

CANADA STEAMSHIP LINES, LIM-
ITED (PLAINTIFF) } APPELLANT;

1924
*Nov. 21.
*Dec. 9.

AND

STEAMER JOHN B. KETCHUM II }
(DEFENDANT) } RESPONDENT.

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

Shipping—Seamen—Collision—Action in rem—Navigation.

A collision occurred between the C. owned by the appellant company and the K. on the St. Lawrence, off shore near Graveyard Point; the former coming down stream and the latter going up. The C. having the right-of-way under rule 25 exercised her right to elect for the north side of the channel and gave a two-blast signal to the K. in ample time to warn the K. of her election to proceed to port, which was not answered. When about 1,000 feet apart, the C., perceiving that the K. did not answer nor comply with her signal and that the K. was on a course nearly at right angles to the C., sounded the danger signal, immediately followed by a two-blast signal, answered by the K. with two-blast, putting her helm to starboard and reversing her engines at full speed astern, instead of putting her helm hard astarboard. The C. starboarded and then ported her helm to avoid grounding and struck the K. amidship.

Held, that the C. coming down with the current had the right to elect which side she would take, under rule 25 of the rules for navigating the St. Lawrence above Montreal and that the K. was wholly responsible for the collision and the damages which ensued.

Held also that a defendant's negligence may cease to operate as the efficient cause of an accident which would not have happened in the absence of it, if notwithstanding the defendant's negligence the accident be directly and proximately brought about by some supervening negligent act or omission by the plaintiff but that principle does not apply in the circumstances of this case where the defendant's negligence operated from beginning to end and step by step in natural and obvious sequence so as to render escape from its consequences impossible or so hazardous as not to commend the attempt to reasonable judgment.

Judgment of the Exchequer Court of Canada Quebec Admiralty District ([1924] Ex. C.R. 196) reversed.

APPEAL from the decision of the Exchequer Court of Canada, Quebec Admiralty District, MacLennan L.J.A. (1), dismissing with costs the appellant's action and maintaining with costs the counter-claim of the respondent.

*PRESENT:—Anglin C.J.C. and Idington, Duff, Mignault, Newcombe and Rinfret JJ.

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

Holden K.C. for the appellant.

Smythe K.C. for the respondent.

The judgment of the majority of the court (Anglin C.J.C. and Duff, Mignault, Newcombe and Rinfret JJ.), was delivered by

NEWCOMBE J.—On the morning of 8th December, 1923, shortly after 7 o'clock, when the SS. *Cataract* belonging to the appellant company and laden with grain from Pt. Colborne, was going down the St. Lawrence and had reached a position in the river opposite or a little above the lock of Farran's Point canal between Croil Island and the mainland, she sighted the respondent vessel, the SS. *John B. Ketchum II*, which was coming up and was then somewhat below, or perhaps nearly opposite, Graveyard Point on the north bank, at a distance of half a mile or upwards below the *Cataract*. The *Cataract* is a vessel of 839 tons gross register, 180 ft. long and 36 ft. beam, while the *Ketchum* which was light, drawing 11 ft. aft and 2 ft. 2 inches forward, is a vessel of 1,103 tons gross register, 193 ft. in length and 42 ft. beam. The *Cataract* upon sighting the *Ketchum*, having the right-of-way under rule 25 of the rules for navigating the St. Lawrence river above Montreal, exercised her right to elect for the north side of the channel, and gave the proper signal of two blasts to indicate that she was directing her course to port. This course required that the *Cataract* should follow the current, which for the intervening distance flowed at the rate of six to eight miles, and she proceeded at her full speed of six or seven miles. The *Ketchum* at the time made no answer to this signal, neither did she direct her course in conformity with it. She was coming also at full speed, although against the current and her captain estimates her speed at nine miles. Therefore the vessels were approaching each other at a speed of not less than fifteen miles, allowing for the effect of the current.

Between the place where the *Cataract* gave her two blasts and Graveyard Point there is a considerable expansion of the river; the current which is strong sets in the

general direction of the north bank and the *Cataract* directing her course with the current, kept to the north side of the channel. At this place the north bank trends northerly for a considerable distance when it bends somewhat abruptly to the southeast and continues generally in that direction to Graveyard Point; therefore as the *Cataract* proceeded northward along the bank, she was heading directly to that part of the bank above Graveyard Point which going down stream runs in a direction approximately southeast.

If the *Ketchum*, when she passed the point, had proceeded by a direct course to the entrance of the canal where she intended to go, the ships would have passed starboard to starboard at a safe distance, because the *Cataract* following the bank and going further into the bay as she progressed would have been well to the north of the course of the *Ketchum*. The latter vessel, however, instead of pursuing the direct course, which would also have been responsive to the signal of the *Cataract*, rounded the Point and proceeded to the northwest also along the bank and into the bay on a course precisely opposed to that which the *Cataract* coming down was pursuing. The *Cataract*, perceiving that the *Ketchum* did not answer nor comply with her signal, and that the *Ketchum* was on a course which was likely to bring the vessels into collision, when at a distance from the *Ketchum* estimated at about 1,000 ft. more or less, gave the danger signal of five or six blasts and followed this by repeating her two blasts, thereby expressing her intention to hold her course on the port hand. Then the *Ketchum* answered with two blasts, indicating acknowledgement and acceptance of the election of the *Cataract* to hold the north bank, and that the *Ketchum* accordingly would direct her course to port. There was thus in the language of the signals verbal understanding and agreement which apparently would have been safely executed if, even at that time, the *Ketchum*, going up steam at full speed, had put her helm hard a starboard. Instead of this the *Ketchum* although she starboarded, reversed at full speed, the natural consequence being that, by the action of the screw and the effect of the strong current on the ship's bow, she swung to starboard instead of to port projecting her stem further into the space between

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the *Ketchum* and the bank through which the *Cataract* might have found her passage, and practically presenting her broadside to the down coming *Cataract*. The *Cataract* in the meantime, having come close to the bank ported her helm sufficiently to keep off the land and endeavoured to pass between the *Ketchum* and the bank. In this effort she was unfortunately unsuccessful owing to the manoeuvres of the *Ketchum*, and her stem came into contact with the port bow of the *Ketchum* about 30 or 35 ft. abaft the stem of the latter, causing considerable damage.

What happened is thus very briefly summarized by the statement that the *Cataract* having the right-of-way and having twice signalled to the *Ketchum* that she would direct her course to port followed that course along the north bank, and maintained her speed to the moment of collision, while the *Ketchum*, receiving the signal, at first paid no attention to it, and then, having replied, though late, with two blasts, indicating that she would pass, as the *Cataract* desired, on the starboard hand of the latter, altered her course to starboard, and thus occupied space through which the *Cataract* might otherwise have found her way.

The circumstances attending the collision were investigated by order of the Governor in Council under the provisions of part X of the Canada Shipping Act by the Dominion wreck commissioner, assisted by two nautical assessors. Each vessel was represented by counsel upon the inquiry and the witnesses from each vessel were examined by the court and also examined and cross-examined by counsel. The hearing took place at Montreal on 19th and 20th November and 18th December, 1923, and the depositions of the witnesses were taken down and extended. Subsequently on 29th February, 1924, the appellant company instituted this action against the *Ketchum* in the Exchequer Court on its admiralty side, claiming damages, and the parties, by memorandum of 11th April, agreed that all evidence and exhibits produced at the inquiry should be and become part of the record in the case, to be used as if the witnesses had testified in open court, subject however to the right of the parties to recall the witnesses or to call new witnesses. Pursuant to this agreement the official transcript of the evidence taken before the court of inquiry was used at the trial of the Admiralty action,

and it was upon this evidence that the findings of the court were based. It does not appear that any of the witnesses was recalled, or that any new witnesses were examined.

In view of the facts, it might naturally have been anticipated that the *Ketchum* would bear the whole responsibility for the collision and the damages which ensued, but remarkably enough the learned local judge in Admiralty who tried the cause, while finding that

there is no excuse for the *Ketchum* refusing to obey the signal, and her persistence in following her course heading for the north shore was improper and wrongful,

found nevertheless that

this collision would not have happened if the *Cataract* had not ported her helm after she gave the second two-blast signal and just before the collision.

He asks, "Was that negligence?" And he answers:

The master of the *Cataract* saw the *Ketchum* going astern and there was an open space of 250 or 300 ft. between the shore and the *Ketchum* through which the *Cataract* could have passed. The porting immediately before the collision against the *Cataract's* own signal of two blasts when there was sufficient room for her to pass, in my opinion, was gross negligence and was the proximate cause of the collision and in this opinion one of my assessors concurs.

Moreover, the local judge says:

While the *Ketchum's* failure to observe the rule cannot be too strongly condemned, her course and conduct were perfectly apparent to the *Cataract* for a considerable time and distance, while the latter vessel carried on in a course which her master admitted was dangerous, when he might by porting have avoided the collision by passing the *Ketchum* port to port. Porting then would have been a precaution required by the special circumstances to avoid immediate danger under rules 37 and 38. In failing to port at that time the master of the *Cataract*, in my opinion, failed to show ordinary care, and in this conclusion one of my assessors concurs. Later, when the *Cataract* gave the danger signal and two-blasts on her whistle, although she first starboarded intending to pass the *Ketchum* starboard to starboard and having plenty of room to do so, she deliberately and improperly ported and brought about the collision. As her master frankly admitted he preferred to hit the *Ketchum* than to have the *Ketchum* hit the *Cataract*, although he had ample room to cross the bows of the *Ketchum* then going astern and backing out of his course. The local judge therefore found that the collision was directly attributable to the fault of the *Cataract* notwithstanding the antecedent negligence of the *Ketchum*, for two reasons: First, because the *Cataract*, although she had elected to pass to starboard and consequently had taken that side of the channel which was on her port hand, should nevertheless have reversed her signal and attempted to pass port to port when it became apparent to the *Cataract* that

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the *Ketchum*, disregarding the *Cataract's* signal, was persisting in her course against the current along the north bank; and secondly, because, as it is found, the *Cataract* after giving the danger signal and the second two blasts deliberately and improperly ported and brought about the collision.

These findings against the *Cataract* have, in my judgment, no justification either in law or in fact. The rule applicable to the St. Lawrence in this locality is explicit that

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

The *Cataract* complied with this rule in every respect, and was therefore entitled to the passage for which she had elected and which she had notified to the *Ketchum* in the prescribed manner. The interval between the *Cataract's* first signal and the collision was very brief, it would not, having regard to the speed with which the vessels were approaching each other, have appreciably exceeded two minutes. It is true that the *Ketchum* did not answer the signal nor promptly change her course as it was her duty to do, and her neglect to do so led to the danger signal and the repetition of the two blasts from the *Cataract* as the distance between the two vessels diminished and the space for manoeuvre became more limited. At that time in the opinion of the Master of the *Cataract*, if the *Ketchum* had starboarded her helm in accordance with her signal the ships would have gone clear. The wreck commissioner, a skilled and experienced mariner, who presided at the court of inquiry, examining the master of the *Cataract* elicited the following information:

Q. Then you had no answer from that two-blast whistle signal?—A. No, sir.

Q. Was there any alteration of course on the part of the *Ketchum*?—A. No. There was not. He was just coming right on over.

Q. When he altered his course how much distance had you covered?—A. The first time I noticed him altering his course was when I blew the danger signal and the two blasts and he answered with two blasts.

Q. What distance were you from each other when you blew the danger signal?—A. I would say probably one thousand feet or probably a little bit more.

Q. What distance were you in angleways, obliquely from each other? I mean to say how many points on your starboard side would she be when you blew the danger signal?—A. I would judge she would be about four points.

Q. Well then it would only require a starboard helm on the part of the *Ketchum* to clear you?—A. Yes, sir.

Q. But she advanced on a port helm—that you noticed?—A. No, the first movement I noticed was his engines started to go full speed astern and that had a tendency to cant him across my bow.

Q. There was no wind?—A. No.

Q. You were loaded and she was light?—A. Yes.

Q. And she would turn very quickly over to starboard with a full speed astern?—A. She was turning quite a bit.

Q. You were about one thousand feet from each other?—A. I would say about one thousand feet sir, probably a little more or a little less.

Q. At that time when you saw her going full speed astern which way did you put your helm?—A. I starboarded my helm to go as much as I could to the bank of the river. She was coming pretty fast and we were going down pretty fast.

Q. One thousand feet—full speed astern—and I suppose the *Ketchum* is no more than nine miles an hour, if she is that? Did she stop her way very quickly?—A. She had not stopped her headway when she struck.

Q. When you collided with each other, how fast was she coming do you think?—A. I could not just say how fast she was coming.

There is no substantial difference between the testimony of the *Cataract* and that of the *Ketchum* as to the relative position of the two ships when the *Cataract* blew the second two blasts, and it is observable that the wreck commissioner having in mind this situation, as described by the master of the *Cataract*, put his question in a form which is suggestive of no doubt on his part that having regard to the bearings, speed and distance of the two ships a starboard helm on the *Ketchum*, even at the time of the danger signal, would have carried her clear. In any case it was a starboard helm on the *Ketchum* which the *Cataract* was entitled to anticipate, and it would in the circumstances have been not only a breach of the rules of navigation but entirely opposed to the imperative demands of good seamanship that the *Cataract* should have ported her helm and sounded a cross signal. One would suppose that nothing but increased confusion and probably disaster could have resulted from any such manoeuvre on her part. Therefore I think it is not only reasonably established by the evidence but entirely beyond question that the *Cataract* would not have been justified in the circumstances to attempt to avoid collision by passing on the port side of the *Ketchum*. Indeed the *Cataract* was expressly forbidden by rule 23 to confound the situation by a cross signal. The rule says in terms:

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Steam vessels are forbidden to use what has become technically known among pilots as "cross signals" that is, answering one whistle with two, and answering two whistles with one.

But, says the local judge, the *Cataract* knew that her course was dangerous and the *Ketchum's* course and conduct were perfectly apparent to the *Cataract*; the answer is that the chief element of danger in the course of the *Cataract* was that introduced by uncertainty as to what the *Ketchum* would do, and the *Cataract*, having declared her intention, could not without incurring greater risks resile from that so long as it was open to the *Ketchum* to acknowledge the *Cataract's* signal and cross in the manner indicated. It is not suggested of course that the master of the *Cataract*, up to the time when he gave his insisting signal, was aware of the impudent resolve of the *Ketchum*, which was admitted at the inquiry, to defy the crossing rule and to persist in opposing the election of the *Cataract*.

As to the second ground of fault which the local judge imputes to the *Cataract* it is apparent from a glance at the chart that the *Cataract*, having directed her course to port, that is to the north as far as navigable space permitted, had shortly after the time when she gave the danger signal, reached a point where, having regard to the trend of the bank, she must either port her helm in order to keep off or go directly ashore. The evidence about her porting on that occasion is given by her master; he says:

Q. Supposing you had not ported as you say you did—supposing you had not directed your course somewhat to starboard as you then did, is it not a fact the boats would have cleared?—A. No, sir.

Q. Why not?—A. Because I would have gone directly ashore and I would have been on when she hit. I would have only about a length to go.

Q. You would have only about a length to go from the time you ported—you would have had only a length to go? Then you were only 250 feet off the shore at that time?—A. Probably a little more or less.

Q. Between the time of porting your helm and the collision, had you changed your course a little bit?—A. A little bit.

Q. Some points?—A. I could not say. I had to port a little bit.

Q. You preferred to hit the *Ketchum* rather than the canal bank?—A. I thought he was going to clear. I was trying to clear him and keep my ship off the river bank.

Q. Then you were in this position—that you had fairly good hopes that by porting when you did, and keeping on full speed ahead you would pass port to port?—A. Oh, no.

Q. What did you?—A. I knew I could not pass port to port the way she was coming.

Q. Did you think he was going to pass you to starboard?—A. Yes, because he answered me the signals.

Q. And yet you ported?—A. I ported merely enough to keep steering way and keep her off the river bank.

By the Court:

Q. If you had not ported, Captain, instead of you striking the *Ketchum* the *Ketchum* would have struck you?—A. Yes, sir.

Q. So you struck the *Ketchum*?—A. Yes, sir.
and also:

A. I ported my helm just probably ten or fifteen seconds before we hit. I was over that close to the bank I either had to port my helm or go on the canal bank.

The captain's testimony is corroborated by that of his second officer and other witnesses and no complaint is made by the witnesses from the *Ketchum* that her navigation was in anywise embarrassed by the fact that the *Cataract* ported immediately before the collision in order to keep off the land, or that the porting had any effect in causing the accident. It might indeed have been regarded as an improper manoeuvre if the *Cataract* had had sea room to hold her course, but in view of her near approach to the bank it was manifest to the *Ketchum* that good seamanship and regard for her own safety would require the *Cataract* to port her helm to the extent and as and when she did.

There were assessors at the trial, and, although they differed in some respects, they were of the same mind in one particular. The local judge says:

My assessors advise me that there was room enough for the *Cataract* to pass between the *Ketchum* and the shore, but say it would have been dangerous for the *Cataract* to attempt it as while she would not collide with the *Ketchum*, she might possibly run ashore after passing the *Ketchum*.

Now if she might run ashore after passing the *Ketchum* that risk would be avoidable by a port helm, and if the *Cataract* had not room to port, it was because of the improper position of the *Ketchum*. The *Cataract* was obviously in a difficulty, but there seems no reason to question the judgment of her master in taking the only course which offered to him a prospect of avoiding the land on the one hand and the *Ketchum* on the other.

If the *Ketchum* had intended to make way for the *Cataract* by reversing and waiting until she had passed clear, she should have done so in time to open a passage for the *Cataract* between the *Ketchum* and the north bank; but

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there is no satisfactory proof that the *Ketchum* had lost her headway when the collision occurred, and on the contrary the weight of evidence points to the opposite conclusion.

The preliminary acts of the colliding vessels were deposited after the taking of the testimony before the court of inquiry and they are in substantial agreement upon the material facts, although differing of course in imputations of fault. There is little conflict in the testimony, and, not only is it admitted by the witnesses from the *Ketchum* who described her movements that Mr. Gendron, about whose position on the ship there is some uncertainty, but who certainly was directing her navigation at the time when she came into relations with the *Cataract*, heard and understood the *Cataract's* first signal of two blasts, but also that he, knowing the rule, perversely refrained from answering the signal or from directing his course in accordance with it. He asserts, boldly enough, that he never had any intention to allow the *Cataract* to pass on his starboard side, although he knew he was breaking the rules, and it appears moreover by the testimony of the man at the wheel that when the *Cataract* blew her first two blasts Gendron said to him "do not answer now." Both sides agree that the section of the river between the canal entrance and Graveyard Point is extremely dangerous; there is a swift current on the north side and an upward eddy on the south, which make the passage difficult, especially for vessels coming down. The master of the *Cataract* says:

It is one of the meanest places on the river especially for a boat that has not got very much power.

Gendron of the *Ketchum* says:

It is an awful bad place, sometimes it is going down fine and you never know what is going to happen there.

If any fault be possibly imputable to the *Cataract* it is that notwithstanding the misconduct of the *Ketchum* she proceeded at full speed up to the moment of collision, but this is explained by the testimony of the master of the *Cataract* who says:

This place is a very hard place to handle a steamboat and you have got to keep in the current, and a boat like the *Cataract*, it takes almost all the power she has got to keep from turning around on that place. If

I was to go out and pass him on the port side I would very likely put my boat on the shore.

Asked if he wishes to imply that the *Cataract* does not steer very well, he answers

No, but she has not got very much power.

This explanation of his speed is not seriously questioned, and I think it reasonable to conclude that the master, knowing that he was making a difficult passage, exercised good judgment in the selection of his course and the management of his ship. Indeed it appears that notwithstanding the faulty and confusing conduct of the *Ketchum* he would not improbably have made the passage in safety if the *Ketchum* in the end had not directed her course to starboard in opposition to her port signal.

The local judge invokes the familiar principle, of which the case which he cites, *Spaight v. Tedcastle* (1), is one of many examples, and of which the latest is *Anglo Newfoundland Development Co. v. Pacifico Steam Navigation Co.* (2), that a defendant's negligence may cease to operate as the efficient cause of an accident which would not have happened in the absence of it, if notwithstanding the defendant's negligence the accident be directly and proximately brought about by some supervening negligent act or omission of the plaintiff; but this principle, well recognized though it be, has no application to a case like this where the defendant's negligence operated from beginning to end, and step by step in natural and obvious sequence, to render escape from its consequences impossible or so hazardous as not to commend the attempt to reasonable judgment. Even if the master of the *Cataract* had made a mistake by porting his helm when faced with the alternatives of stranding his ship and in that position receiving, as he anticipated, the impact of the *Ketchum* on his starboard quarter, or of the precarious attempt to pass between the *Ketchum* and the bank, he should not be held accountable for an error which it required time and opportunity, which were not at his disposal, to demonstrate. Illustrations of the indulgence or favourable consideration shown by the courts to navigators in dangerous extremities or in confused and difficult situations abound, and may be seen in such cases

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(1) 6 App. Cas. 226.

(2) [1924] A.C. 406.

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as *The Nor* (1); *The Bywell Castle* (2); *Stoomvaart Matschappy Nederland v. Peninsular & Oriental Steam Navigation Co.* (3); *The Emmy Haase* (4); *Mary Tug Co. v. British India Steam Navigation Co.* (5); *Kwang Tung v. Ngapoota* (6); *Hoek Van Holland Maatschappij v. Clyde Shipping Co.* (7). As to this aspect of the case the reasoning of Lord Mersey in *Canadian Pacific Railway Co. v. The Kronprinz Olav* (8), is applicable. His Lordship said:

It is said on the part of the *Olav* that those in charge of the *Montcalm* ought to have recognized sooner than they did the danger created by the bad navigation of the *Olav* and by a timely reversal of the *Montcalm's* engines ought to have averted it. In considering this question it is necessary to bear in mind that the onus of providing the alleged negligence rests on the *Olav* and that it is an onus which can only be discharged by clear and plain evidence, (and having referred to the evidence, he continued): It seems to their Lordships impossible to say, in the face of this evidence, that the captain of the *Montcalm* was negligent in not realizing before he did that the risk of collision was imminent; and even if he can be said to have miscalculated the time by some few seconds the very gross negligence in the navigation of the *Olav* was well calculated to confuse him and to cause the error. He was, moreover, fully justified in expecting that the *Olav* would realize the dangerous position into which she had brought herself and would try to remedy it by herself-reversing.

For the reasons which I have stated I find no fault against the *Cataract*, and I find that the collision was due solely to the reckless and persistent breach by the *Ketchum* of the navigation rules and the requirements of good seamanship.

The appeal should therefore be allowed; the action should be maintained; the counter-claim should be dismissed, with costs in both courts, and the cause should be remitted to the local judge to determine the damages.

IDINGTON J.—The appellant owned a vessel named *The Cataract* which it employed for carrying wheat from Port Colborne to Montreal. The respondent ship was coming up, empty, from Montreal by the St. Lawrence river, and the *Cataract* was going down the same river, on the 8th of November, 1923. They collided at a point therein between the lower end of the Farran's Point canal, and a point called Graveyard Point. The appellant brought an action

(1) 2 Asp. M.C. (N.S.) 66.

(2) 4 P.D. 223.

(3) 5 App. Cas. 876 at p. 891.

(4) 9 P.D. 81.

(5) [1897] A.C. 357.

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

(7) 5 Session Cases 15 Ser. 227
at p. 234.

(8) 14 D.L.R. 46, at p. 48.

in the Exchequer Court for the damages which the *Cataract* suffered by said collision; and the respondent counter-claimed for its damages.

The case was tried by Mr. Justice MacLennan, Local Judge in Admiralty in the Exchequer Court, Quebec Admiralty District. That learned judge dismissed the appellant's action and allowed the respondent's claim for damages, with a reference to the deputy registrar to assess the damages. Hence this appeal.

Having read the evidence specially cited by appellant and respondent respectively, and more, including that of the chief actors in what is involved herein, and considered therewith the decisions relied upon by the learned trial judge, I have come to the conclusion that the evidence does not bring the case within the principle proceeded upon in said decisions, and hence that this appeal should be allowed with costs, the appellant's claim for damages allowed but referred to the said deputy registrar to assess same, and the judgment in favour of respondent be reversed and set aside with costs.

The appellant's officers in charge of the *Cataract* were, by the course respondent's officers directed and pursued, in my reading of the evidence, placed in such a position up to the last moment before the collision that they could not safely pursue the course which the learned trial judge suggests might have been taken, and the collision avoided thereby.

The appellant's officers in charge of the *Cataract* may have erred in judgment but, speaking with every respect for the said learned judge, in my opinion they were not guilty of negligence, and not being to blame the appellant should have succeeded and the counter-claim been dismissed.

Appeal allowed with costs.

Solicitors for the appellant: *Meredith, Holden, Hague, Shaughnessy & Heward.*

Solicitors for the respondent: *King & Smythe.*

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