south side of the fairway or mid-channel line, the "Cape Breton's" stem striking the "Canada" on her starboard quarter between the pilot house and wheel-box. The "Cape Breton" was damaged to some extent by the collision and the "Canada" sank in about thirty-five feet of water, with her bow about 400 feet south of the centre line of the channel.

Both vessels were carrying the regulation lights. The "Canada" was steaming at about 14 miles an hour, and the "Cape Breton" at about ten miles an hour. The "Cape Breton" was being navigated by a regularly licensed branch pilot, and her first officer (who carried a master's certificate) was in command of the vessel on the bridge with the pilot. An able-bodied seaman was stationed in the "Cape Breton's" bow in the capacity of "look-out," and having no other duties to perform, while the ship's boatswain and another able-bodied seaman completed the watch on deck at the time.

1905

SS. "CAPE
BRETON"
v.RICHELIEU
AND ONT.
NAV. CO.Nesbitt J.

The "Canada" had no look-out, and the red and green lights of the "Cape Breton" were not seen by any one. When the "Canada" arrived at the north of the black buoy described in the evidence, she not having seen the lights indicating an approaching vessel changed her course and turned for Sorel without giving any signal to any approaching vessel that she was going to the other side of the channel, and in effect becoming a crossing instead of a passing vessel. It is at this point only of the case I have entertained any doubt, because, if the evidence satisfied me that, notwithstanding this default, nevertheless those in charge of the "Cape Breton" should or did see the green light indicating an approaching crossing vessel, then I think the "Cape Breton" would be partially to blame. If, on the other hand, the fact of the "Canada" attempting to cross only became apparent after the first blast and the answer to it, then I think no fault can be attributed to those in charge, even if, in the agony of collision, a different movement might have avoided the accident. Certain principles seem to me to be well settled by the authorities. First, that these vessels were approaching each in a narrow channel and rule 25 was applicable, which compels each to keep to that side of the fairway or mid-channel, which lies on the starboard side of the vessel. The "Canada" answers by referring to rule 33 by which ships entering or leaving Sorel are directed to take the port side, but even assuming the point where the "Canada" changed her course was within that rule (which I am inclined to think it was not), she was bound under the combined effect of rules 27 and 28 to give notice to an approaching vessel of the intention to so direct her course as to cross the other. Assuming after that the "Canada" was properly on her course she

1905
SS. "CAPE
BRETON"
v.
RICHELIEU
AND ONT.
NAV. CO.
Nesbitt J.

was bound under article 19 to keep out of the way of the "Cape Breton," and if necessary to slacken her speed or stop and reverse. She neither gave notice of her change of course from that to be assumed under rule 25 she was going to follow nor attempted to keep out of the way, nor slackened, nor stopped, nor reversed, and the conclusion is irresistible that she behaved as she did simply because she failed utterly to see the lights of the "Cape Breton" by reason of failure to keep proper look-out and so to appreciate that a vessel was approaching. In fact her pilot Boule says he saw the red light of the "Cape Breton" first when that vessel blew a single blast, and then she was only 700 or 800 feet away. Even then, after an interval of five or six seconds, he blew two whistles and continued on his course. As I have said, notwithstanding this utter failure to obey the rules on the part of those in charge of the "Canada," if those in charge of the "Cape Breton" knew or with due care should have known of the change of course of the "Canada" and could have prevented the collision by any act on their part, then the judgment must stand. The pilot Hamelin admits that a mile away he saw a flash of a green light indicating, if it continued in view, a crossing vessel, but he swears it was a momentary flash to be expected from an approaching vessel owing to the sinuosity of the river, and that he kept a constant look-out and saw nothing but a red and white light indicating an approaching and passing vessel until, a quarter of a mile away, the vessel suddenly turned in front of him when he signalled he would go still more to the right, assuming the vessel would obey the signal, and to his astonishment she answered she would continue her course, and that instantly he stopped and reversed, but too late to avert the disaster. The trial judge does

not expressly find upon this, but indicates his doubts as to whether the green light was not visible for a longer period of approach than I have indicated. Had he found expressly it might have been difficult for the appellants to displace the finding, but, bearing in mind the well-settled principles of law applicable, I think the defendants must be absolved. The fault of the "Canada" being obvious and inexcusable, the evidence to establish the fault on the part of the "Cape Breton" must be clear and convincing in order to make a case for apportionment, and the burden of proof is upon the "Canada" to establish fault in the "Cape Breton". The trial judge has not discredited the testimony of those in charge of the "Cape Breton"; he relies apparently on an ambiguous entry in the "log" and a conversation between the pilot and mate which I think is shewn to have taken place when the first blast was given and not when the green light flashed momentarily in view. I think in view of the findings that the regulation lights of the "Cape Breton" were burning, and that she was on her proper course, she was not bound by seeing the momentary flash of the green light to anticipate the conduct of the "Canada"; that she took all proper precautions as soon as chargeable with notice of risk of collision and, assuming the learned judge is right, that if she had starboarded her helm the accident might have been avoided (though the weight of evidence seems to me to be the contrary), the pilot exercised the best judgment he could in the agony of collision without violating any express rule, and cannot be held responsible if his judgment erred. The case, I think, is governed by *The "Victory"* (1); *The "Cuba"* v. *McMillan* (2);

1905
 SS. "CAPE
 BRETON"
 v.
 RICHELIEU
 AND ONT.
 NAV. CO.
 Nesbitt J.

(1) 168 U.S.R. 410.

(2) 26 Can. S.C.R. 651.

1905 *Turret SS. Co. v. Jenks* (1), decided in the Privy
 SS. "CAPE BRETON"
 v.
 RICHELIEU
 AND ONT.
 NAV. CO. Council, in 1901. I would allow the appeal with costs
 in all courts.
 IDINGTON J.—I concur for the reasons stated by
 Nesbitt J. my brother Nesbitt.

*Appeal allowed with costs.**

Solicitors for the appellants:

Solicitors for the respondents:

*NOTE.—Upon the application of the respondents, on 21st October, 1905, before His Lordship Mr. Justice Idington, in Chambers, for an order under the rules established by the Colonial Courts of Admiralty Act, 1890 (Imp.), fixing bail to be given by the said respondents upon an appeal by them to His Majesty in Council to answer the costs of such appeal, after hearing counsel for both parties, it was ordered that the respondents should give bail to answer the costs of the proposed appeal in the sum of £300 sterling, to the satisfaction of the Registrar of the Supreme Court of Canada, on or before the 30th of October, 1905, costs of the application to be costs in the cause.