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* May 13, 14.
* Nov. 18.

PORT COLBORNE & ST. LAWRENCE NAVIGATION COMPANY LIMITED (PLAINTIFF)

AND

THE MASTER, OFFICERS, MEMBERS OF THE CREW, AND PASSENGERS OF THE SS. *Benmaple* (ADDITIONAL PLAINTIFFS)..... } APPELLANTS;

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AND

THE SHIP *Lafayette*, AND HER OWNERS, LA COMPAGNIE GÉNÉRALE TRANSATLANTIQUE (DEFENDANTS AND COUNTER-CLAIMANTS)..... } RESPONDENTS.

MAPLE LEAF MILLING COMPANY LIMITED AND OTHERS (PLAINTIFFS) } APPELLANTS;

AND

THE SHIP *Lafayette* (DEFENDANT).... RESPONDENT.

ON APPEALS FROM THE EXCHEQUER COURT OF CANADA

Shipping—Collision in St. Lawrence River during fog—Whether proper fog signals given—Whether either one or both ships at fault—Moderate speed in fog—Article 16 of International Rules of the Road—Apportionment of blame on each vessel by trial judge—Alteration of it by appellate courts.

The appellant, Port Colborne & St. Lawrence Navigation Company, Limited, were owners of the SS. *Benmaple,* which sank as a result of a collision between her and the ship *Lafayette,* owned by the respondent, La Compagnie Générale Transatlantique. The collision occurred at about five o'clock in the morning of August 31st, 1936, in the St. Lawrence river, about 25 miles above Father Point, where the *Lafayette* had taken a pilot. There was a dense fog and neither ship saw the other until almost the moment of the collision, apparently too late to avoid it. The *Lafayette,* about ten minutes before the collision, heard an ordinary fog whistle ahead, slightly on her port bow. Up to that time, she had been running through the fog for some 35 minutes at a "standby full speed" which, for her, was about 16 knots "over the ground." The tide was ebb about 2 to 3 knots against her. When the *Lafayette* heard the fog signal, the only one she alleged she did hear, she stopped her engines for three minutes, but the ship still continued running along at about 5 or 6 knots over the ground. Then she went ahead at slow speed for two minutes and then increased to half speed for about five minutes when the collision occurred. The trial judge found that the logs on the *Lafayette* plainly appeared to have been erased and falsified at critical points.

* PRESENT:—Duff C.J. and Crocket, Davis, Kerwin and Hudson JJ.

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Subsequent to the action in damages by the owners of the *Benmaple* against the ship *Lafayette,* the master and other officers and members of the crew of the *Benmaple* and four passengers on board the steamer were added as plaintiffs for loss of clothing and personal effects. La Compagnie Générale Transatlantique also filed a counterclaim against the owners of the *Benmaple* for $75,000 for damage caused to the ship *Lafayette* by the collision. Another action was taken against the *Lafayette* by Maple Leaf Milling Company, Limited and other owners of cargo or goods laden on the *Benmaple.* The trial judge, Demers J., Judge in Admiralty, hearing the case with two assessors, held that there was no doubt as to the fault on the part of the *Benmaple;* that the *Lafayette* also contributed to the accident, she having been wrong in going half speed before ascertaining that there was no danger from the other ship; and the trial judge apportioned fault three-quarters against the *Benmaple* and one-quarter against the *Lafayette.* On appeal to the Exchequer Court of Canada, Angers J., assisted by one assessor, held that the fault was wholly that of the *Benmaple* and that, even assuming that the *Lafayette's* speed was too great, that was not the proximate cause of the accident, and the actions were dismissed.

Held, Crocket J. dissenting, that there was no doubt as to the fault on the part of the *Lafayette* as well as on the part of the *Benmaple,* as found by the trial judge and that such finding should not have been disturbed on appeal to the Exchequer Court of Canada.

Per the Chief Justice and Davis J.—Under the circumstances of this case, it is plain that the *Lafayette* should have stopped when she heard the first fog signal until she had ascertained "with certainty" what was the position of the ship from which the signal had come.—Comments as to what constitutes a moderate speed in fog; as to the duty of a ship to stop and then navigate with caution until the danger of a collision is over; and as to the question of altering the apportionment of blame on each vessel as fixed by the trial judge.

Per Crocket J. (dissenting):—The vital issue in the case is a question of fact as to whether the fog signals of the *Benmaple* were sounded at regular intervals after the first signal heard by the *Lafayette;* and the trial judge misdirected himself in holding that he was obliged to accept the affirmative testimony of the *Benmaple's* witnesses that they were sounded rather than the negative testimony of the *Lafayette's* witnesses that they were not, following the rule of evidence that the positive or affirmative testimony as to whether a thing did or did not happen should be accepted rather than the negative testimony. Therefore, the judge in appeal was justified in disregarding the trial finding upon that vital issue and himself concluding upon the evidence that the *Lafayette* was not at fault: her act of increasing her speed from slow to half was attributable, not to any negligence on her own part, but solely to the negligent failure of the *Benmaple* to regularly sound her fog signals for a period of at least five minutes.

Judgment of the Exchequer Court of Canada ([1939] Ex. C.R. 355) reversed, Crocket J. dissenting.

APPEALS (heard together before this Court) from the judgments of the Exchequer Court of Canada, Angers

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J. (1), reversing the judgments of the District Judge in Admiralty for the Quebec Admiralty District, Demers D.J.A. (2) and holding that all the actions by the several plaintiffs should be dismissed and that the respondents' counter-claim should be maintained.

The material facts of the case and the questions at issue are stated in the above head-note and in the judgments now reported.

R. C. Holden K.C. for the appellants.

Lucien Beauregard K.C. for the respondents.

The judgment of the Chief Justice and of Davis J. was delivered by

DAVIS J.—The appeals in these cases were heard together and arise out of a collision between two ships in the St. Lawrence river at about five o'clock in the morning of August 31st, 1936. The appellants Port Colborne & St. Lawrence Navigation Company, Limited, were owners of the *Benmaple,* which sank as a result of the collision. She was a steel single screw steamer of the Canadian canal type of construction, about 250 feet in length with a beam of about 43 feet and a gross tonnage of about 1,729. She was carrying a heavy cargo of flour and feed and was on her way down the river from Montreal to Halifax. The respondents, La Compagnie Générale Transatlantique, are the owners of the *Lafayette*—a large French passenger motor vessel of a gross tonnage of 25,000 with a net registered tonnage of 14,430. She is a ship over 600 feet in length. The *Lafayette* was coming up the river on an excursion trip from Boston to Quebec. The collision occurred about 25 miles above Father Point where the *Lafayette* had taken on a pilot. There was a dense fog and it is plain that neither ship saw the other until almost the moment of the collision. The *Lafayette* cut into the *Benmaple's* stern about 33 feet, going from starboard to port and from stem to stern, and swinging the *Benmaple* right around. Within about an hour the *Benmaple* with her full cargo sank.

The vital fact in the case, and it is not in dispute, is that the *Lafayette* heard a fog whistle ahead, slightly on

(1) [1939] Ex. C.R. 355. (2) [1938] Ex. C.R. 10.

her port bow, about ten minutes before the collision. It was an ordinary fog signal. Up to that time she had been running through the fog for some 35 minutes at what the witnesses termed "standby full speed" which, for the *Lafayette,* is about 16 knots "over the ground." The tide was ebb about 2 to 3 knots against the *Lafayette.* When the *Lafayette* heard the fog signal (the only one she did hear if any other was given until she was right upon the *Benmaple*) she stopped her engines for three minutes. But the stopping of her engines for such a short time did not mean that the ship stopped going ahead; it appears to have left the ship running along at about 5 or 6 knots over the ground. The *Lafayette,* after stopping her engines for three minutes, then went ahead at slow speed for two minutes and then increased to half speed for about five minutes when the collision occurred. She had heard no further fog signals but when there suddenly appeared on her port bow a white masthead light on an approaching ship (it turned out to be on the *Benmaple*) the Lafayette turned 15 degrees up to the moment of impact. What the appellants say is that on all the authorities the speed of the *Lafayette* was a very serious matter. It is rather apparent that the *Lafayette's* witnesses at the trial endeavoured to keep down the speed of the ship and to extend the range of visibility. The logs on the *Lafayette* plainly appear to have been erased and falsified at critical points as found by the trial judge.

Demers J., the learned district Judge in Admiralty for Quebec, who heard the case with two assessors, said he had no doubt as to fault on the part of the *Benmaple.* She did not have a pilot and while not bound by law to have one she did not follow the usual course of ships going down the Gulf of St. Lawrence. She was not sufficiently manned and the captain failed to meet his responsibilities. Further, the trial judge found that those on board the *Benmaple* were not keeping a proper lookout. The *Lafayette* was equipped with an exceptionally strong diaphone whistle which was placed forward of the funnel and the fog signals of the *Lafayette* were given at regular intervals and were always heard by the officer of the *Daghild,* another ship which was going up the river at the time and which the *Lafayette* had overtaken two or three miles before the collision.

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The trial judge said that he had more difficulty in determining the question whether the *Lafayette* was also in fault. The only serious reproach, he said, was that she violated article 16 of the International Rules of the Road. But he pointed out that she did not entirely disregard the rule; if she had and continued at full speed, very likely nothing would have happened. She started to obey the rule. Hearing a signal, she stopped for three minutes and nothing more being heard, she started to slow for two minutes and then she started at half speed. She was so going for one or two minutes when she saw the *Benmaple* at a distance of between 500 and 1,000 feet. Her engines were stopped and reversed. The learned trial judge then put to himself the question: "Was half speed a reasonable speed?" On the evidence he reached the conclusion that a vessel in such a fog should have been stopped until it could be ascertained with certainty what the position of the *Benmaple* was and what she was doing, and in failing to do so, the *Lafayette* was wrong in going half speed before ascertaining that there was no danger from the other ship. The trial judge was satisfied that the *Lafayette's* neglect contributed to the accident and he apportioned fault three-quarters against the *Benmaple* and one-quarter against the *Lafayette,* and therefore only gave the *Benmaple's* owners and co-plaintiffs one-quarter of their damages without costs. From that judgment the *Lafayette* appealed to the Exchequer Court of Canada and the present appellants, the *Benmaple* and the owners of her cargo, gave notice of a cross appeal asking for an equal division of fault. Angers J. heard the appeal and he came to the conclusion that the fault was wholly that of the *Benmaple,* allowed the appeal and dismissed the actions. From his judgment the *Benmaple* and the owners of her cargo appealed to this Court, asking for the restoration of the trial judgment with a variation to the extent of holding the *Lafayette* equally to blame with the *Benmaple* and condemning her to pay to the appellants one-half of their damages and full costs. Certain members of the crew and the parents of a deceased member of the crew intervened in the actions but when the actions were dismissed by Angers J. they did not carry their interventions to this Court.

Angers J., on appeal, while not inclined to think that the *Lafayette* proceeded at an immoderate speed after stopping her engines for three minutes and then proceeding at slow speed for two minutes, and then at half speed, held even if her speed was too great, that was not the proximate cause of the accident.

> If the *Lafayette* had continued to proceed at slow speed, the damages would very likely have been less serious. I do not think, however, that this is a sufficient reason to hold the *Lafayette* partly responsible for the damages incurred, as, in my opinion, the collision could and would have been avoided had the *Benmaple* given regular fog signals and kept a proper lookout.

For this reason the learned judge on appeal exonerated the *Lafayette* from any fault causing or contributing to the collision.

Mr. Holden for the appellants admitted at once that there was fault on the part of the *Benmaple* in that its speed was not "moderate" as required by article 16 of the International Rules of the Road, but contended, as the trial judge found, that there was clearly fault also on the part of the *Lafayette;* that Angers J. had no just ground for disturbing that finding of the trial judge; and that on the evidence taken as a whole the apportionment of fault should have been an equal division. Mr. Holden's submission was that the *Lafayette* cannot be exonerated: (1) because up to 4.52 a.m. the *Lafayette* by going ahead at full speed in dense fog was guilty of travelling at an immoderate speed; (2) that any ship in a dense fog after hearing even one fog signal ought not to go ahead even at half speed—that was not cautious; (3) that Demers J. in making the apportionment did not take into account the speed of the *Lafayette* before the first whistle but only the speed after it was heard; and if the trial judge had given that aspect of the case its proper weight he could not and would not have put 75 per cent of the blame on the *Benmaple* as against 25 per cent on the *Lafayette.*

The evidence satisfies us that the two ships did not come head to head but that the *Benmaple's* direction was rather that of crossing the other's course. One can only roughly estimate the angle of the collision. While the witnesses no doubt give their best recollection as to the distances in feet between the two ships when each observed the other, it is plain that the ships were practically on top

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of one another at that time. Taking the speed of the two vessels travelling in opposite directions it is estimated by Mr. Holden that their combined speed was about 1,750 feet in a minute and from the various distances of separation given by the several witnesses it would probably be only a matter of seconds when each ship suddenly endeavoured to avoid the other.

There was undoubtedly a thick fog and when the *Lafayette* finally saw the *Benmaple* her orders were: "Stop. Hard to starboard. Full astern." These orders were given almost all at once. Mr. Holden referred to the automatic course recorder as conclusive against the *Lafayette* having stopped. It is contended that she could have stopped in 2·44 minutes but Mr. Holden argued that the chart shows that she could not have been dead in two and a half minutes. I now quote article 16 of the International Rules of the Road:

> Article 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

Now what constitutes a moderate speed in fog? In the House of Lords in *The Oceanic* (1), Lord Halsbury at p. 380 said this:

> Apart from any rule, one would think that where it was known that two bodies were approaching, and that there was no absolute means of knowing the direction in which they were coming and the danger which was to be avoided, the common sense thing would be to stop until the direction was ascertained, and also whether it was possible to avoid the serious danger which might arise.

Lord Shand added, at p. 380:

> It is not denied that the *Kincora* was to blame, and the question now is whether she was solely to blame. The *Oceanic* seems to possess a remarkable stopping power, and it was said that that power of stopping justified the speed at which she was going.. I have come to the opinion after the full arguments which we heard that taking that power of stopping into account, the *Oceanic,* nevertheless, was not going at a moderate speed having regard to the circumstances of the case. The power of stopping within a short distance is no doubt a material circumstance to be taken into account in such a question as this, but here the fog was so thick that the power of stopping was not timeously exercised. As it was not timeously exercised the way on the vessel was such that she by her speed conduced to the collision, and so the *Oceanic* was also, in my opinion, to blame.

(1) (1903) 9 Asp. Mar. Cas. (N.S.) 378.

As to the duty to stop and then navigate with caution until the danger of a collision is over, a leading case is *The Chinkiang* in the Privy Council (1). The judgment was delivered by Sir Gorell Barnes. Their Lordships were clearly of opinion that, having regard to the weather and the circumstances of the case, the ship

> was not proceeding at a moderate speed, and that her excessive speed was a contributing cause to the collision in question.

Dealing with article 16 of the International Regulations,

> Their Lordships cannot consider that the speed which was upon the vessel in this case was such as to comply with the terms of art. 16.

The judgment continues (at p. 259):

> after hearing the first whistle * * * it is notorious that it is a matter of the very greatest difficulty to make out the direction and distance of a whistle heard in a fog, and that it is almost impossible to rely with certainty on being able to determine the precise bearing and distance of a fog signal when it is heard.

and goes on to say that the ship should know "unequivocally and distinctly what was the position" and that the engines

> ought to have been stopped until it could be, with certainty, ascertained what the position of the *Chinkiang* was, and what she was doing.

In 1934 in the Privy Council in *Nippon Yusen Kaisha* v. *The China Navigation Co. Ltd.* (2), Lord Macmillan said, at pp. 534 and 535:

> The result is that their Lordships are of opinion that the *Kiangsu* was in breach of Regulation 16 by reason of her failure to stop her engines * * * She cannot be absolved from a share in the blame for the collision. Their Lordships cannot too emphatically express their sense of the importance of implicit obedience to the regulations on whose observance navigators are entitled at all times to rely.

At the close of the argument of counsel for the respondent the case came down for discussion very much to what was the distance between the two ships when the *Lafayette* first sighted the *Benmaple*. In fact I asked specifically for an answer to that question because it seemed to me that the closer the one ship was put to the other, the stronger became the inference that the five men on the bridge of the *Lafayette* plus two additional lookouts must either have been inattentive if they did not see the *Benmaple* until they were right on top of her, or, that the fog must have been so dense that they could not

(1) [1908] A.C. 251. (2) (1934) 18 Asp. Mar. Cas. (N.S.) 533.

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see her until they were right on top of her, in which case great caution should have been taken in navigating. Mr. Beauregard answered the question by saying in terms of time it was between a minute and two minutes and then translated that into distance, making, as Mr. Holden did, the combined speed of the two ships travelling in opposite directions at about 1,750 feet per minute, although Mr. Beauregard preferred to state that as the maximum. Mr. Justice Demers had said:

* * * when she (i.e. the *Lafayette*) saw the *Benmaple* at a distance of between five hundred and one thousand feet * * *

Mr. Justice Angers put it at 1,000 feet. No matter what the exact distance may have been, it is plain that it was a very short distance but Mr. Beauregard, in a clear and forcible argument, contended that if there was any immoderate speed on the part of the *Lafayette* which might be said to be a breach of article 16, such speed on the facts of this case did not cause or contribute to the collision. It was merely collateral and immaterial, he said.

On the whole case we think it is plain that the *Lafayette* should have stopped when she heard the first fog signal until she had ascertained "with certainty" what was the position of the ship from which the signal had come. There can be no question, we think, of fault on the part of the *Lafayette* as well as on the part of the *Benmaple* and that was the finding of the trial judge, assisted by two assessors. With the greatest respect I can find no ground upon which the learned Judge in the Exchequer Court of Canada on appeal, assisted by one assessor, should have disturbed the finding of liability.

We were pressed by counsel for the appellant, if we came to the above conclusion on the question of liability, to apportion the blame on an equal division rather than on the division of 25 and 75 per cent fixed by the trial judge. But upon the question of altering the share of responsibility Lord Buckmaster in the House of Lords in SS. *Kitano Maru* v. SS. *Otranto* (1) (and his judgment was concurred in by all the other Law Lords who sat upon the appeal) said:

* * * this is primarily a matter for the judge at the trial, and unless there is some error in law or fact in his judgment it ought not to be disturbed.

(1) [1931] A.C. 194, at 204.

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The Luso (1) was an appeal in the Court of Appeal before Lord Justice Scrutton, Lord Justice Greer and Lord Justice Maugham (as he then was). That was a collision case and the only thing in dispute was the measure of apportionment of the damage. Lord Justice Scrutton, after referring to *The Glorious* (2), *The Karamea* (3), and *The Peter Benoit* (4), said (at p. 165):

> The learned Judge below having two admissions from the two sides, has apportioned the damage between them, making certain findings as to the reliability of the evidence given by the two sides, and has apportioned the damage 75 per cent on the Latvian ship and 25 per cent on the Portuguese ship, and before the Court of Appeal ought to interfere with that finding they must be able to put their finger on something and say that the learned Judge has been wrong on some particular point and that that particular point is so substantial that if he had taken what we say is the right view of it he must have altered the proportion of damage.

Lord Justice Greer at p. 166 said:

> It is not an easy problem to set a tribunal of fact to measure the amount of fault there is in the navigation of two ships, but the statute (*Maritime Conventions Act*, 1911, sect. 1 (1)) puts it upon the tribunal to decide that question, and where it is more or less in every case a question of degree, it is right to say that on only very rare occasions is it that the Court of Appeal ought to reverse the decision of the learned Judge, if there is any ground on which there can be established a difference of fault of the two vessels in collision.

We have come to the conclusion that the learned trial judge was justified in his view that there were different degrees of fault of the two vessels in collision and we are not satisfied that in making the apportionment he did he was in any degree acting either on any wrong ground of law or conclusion of fact.

The appeals should be allowed, the judgments of Angers J. set aside and the judgments of Demers J. at the trial restored. The appellants should have their costs of the appeal in the Exchequer Court and in this Court.

CROCKET J. (dissenting)—These actions arose out of a collision, which occurred in the River St. Lawrence at a point 6 or 7 miles west of Bicquette Island about five o'clock a.m. (daylight time), on August 31st, 1936, between the *Benmaple* and the *Lafayette*. The *Benmaple* was a steel single screw steamer of the Canadian canal type with

(1) (1934) 49 Lloyd L.R. 163.
(2) (1932) 44 Lloyd L.R. 321.
(3) (1920) 5 Lloyd L.R. 253; (1921) 9 Lloyd L.R. 375.
(4) (1915) 84 L.J.P. 87.

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triple expansion steam engines. She was 250·1 feet in length and 43 feet in beam and of a net registered tonnage of 1,074, and was on a trip from Montreal to Halifax with a cargo of flour, feed and other general cargo. The *Lafayette* was a motor steel passenger vessel with a length of 184 meters, a width of 26 meters and a net registered tonnage of 14,430 tons. She was equipped with four Diesel engines, her maximum speed being about 17 knots. She was on an excursion trip from Boston to Quebec. For some hours before the collision foggy weather of varying thickness had prevailed in the river between Quebec and Father Point, and the trial judge found that, while the crew of the *Lafayette* saw the *Benmaple* at a distance of between 500 and 1,000 feet, the crew of the *Benmaple* did not see the *Lafayette* until she was within a distance of 50 feet of the motor ship, bearing slightly on the *Benmaple's* starboard bow. It was apparently then too late to avoid the collision. Both vessels at the moment the *Benmaple's* white masthead light was first seen by the *Lafayette* were going at half speed, which, making due allowance for the one moving against the current and tide and the other with it, meant a speed of 9 knots (over the ground) for the *Lafayette* and at least 8½ knots for the *Benmaple.* Notwithstanding that the powerful engines of the *Lafayette* were immediately stopped and reversed to full speed astern, and the helm put hard astarboard, she struck the *Benmaple,* cut through the forecastle and main decks for a distance of 33 feet, and turned her completely around. The *Benmaple* sank with her cargo in a little more than an hour, all 19 members of her crew except one sailor having been rescued by one of the *Lafayette's* life boats.

The actions were tried before Mr. Justice Demers, Local Judge in Admiralty for the district of Quebec, sitting with two assessors. The learned judge held the *Lafayette* one-quarter and the *Benmaple* three-quarters to blame for the collision and rendered judgment accordingly, condemning the *Lafayette* and her bail to pay one-quarter of the plaintiffs' damages and awarding the defendants three-quarters of their damages on their counter-claim, without costs to any of the parties, and with a reference to the Registrar to assess the damages on that basis.

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The defendants appealed from the trial judgment to the Exchequer Court of Canada and the plaintiffs cross-appealed, claiming that the trial judgment should be varied so as to hold the *Lafayette* at least equally to blame with the *Benmaple* for the collision. The result was that the defendants' appeal was allowed, the plaintiffs' action dismissed with costs and the defendants' counter-claim maintained, and a reference to the District Registrar ordered for the assessment of the defendants' damages only.

The one ground, on which the learned trial judge found the *Lafayette* in part to blame for the collision, was that after she had stopped for three minutes upon hearing a fog signal from a ship ahead, which proved to be the *Benmaple,* and then proceeding slow for two minutes, she went to half speed again before ascertaining that there was no danger from the other ship. Other than this he found no negligence of any kind on the part of the *Lafayette.* "Nobody denies," he said,

> that the ship was well manned. Her officers were all on the alert. Her fog whistle was in operation with regularity. There were seven persons on the bridge exercising a vigil and there were two additional lookouts. The master and the staff were all at their posts.

On the other hand, with respect to the *Benmaple,* which admittedly had no pilot, he found in effect that this lack was not made up by the presence of officers, who were conversant with all the difficulties of navigation in that stretch of the river, and that as a result she did not follow the usual course of outgoing ships. The undisputed and admitted fact was that the master of the *Benmaple* had retired to his cabin below the pilot house about midnight, undressed and went to sleep, and continued to sleep until he was awakened by the collision, and that during all this time the vessel was in charge of a master mariner, 64 years of age, who had been on duty for approximately 17 hours except for a few moments' rest, and who the trial judge, in his reasons, described as being deaf. The learned trial judge explicitly found that the master failed to meet his responsibilities, and, moreover, that those on board the *Benmaple* were not keeping a proper look-out.

The appellant, while of course impugning the validity of the Exchequer Court of Canada judgment in exonerating the *Lafayette* from all blame, makes no pretension on this appeal that the trial judge was not fully warranted

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in finding that the *Benmaple* was guilty of negligence, which materially contributed to the collision, but it does contend, as it did in the Exchequer Court of Canada, that it should not be saddled with more than fifty per cent of the responsibility, and that the trial judgment should be varied accordingly. The respondent on the other hand directly challenges, as it did in the Exchequer Court of Canada, the trial finding that the *Lafayette* was at fault in starting her engines at half speed in the circumstances described by the presiding judge before ascertaining that there was no danger ahead. Herein, it seems to me, lies the crux of the problem presented by this appeal—the main issue upon which the trial judge and Angers J. differed.

That the question whether or not the *Benmaple,* in addition to the other grounds of negligence found against her by the trial judge, failed also to properly sound her fog whistle at regular intervals was a matter of first importance in determining whether the *Lafayette* violated its duty in ordering her engines from slow to half speed, when she did, goes, I think, without saying. It could hardly be doubted, as pointed out by Angers J., that if the *Lafayette* had heard another signal before the expiry of the three minutes during which her engines were stopped, she would have kept them stopped, and not gone on. No one, I think, can read the learned trial judge's reasons without seeing that he was keenly alive to this fact. Indeed these considered reasons seem to me directly to point to the probability that, had he not felt obliged to accept the affirmative testimony of the *Benmaple's* witnesses that her fog signals were being regularly sounded rather than the negative testimony of the *Lafayette's* witnesses that they were not, he would have exonerated the *Lafayette* from all blame. His finding on this question of the *Benmaple's* signals was the only finding of fact, which the learned judge on appeal does not seem to have followed; and as to this the trial judge says:—

> I must now come to the question of signals. There is positive evidence by the *Benmaple* that they were regularly given. My assessors are of the opinion that they were not. They base their opinion on the fact that the *Lafayette* was stopped three minutes to listen and that all on board were very attentive and heard nothing; that the *Daghild* was coming astern but heard them (the *Lafayette*), though the diaphone was on the funnel; and also very likely by the poor manner in which the

Benmaple was conducted. This, however, being a question of evidence, I consider I am not bound by their opinion and that I must follow the ordinary rules of evidence and that I cannot reject positive evidence on presumption. The doubt in my mind is not sufficient. Plaintiff, therefore, is entitled to the benefit of the doubt.

No doubt what His Lordship had in mind was the principle that upon an issue as to whether a thing did or did not happen, the positive or affirmative testimony ordinarily should be accepted rather than the negative testimony. The clear implication of his statement is that he felt he was precluded by this so-called rule of evidence from rejecting the positive testimony of the *Benmaple's* witnesses, and that that rule cast upon the defendant ship the burden of proving the negative of the issue beyond all reasonable doubt. With the greatest respect, I am of opinion that the learned trial judge misdirected himself in that regard. No more than a preponderance of evidence upon the particular question involved was required, to my mind, to rebut the affirmative assertions of the *Benmaple's* witnesses, the question always being: on which side does the balance of the probabilities lie? The rule referred to, which some judges have described as being merely a rule of common sense rather than a rule of evidence, is, I think, applicable only to a case where a trial tribunal is obliged to choose between a positive assertion made by one or more apparently credible witnesses on one side that some particular thing happened and its denial by one or more apparently equally credible witnesses on the other. The reason of the rule, as I have always understood it, is that the negative testimony may be explained on grounds, which are perfectly consistent with the good faith and veracity of the negative witnesses, as, for instance, that they were in such a position or the conditions were such that the thing may have happened, notwithstanding that they neither heard nor saw it.

That such was not the case in the present instance is, to my mind, plainly shown by the facts which the learned trial judge has himself found. For instance, he quotes the statement of his assessors regarding the vagaries of sound in a fog and "silent areas" and finds that there was nothing in the conditions prevailing at the time to prevent fog signals being heard. He also explicitly finds in the extracts I have already quoted that the *Lafayette's*

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officers were all at their posts and on the alert and that they heard at least one signal before making the three-minute stop. The obvious purpose of that stop was to watch and listen and assure themselves that the fog signal they did hear did not come from a vessel bearing towards her, and that there was consequently no danger ahead. Then, as the presiding trial judge himself puts it, "*nothing being heard,* she started to slow for two minutes, and then she started half speed." Had the atmospheric conditions in that area been such as were likely to render sound signals inaudible in certain directions, one could perhaps understand the possibility of the *Benmaple* repeating her fog signals at regular intervals as she came nearer and nearer the *Lafayette* without their being heard by the latter; but how can such a hypothesis be reconciled with the trial judge's finding, after consultation with his expert assessors, that no such conditions were present, and at the same time with the completely irreproachable character of the vigil exercised, not only from the bridge but the forward lookout posts of the *Lafayette,* by the master and eight other efficient navigating officers and seamen, all on the alert, as so explicitly certified by the presiding trial judge himself? Or how can it be reconciled with the other equally vital fact that the *Lafayette* had previously heard one fog signal from the *Benmaple,* which must necessarily have been given from a greater distance, and immediately stopped her engines for three minutes for the special purpose of making sure that the vessel, from which the signal had come, was not bearing towards her own course? I should have thought that these facts themselves were quite sufficient, not only to override any assumption that the *Benmaple's* fog signals may have been regularly repeated and yet not heard on board the *Lafayette,* but to leave no other conclusion reasonably open in the situation described than that, if further fog signals were not heard by the *Lafayette's* witnesses after the stop-engines order was given and immediately executed, further signals were not sounded, as alleged by the *Benmaple's* witnesses.

This, however, is not all. The learned trial judge found also that the fog signals of the *Lafayette* were given at regular intervals and were always heard by the officers of the *Daghild,* which was coming astern. It should be explained in this connection that the *Lafayette* shortly

after passing Bicquette Island overtook the *Daghild* proceeding up river, which she passed on the latter's starboard side at a distance of between a quarter and a half mile, when the *Daghild's* lights were plainly visible, as were those of the *Lafayette,* and that from that time the *Lafayette* never got beyond hearing of the *Daghild's* fog signals. When the *Lafayette* stopped her engines for three minutes and then started them at slow for two minutes more, the *Daghild* naturally gained on her. Three witnesses from the *Daghild*—the master, chief officer and pilot—gave evidence before the trial judge, all of whom, though swearing that they distinctly heard the *Lafayette's* signals as they were regularly given, testified that they did not hear any signals from the *Benmaple.* Here is another material fact, proven by three perfectly independent disinterested witnesses, and tending unerringly, as it seems to me, to further confirm the *Lafayette's* case that no further fog signals were sounded by the *Benmaple* while the *Lafayette's* engines remained stopped or were run at slow, i.e., for a period of five minutes, before the motor vessel started them at half speed again.

Adding to these considerations the laxity and carelessness, which marked the navigation of the *Benmaple* during the relevant period, as found by the learned trial judge himself, we have such a formidable series of facts, conditions and circumstances as, considered in relation to each other, cannot reasonably, it seems to me, be squared with the affirmative testimony that the *Benmaple's* fog signals were actually blown at regular intervals.

In my most respectful opinion the learned trial judge misdirected himself when he held that he was precluded by the rule of evidence he had in mind from accepting, not only the advice of his expert assessors upon this question, but the negative testimony upon which the *Lafayette* relied, supplemented, as that testimony was, by all the facts and circumstances I have above indicated. If this be so, it follows that the learned judge in appeal was fully justified in disregarding the trial finding upon that vital issue and himself concluding upon the evidence in relation thereto that the *Benmaple's* signals were not regularly given, and determining the appeal upon that basis and all the other trial findings, in which he concurred.

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Considering this appeal upon that footing, as I think we ought to do, the really decisive question for our determination is as to whether the learned judge of the Exchequer Court of Canada was warranted in setting aside the conclusion of the learned trial judge that the *Lafayette,* after stopping her engines for three minutes upon hearing one fog signal from the *Benmaple,* and then proceeding slow for two minutes, was at fault in proceeding at half speed again before ascertaining that there was no danger from the other ship. As to this conclusion the learned trial judge seems again to be in disagreement with his assessors, who, he says, considering the *Lafayette's* special and powerful equipment, "are inclined to think that under the circumstances (her) speed was moderate." In this instance, however, His Lordship bases himself upon the judgment of Barnes, J., rendered in 1900 in the case of *The Campania* (1), and the judgment of the Privy Council in *The Chinkiang* (2), which was delivered by the same eminent judge (then Sir Gorell Barnes). Both these cases involved the consideration of Article 16 of the International Rules of the Road. This Article reads as follows:—

> Every vessel shall, in a fog, mist, falling snow or heavy rainstorms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> A steam vessel hearing, apparently forward of her beam, the fog signal of a vessel, the position of which is not ascertained, shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over.

The Campania case (1) concerned a collision, which took place in St. George's Channel between the well known Cunard transatlantic liner and the barque *Embelton* in a fog so dense that the *Campania* could not be seen until she came within a distance of about half the length of the barque. The liner was running at slow, making between 9 and 10 knots an hour and her whistle was continuously sounding a long blast every minute. The trial judge found that the *Embelton's* fog horn was efficient and that it was being duly and properly sounded, notwithstanding that it did not appear to have reached the ears of those on board the *Campania.* This latter fact, he said, was

(1) (1900) 9 Asp. Mar. Cas. 151. (2) [1908] A.C. 251.

not sufficient to override the positive evidence of the witnesses from the barque that it was properly sounded. The Elder Brethren advised me that, as a matter of experience, sound signals in a fog are not always to be heard as they might be expected to be, and especially by persons on steamers approaching at considerable speed, and sounding their own fog whistles, and that this makes it all the more necessary that the speed of vessels in a fog should be moderate, as provided by the 16th Article.

He held that the *Campania* was guilty of a breach of Article 16, and was solely to blame for the collision. It was contended that the *Campania* could not be safely navigated at sea at less speed; that if she were she would not steer properly and there would be uncertainty about her course and the distance run; and further, that being a twin-screw steamer, she could be brought to a standstill in a very short distance by reversing her engines full speed astern. Barnes, J., held, notwithstanding that it was proved that her engines were so constructed that she could not go slower, that she was not going at a moderate speed within the meaning of the regulation, and that she was solely responsible for the collision. In his reasons he quoted Lord Hannen's dictum in *The Irrawaddy* in the Admiralty Div. in 1887, cited in Marsden on Collisions, 9th ed., at 344, viz.:

> If it be necessary to reduce the speed of a vessel below that which is its lowest speed, though it may cause inconvenience, yet it must be done in what appears to be the only practical way of doing it—viz.: by stopping from time to time.

In *The Chinkiang* (1) the collision took place in a dense fog off the Shantung Promontory, North China, between that steamer and His Majesty's despatch vessel, *Alacrity*. The trial judge held that the *Chinkiang* was solely to blame for not stopping and going at a speed of 9½ knots an hour in the fog which prevailed, but the Judicial Committee held that the *Alacrity* was guilty of negligence, which also contributed to the collision, in that she was going at a speed of about 6·8 knots an hour, which, having regard to the weather and the circumstances of the case, was not a moderate speed within the meaning of the Article, and that by not stopping her engines after hearing the first signals from the *Chinkiang* until he could ascertain her position with certainty and what she was doing, her commander failed to comply with the Article's directions.

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Both these cases are clearly distinguishable from the case at bar in that neither the *Campania* nor the *Alacrity* stopped her engines at all, and that in both cases the weather and fog conditions were apparently such as to render the sound of fog signals uncertain and undependable, which the trial judge distinctly found was not the fact in this case.

While these cases illustrate the marked disinclination of the English courts to recognize any considerations of convenience or even government urgency as an adequate excuse for non-compliance with a code of rules devised to ensure as far as possible the safety of navigation throughout the world, they clearly recognize, as the terms of Article 16 themselves do, that the duty of observing them depends at all times on existing circumstances and conditions. In neither of these cases is any new doctrine propounded, which can well be taken as in any way affecting the application of the general governing principles of the law of negligence to collisions at sea. When a ship is charged with negligence causing or materially contributing to a collision and the relevant facts, conditions and circumstances are proved, there is but one recognized criterion for determining her responsibility. That is, as I apprehend it from the various cases: Did the ship, by her master and those navigating her under his command, exercise that degree of nautical care and skill, which is generally looked for in competent seamen, to avoid such risks as might in the existing circumstances be reasonably anticipated?

In considering whether the *Lafayette* discharged this duty in relation to the *Benmaple* we must bear in mind that both courts below distinctly negatived all negligence on her part up to the moment when she ordered her engines from slow to half speed, and that she was going at that speed only " for one or two minutes when she saw the *Benmaple* at a distance of between five hundred and one thousand feet," as the trial judgment says. I concede at once that, had she heard any further signals forward of her beam or had the atmospheric conditions been such as to render fog signals inaudible or uncertain as to distance or direction, she ought to be held to have violated Article 16, as well as her duty to the *Benmaple.*

As I have already pointed out, however, the learned trial judge himself has expressly found that no such atmospheric conditions prevailed; that her master and his staff were exercising a faultless vigil from the bridge with two special lookouts at their forward posts and that, when she heard a single signal (which turned out to be from the *Benmaple*), "she stopped for three minutes, and *nothing being heard,* she started to slow for two minutes" before going into half speed again. In all these explicit findings the learned judge in appeal has concurred, so that we must, I think, take it as conclusively established that the *Lafayette* heard no further signals during at least the three minutes her engines were stopped. I think, moreover, that, though the trial judge did not distinctly say so, he must be taken to have meant that she heard no further signals during the following two minutes her engines were running at slow, for it is hardly conceivable that a ship, which admittedly stopped for three minutes for the special purpose of listening for further signals, and then, hearing none, proceeded slow for two minutes more, would then double her speed, had she heard any further signals during the latter interval. It follows as a necessary inference, I think, that, when the half speed order was given, the *Lafayette* had not heard a fog signal from the *Benmaple* for at least five minutes before she started half speed again. What else could the master and his navigating staff reasonably assume from the facts, conditions and circumstances, to which they were all during that critical interval admittedly so keenly alive, than that there was no further danger from the *Benmaple?* As Lord Blackburn pointed out in *Cayzer* v. *Carron Co.* (1), they had a right to suppose that the other vessel would observe the requirements of the well known international rules of the road, as she herself was doing, and to regulate their own movements on that supposition. This, it seems to me, makes an end of the charge of negligence against the *Lafayette* concerning the changing of her speed from slow to half after her three-minute stop. The trial judge having, as I have said, negatived all negligence up to that moment, and only found the *Lafayette* at fault in respect of that act, and of going at that speed for not more than one or two minutes before she saw the *Benmaple,* it is

(1) (1884) 9 App. Cas. 873, at 883.

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self-evident that, if the *Lafayette* would not have thus increased her speed from slow to half but for the negligent failure of the *Benmaple* to regularly sound her fog signals for a period of at least five minutes, her act in doing so was attributable, not to any negligence on her own part, but solely to the negligence of the *Benmaple,* as are all the natural and direct consequences thereof.

As to the apparent alteration of the *Lafayette's* deck and engine room logs, this concerned only her speed during the one or two minutes which elapsed between the half speed order and the collision of the two ships and the contention put forward on the trial that the *Lafayette* had come to a full stop before hitting the *Benmaple.* Both the trial judge and the judge in appeal, as well as all three assessors, concurred in the opinion that she had some advance when the two vessels came together.

After the fullest and most careful consideration I have been able to give this case, I have concluded for the reasons, which I hope I have made sufficiently clear, that these appeals should be dismissed with costs.

KERWIN J.—The Local Judge in Admiralty found that the *Benmaple* and *Lafayette* were to blame in the proportions of seventy-five and twenty-five per cent. In view of his findings and the alteration of the logs of the *Lafayette,* I am not prepared to disagree with his conclusion. I would allow the appeal and restore the judgment at the trial. The appellants are entitled to their costs of the appeals in the Exchequer Court of Canada and to their costs of the appeals to this Court.

HUDSON J.—The only questions open for decision by this Court are whether or not the *Lafayette* was in part at fault causing the collision of the two ships and, if so, in what degree. Both of these are questions of fact. The trial was lengthy, many witnesses were heard and the evidence was conflicting. The case was tried by a very able and experienced judge who found that the *Lafayette* was responsible to the extent of 25%. While one may differ from the learned trial judge in some respects, a perusal of the evidence has not convinced me that he was wrong in his conclusions. Therefore, with all respect to the learned judge in appeal, I would restore the judgment at

the trial with costs of the appeal to this Court and of the appeal heard before Mr. Justice Angers in the Exchequer Court of Canada.

Appeals allowed with costs.

Solicitors for the appellants: *Meredith, Holden, Heward & Holden.*

Solicitors for the respondents: *Beauregard, Phillimore & St. Germain.*