

ON APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT

BETWEEN :

THE SHIP *LAFAYETTE* AND HER OWNERS, LA COMPAGNIE GENERALE TRANSATLANTIQUE (DEFENDANT AND COUNTER CLAIMANT) . .

1938
April 21 & 22
1939
July 29.

APPELLANTS;

AND

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

AND

THE MASTER, OFFICERS, MEMBERS OF THE CREW OF THE STEAMSHIP *BENMAPLE*, AND THE PASSENGERS WHO WERE ON BOARD HER

(ADDITIONAL PLAINTIFFS)

AND

LEONARD LABATTE ET AL. (INTERVENANTS)

AND

JOHN L. DICKEY ET AL. (INTERVENANTS)

RESPONDENTS.

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Shipping—Collision in St. Lawrence River during fog—Article 16, International Rules of the Road—Negligence of respondent ship—Appeal allowed and cross-appeal dismissed.

The ships *Lafayette* and *Benmaple* collided in the St. Lawrence River, during a dense fog. The trial Court found both ships to blame and assessed the damages accordingly.

Held: That the proximate and direct cause of the collision was due to the fault and negligence of the *Benmaple* in failing to give proper fog signals at proper intervals, in not keeping a careful look-out, in navigating at an excessive speed through a dense fog and in not exercising reasonable care and prudence.

2. That the speed of the *Lafayette* from the time she picked up her pilot at Father Point until she heard a whistle signal, is irrelevant; it is the speed that she was making at the material time that must be considered.
3. That the breach of an article of the *International Rules of the Road* by a vessel is not in itself sufficient to warrant a finding that the vessel guilty of such breach is to blame; it must be shown that the breach caused, or at least contributed to, the accident.

APPEAL and CROSS-APPEAL from the judgment of the District Judge in Admiralty for the Quebec Admiralty District. Judgment of Demers D.J.A., (1938, Ex. C.R. 10) reversed.

The appeal and cross-appeal were argued before the Honourable Mr. Justice Angers, at Ottawa.

Lucien Beauregard, K.C. for appellants.

R. C. Holden, K.C. for respondents.

H. H. Harris for intervenants.

The facts and questions of law raised are stated in the reasons for judgment.

ANGERS J., now (July 29, 1939) delivered the following judgment:

This is an appeal from a decision of Mr. Justice Philippe Demers, District Judge in Admiralty for the Quebec Admiralty District, rendered on November 10, 1937, as follows:

(a) condemning the ship *Lafayette* and her bail to one-fourth of the damages and the ship *Benmaple*, owned by plaintiff, Port Colborne & St. Lawrence Navigation Company Limited, to three-fourths of the damages, without costs on the action nor on the counter-claim;

maintaining the action of the additional plaintiffs against the ship *Lafayette* and her bail in the same proportion for the damages to be proved, without costs;

maintaining the intervention of the intervenants Leonard Labatte *et al.* against the ship *Lafayette* and her bail for one-fourth of their damages, without costs;

maintaining the intervention of the intervenants Mr. and Mrs. Dickey, who are really additional plaintiffs, against the ship *Lafayette* and her bail, with the condition that any amount coming to Mrs. Dickey should go to Port Colborne & St. Lawrence Navigation Company Limited, which was subrogated to her rights, without costs.

The action arose out of a collision which occurred on the 31st of August, 1936, at about five o'clock in the morning (daylight saving time), in the St. Lawrence River, at a point approximately seven nautical miles west of Bicquette Island, between the motor vessel *Lafayette*, owned by La Compagnie Générale Transatlantique, and the steamer *Benmaple*, owned by Port Colborne & St. Lawrence Navigation Company Limited.

The *Lafayette* was a motor steel passenger vessel with a length of 184 metres, a width of 26 metres and a net registered tonnage of 14,430 tons. The *Benmaple* was a steel screw steamer 250.1 feet in length and 43 feet in beam, having a gross tonnage of 1,729 tons and a net registered tonnage of 1,074 tons.

On the day of the accident, the *Lafayette* was proceeding up the River St. Lawrence on her way to Quebec; the *Benmaple* was on a trip from Montreal to Halifax, laden with a cargo of flour and feed.

As a result of the collision the *Benmaple* was sunk with her cargo; a sailor on board the *Benmaple*, John Dickey, a son of the intervenants Mr. and Mrs. Dickey, was thrown overboard and drowned.

At first an action was taken by the owners of the *Benmaple*, Port Colborne & St. Lawrence Navigation Company Limited, against the ship *Lafayette*, claiming condemnation of the latter and her bail in damage and costs. Subsequently 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. An intervention was made by members of the crew of the *Benmaple* for a joint claim of \$2,000

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for damages arising from the loss of their gear and clothing. Finally another intervention was made by Mr. and Mrs. John L. Dickey for a joint claim of \$10,000 arising from the loss of life of their son John, killed in the collision between the two vessels.

La Compagnie Générale Transatlantique filed a counter-claim against the plaintiff, Port Colborne & St. Lawrence Navigation Company Limited, for \$75,000 for damage caused to the ship *Lafayette* by the collision in question.

Another action was taken by Maple Leaf Milling Company Limited, Canada Linseed Oil Mills Limited, United Chemical Company Limited and other owners of cargo or goods laden on the *Benmaple*; I will deal with this last action in a separate judgment. I may note in passing that a motion was made asking that the two cases be united for purposes of argument; the motion was granted by consent.

On the day of the accident, the *Lafayette* picked up a pilot at Father Point a few minutes after three o'clock in the morning. It was foggy and the lights at Father Point were not visible. After leaving Father Point, the *Lafayette* proceeded at full speed with her engines at "stand by," but she had to reduce her speed from time to time when she overtook or met other vessels. I may say that the speed at which the *Lafayette* was going from the time she left Father Point to the time she heard the faint whistle signal hereinafter referred to and stopped her engines is, to my mind, irrelevant; the speed which must be considered is the one at the material time; *The Induna* (1); *The Upwey Grange* (2). The *Lafayette* passed Bicquette Island, shown in the charts filed as exhibits P1 and P15, at a distance estimated at between three and three and a half miles; the Bicquette light could not be seen. Shortly after passing Bicquette Island the *Lafayette* overtook a vessel, the *Daghild*. The *Lafayette* was then proceeding at full speed, with her engines at "stand by."

The full speed of the *Lafayette* was mentioned as being normally between 17 and 17½ knots; at "stand by" her speed is reduced by about 2 knots. The master said that her speed at "stand by" would be about 15 knots; the chief officer estimated it at 14 knots.

(1) (1927) 28 Lloyd's L.R. 198.

(2) (1927) 28 Lloyd's L.R. 336.

The evidence discloses that the *Lafayette* passed the *Daghild* on the latter's starboard side at a distance of between a quarter and a half mile; at that time the *Daghild's* lights were plainly visible, as were also those of the *Lafayette*. The *Lafayette* kept on proceeding at full speed with her engines at "stand by." There were two look-outs forward on the forecastle head of the *Lafayette* and two look-outs on the bridge, one standing on each side; besides these look-outs there were on the bridge the master, the officer on watch, the quartermaster and the pilot.

A few minutes before five o'clock one of the look-outs on the forecastle head telephoned to the bridge saying that a faint whistle signal had been heard ahead, slightly on the port bow. This signal was not heard by those on the bridge although they were keeping a sharp look-out. The engines of the *Lafayette* were stopped and the officers listened attentively; they waited for three minutes and they did not hear any other signal ahead. They heard however the signals of the *Daghild* astern, which were gradually growing louder. Taking for granted that the *Daghild* was approaching, the master and pilot of the *Lafayette* considered it was good seamanship to put their engines slow ahead. The tide was ebbing and there was then a current against the *Lafayette* of some two to three knots. The master and the pilot of the *Lafayette*, taking into consideration the effect of the current, estimated that, after having stopped the engines for three minutes, the vessel's speed had been reduced to 5 or 6 knots. They kept a sharp look-out to see if there would be any further signal, but they heard none. The master inquired from the look-outs forward on the forecastle head if they had heard any other signal and they replied that they had not. The master thereupon gave orders to put the engines half speed ahead. A couple of minutes later a white light was seen on the port bow of the *Lafayette* at a distance which was estimated to be between 500 and 1,000 feet. The engines of the *Lafayette* were immediately stopped. The green light of the oncoming steamer was noticed; the engines of the *Lafayette* were reversed and the helm ordered hard to starboard. The *Benmaple* however approached steadily, no alteration appearing to have been made in her

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course. The ships collided; as a result, the *Benmaple* swung around, heading then in the same direction as the *Lafayette*. She sank with her cargo in a little over an hour.

Shortly after the collision a lifeboat was lowered from the *Lafayette* and sent to the rescue of the persons of the *Benmaple*, all of whom were saved with the exception of the sailor John Dickey, who was drowned.

The evidence discloses that the stem of the *Lafayette* struck the starboard bow of the *Benmaple* between her stem and her starboard anchor. She cut into her about 33 feet, going from starboard to port and from stem to stern, heaving up the windlass by the roots and throwing it up on the forward house, knocking down the forecastle and the wheel-house, penetrating into the watchman's cabin (marked with the figure 6 in a circle on plan exhibit P6), demolishing a bulkhead and continuing as far aft as the rear end of the deckhouse (marked with the figure 3 in a circle on the same plan).

The plaintiff, in its amended statement of claim, charges the *Lafayette* with the following acts of negligence:

- excessive speed through a dense fog;
- failure to keep a proper look-out;
- failure to sound the proper fog signals;
- failure to navigate with caution until all danger of collision was over, after hearing forward the fog signal of the *Benmaple*;
- failure to take the proper steps to avoid the collision;
- improper handling of the engines;
- improper alteration of the course to starboard and failure to give a signal of such alteration;
- failure to exercise the precautions required by the ordinary practice of seamen or by the special circumstances of the case;
- failure to comply with articles 15, 16, 27, 28 and 29 of the International Rules of the Road.

The defendant, in its amended statement of defence, imputes to the *Benmaple* the following acts of negligence:

- failure, when proceeding in a fog, to give at intervals of not more than two minutes a prolonged blast, in violation of article 16 of the International Rules of the Road;
- navigating at an excessive speed through fog;

failure to stop the engines and navigate with caution until danger of collision was over, after hearing the fog signal of the *Lafayette*, in violation of article 16 aforesaid;

absence of a pilot and the master not on the bridge, although navigating through fog, in violation of all rules and customs of good seamanship;

failure to keep a proper look-out;

the *Benmaple* was not in charge of competent officers and was insufficiently manned and equipped;

the *Benmaple* was improperly steered and she neglected to keep clear of the *Lafayette*;

the engines of the *Benmaple* were improperly handled and those in charge neglected to ease the engines and to stop and reverse in due time;

failure to exercise reasonable care and prudence and to take in due time proper steps to try to avoid the collision;

failure to comply with rules 15, 16, 18, 19, 22, 23, 27, 28 and 29 of the International Rules of the Road.

As stated by Mr. Justice Demers, the collision not being inevitable, the Court is bound to examine the behaviour of both ships.

I shall first deal with the *Benmaple*. She had no pilot; she was not legally bound to have one; in such a case however, it was her duty to have on board competent and vigilant officers, fully conversant with the difficulties of navigation on the River St. Lawrence and familiar with the course usually followed by vessels going down the river. For a reason undisclosed, possibly on account of the fog, the *Benmaple*, at the time of the accident, was not following the way generally used by outbound vessels.

The *Benmaple* was properly equipped and would, in my opinion, have been sufficiently manned had her master met his responsibilities. But, around midnight, Captain Johnson retired into his cabin, undressed, got in his bunk and went to sleep; in so doing, I believe that he failed in his duty and I may say that my assessor shares this opinion. If Captain Johnson needed a rest, he could have retired for a short while but he should not have taken off his clothes so as to be ready at any moment to respond to a call. Captain Johnson left Captain Lebrun in charge

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of the vessel; Lebrun, a master mariner, holds a Board of Trade Master's Foreign Going Certificate since 1905; he has had apparently a certain experience in command of ocean going vessels. He was acting as sailing master on the *Benmaple*. Captain Lebrun, in August, 1936, was 64 years old; he was slightly deaf. He had been on duty for approximately seventeen hours, except for a few moments rest. In the circumstances, I feel that the task imposed upon him was too heavy.

The learned trial judge held that a proper look-out was not kept on the *Benmaple*; I concur with him. The *Lafayette* was equipped with an exceptionally powerful diaphone whistle placed forward of the funnel. Fog signals were given by the *Lafayette* regularly every two minutes. They were heard distinctly by the crew of the *Daghild* both before and after the *Lafayette* overtook her a few moments before the accident. Those on board the *Benmaple* testified that they had not heard these signals; the reason for not hearing them is either that they were not keeping a proper look-out or that they were inside the pilot-house with the windows closed; the night was quite cool and those on board the *Benmaple* did not wear overcoats, which may explain, if not excuse, their not staying at their posts on the bridge. The vagaries of sound in fog are well known to those having experience in navigation but the evidence shows beyond doubt that this condition did not exist during the night of the collision.

Moreover, if the *Benmaple* had kept a proper look-out, she could have sighted the *Lafayette* at a distance of about 1,000 feet, instead of 50 to 100 feet as stated by members of her crew. My assessor is of the opinion that the evidence of the witnesses of the *Lafayette* that they saw the *Benmaple* at a distance of about 1,000 feet is supported by the *Lafayette's* movements as evidenced by the course recorder (exhibit D3). Had the *Benmaple* sighted the *Lafayette* at that distance, as she ought to have done, and immediately put her engines full speed astern and her helm hard astarboard, in compliance with article 18 of the International Rules of the Road, it is quite possible that the collision would have been averted.

The only conclusion to which I can arrive is that a very poor and lax look-out was being kept on board the *Benmaple*.

Let us now consider the question of speed. It is proven that the *Benmaple* was, at the time immediately preceding the collision, going at half speed; the *Benmaple's* half speed has been estimated at between five and a half and six knots. The ebb tide has been mentioned as being two or three knots. From this I may conclude that the speed of the *Benmaple*, at the time of the collision, was approximately eight and a half knots. The visibility being limited to 50 or, at the utmost, 100 feet, if we are to accept the version of the plaintiff's witnesses, this speed was, in my opinion, excessive.

Dealing with the question of signals, the learned trial judge says that there is positive evidence that they were given regularly. On that point there is the evidence of the sailing master, of the mate, of the wheelsman, of one of the engineers, of two watchmen of the *Benmaple*, all of whom, I may say, are, to a certain extent, interested witnesses. Against this version, there are the testimonies of the master of the *Lafayette*, the officer on watch, the quartermaster, the pilot, the wheelsman, two look-outs forward and two look-outs on the bridge, all on the alert and keeping a sharp look-out, particularly after the first and only faint signal had been heard; they all swear that no other signals were given by the *Benmaple*; these witnesses of course, as in the case of the witnesses of the *Benmaple*, are all more or less interested; their evidence however is supported by that of Captain Lewis, David Hook and Joseph Emile Lachance, respectively master, chief officer and pilot of the *Daghild*; neither of these witnesses appear to have any interest in the issue of the present case. I must say, with all due respect, that on this point I differ in opinion with the learned trial judge. Had it not been that the two officers and the pilot of the *Daghild*, although on the alert and apparently keeping a proper look-out, had not heard the alleged signals of the *Benmaple*, I must say that I would have hesitated to accept the version of the officers and sailors of the *Lafayette* in preference to that of the crew of the *Benmaple*. I would in that case have felt inclined to share the opinion of the learned trial judge. The trial judge, who heard and saw the witnesses, is certainly in a better position to appreciate their competency and truthfulness than the judge of an appeal court: *Powell et al.*

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v. *Streatham Manor Nursing Home* (1); *The Corton* (2); *Clarke v. Edinburgh and District Tramways Co.* (3); *Owners of Steamship Hontestroom v. Owners of Steamship Sagaporack* (4); *Montgomerie & Co. Ltd. v. Wallace-James* (5). In the present instance, however, we are not only concerned with the competency and good faith of the masters, officers and sailors of the *Lafayette* and of the *Benmaple* and the veracity of their assertions; we have the testimonies of Lewis, Hook and Lachance, all three independent and disinterested witnesses, which seem to me to deserve much consideration and to shift the weight of the evidence in favour of the defendant-appellant.

It was urged on behalf of the plaintiff-respondent that preference should be given to affirmative evidence; in support of his contention counsel cited *Canadian National Railways v. Dame Montpetit* (6); *McCrea v. La Compagnie de Chemin de Fer de Napierville Jonction* (7); *Lefeunteum v. Beaudoin* (8). The facts and circumstances in each of these cases differ materially from those disclosed herein; in my humble opinion these decisions have no application in the present case.

Let us now consider the case of the *Lafayette*. She was unquestionably properly manned. As previously stated, the master, the officer on watch, the pilot, the quartermaster, the wheelsman, two look-outs forward on the fore-castle head and two look-outs on the bridge were at their posts, on the alert and attentive, and particularly so after one of the look-outs forward had telephoned to the bridge to say that he had heard a very faint whistle signal ahead, slightly on the port bow.

As soon as this whistle signal was reported, the engines of the *Lafayette* were stopped in compliance with the provisions of article 16 of the International Rules of the Road which read thus:

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.

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| (1) (1935) A.C. 243, 249. | (5) (1904) A.C. 73, 75. |
| (2) (1935) 52 Lloyd's List L.R. 261, 262. | (6) (1925) R.J.Q., 39 K.B., 114, 121. |
| (3) (1919) Sess. Cas. (H.L.) 35, 36, in fine. | (7) (1920) R.J.Q., 29 K.B., 414, 417, 419. |
| (4) (1926) 17 Aspinall's M.L.C. (N.S.), 123. | (8) (1897) 28 S.C.R., 89, 93. |

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 engines were stopped for three minutes. Having heard no other signal and thinking that the vessel of which one of the look-outs had heard the whistle signal ahead was proceeding upstream, the master ordered the engines put slow ahead. They were kept at that speed for two minutes. There being still no further signals the engines were put at half speed. The *Lafayette* proceeded at that speed for two or three minutes when she noticed the *Benmaple* at a distance estimated at between 500 and 1,000 feet ahead slightly to port.

The engines of the *Lafayette* were stopped and reversed and a few seconds later the *Lafayette* and the *Benmaple* collided, with the result aforesaid.

Was half speed a reasonable one in the circumstances? The half speed of the *Lafayette* in normal conditions was estimated at eleven and a half or twelve knots.

The *Lafayette* was going against an ebb tide, the speed of which was said to be between 2 and 3 knots. The half speed of the *Lafayette* was thereby reduced to somewhere between eight and a half and ten knots. From the time the *Lafayette* sighted the *Benmaple* and stopped and reversed her engines, putting them full speed astern, and the time the ships collided, the speed of the *Lafayette* was undoubtedly decreased, but I am unable to admit, as contended by some of the witnesses heard on behalf of the appellant, that, when the collision occurred, the *Lafayette* was at a standstill; she certainly had some advance, the speed whereof is not easy to determine with any precision.

The deck log and the two engine logs of the *Lafayette* have been altered; the alterations are very crude and apparent; had they been effected with a view to deceive, it seems to me that they would have been made with more care. However it may be, it is possible that these alterations had for object the shortening of the time during which the *Lafayette* proceeded at half speed, after having stopped during three minutes and proceeded slow ahead during two minutes, so as to minimize as much as possible the speed at which she was going at the time of the collision. However I do not think that one more minute at

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half speed would have made a very great difference in the speed of the *Lafayette* at the time of the accident.

Was there negligence on the part of the *Lafayette* in proceeding at half speed, after stopping her engines during three minutes and going slow speed ahead for two more minutes in view of the dense fog which existed? Was she in the circumstances, navigating with caution as prescribed by article 16 of the International Rules of the Road?

It seems to me very probable, nay, quite certain, that, if the *Benmaple* had given signals regularly, at intervals not exceeding two minutes, as she should have done, the collision would have been averted. If the *Lafayette* had heard another signal before the expiry of the interval of three minutes during which she stopped her engines, as she should, had the *Benmaple* given her signals regularly, she undoubtedly would have kept her engines stopped and navigated with much greater caution; and on hearing a third signal she, in all likelihood, would have gone astern; the collision would have thus been rendered impossible. After stopping her engines for three minutes and then proceeding at slow speed for two more minutes and not hearing any signal, the *Lafayette* took for granted that there was no vessel ahead in the vicinity and that her way was clear; and for this I do not think that any blame can be imputed to her in the circumstances.

To the lack of fog signals on the part of the *Benmaple* must be added the absence of proper look-out. I am satisfied that, if the *Benmaple* had sighted the *Lafayette* at the same distance as the *Lafayette* saw the *Benmaple*—and there is, in my opinion, no reason why this should not have occurred seeing that the *Lafayette* was a much larger vessel than the *Benmaple*—and put her helm hard astarboard and her engines full speed astern, thereby complying with rule 18 of the International Rules of the Road, the collision would likely have been avoided or at least made much less severe and injurious.

It was contended on behalf of respondents and held by the learned trial judge that the *Lafayette* in proceeding at half speed violated article 16 of the International Rules of the Road. It was urged that half speed in a dense fog was excessive and that the *Lafayette* should have proceed-

ed at slow speed and stopped intermittingly. I am inclined to believe that half speed, in the circumstances disclosed by the evidence, was not an unreasonable one, particularly when taking into consideration that the *Lafayette* is a powerfully equipped motor vessel and that she reacts quickly to her engines.

I may note in passing that the breach of an article of the International Rules of the Road by a vessel is not in itself sufficient to warrant a finding that the vessel guilty of such breach is to blame; it must be shown that the breach caused, or at least contributed to, the accident; Marsden's *Collisions at Sea*, 9th ed., pp. 2, 5 and 37.

But even if I came to the conclusion that the speed at which the *Lafayette* was going after she had stopped her engines for three minutes and had proceeded at slow speed for two minutes was too great, I do not think that this was 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 look-out.

After a minute perusal of the oral evidence and a careful examination of the numerous exhibits produced and an attentive study of the able and exhaustive arguments presented by counsel and of the authorities cited, I have reached the conclusion that the proximate and direct cause of the collision is attributable to the fault and negligence of the *Benmaple* in failing to give at intervals of not more than two minutes the proper fog signals, in not keeping a careful look-out, in navigating at an excessive speed through a dense fog and in not exercising reasonable care and prudence.

I may add that the speed of the *Lafayette*, if it, to a certain extent, aggravated the damage incurred by the *Benmaple*, cannot, in my opinion, be considered as the determining cause or, in other words, the *causa causans* of the accident.

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For these reasons I feel that the appeal of the ship *Lafayette* and her owners La Compagnie Générale Transatlantique must be maintained and the cross-appeal of the plaintiff Port Colborne & St. Lawrence Navigation Company Limited must be dismissed and that the judgment of the learned trial judge must be varied as follows: the action of the plaintiff against the defendant is dismissed with costs;

the action of the additional plaintiffs, the master, officers and members of the crew of the steamship *Benmaple* and the passengers on board her is dismissed, with costs;

the intervention of the intervenants Leonard Labatte and others is dismissed, with costs;

the intervention of Mr. and Mrs. John L. Dickey is dismissed with costs;

the counter-claim of the owners of the ship *Lafayette*, La Compagnie Générale Transatlantique, for the damage caused by the collision to the ship *Lafayette* is maintained; there will be a reference to the District Registrar, assisted by merchants, to assess such damage.

Costs of the appeal and the cross-appeal to be borne by the respondent Port Colborne & St. Lawrence Navigation Company Limited.

Appeal allowed and cross-appeal dismissed.

NOTE: The appeal of the ship *Lafayette* from the judgment of Demers D.J.A., in the action brought against it by the Maple Leaf Milling Company Limited, Canada Linseed Oil Mills Limited and United Chemical Company Limited, was also allowed by the Honourable Mr. Justice Angers in a judgment rendered on July 29, 1939.