QUEBEC ADMIRALTY DISTRICT.

BETWEEN

1909
May 12.

THE MONTREAL TRANSPORTATION CO., LIMITED ..... } PLAINTIFFS;

AND

THE SHIP *NORWALK*.

ALEXANDER D. THOMSON.. INTERVENING PLAINTIFF.

Shipping—Collision—Inland Waters Regulations, 1905—Narrow channel—Negligence—Liability.

For vessels using the St. Lawrence River, the Imperial rules of the road apply from the Victoria Bridge down; above that point such vessels are regulated by the rules passed by the Governor-General in Council on the 20th April, 1905. (See Statutes of Canada 4 & 5 Edw. VIII. p. lx.)

2. The steamer *Norwalk* was proceeding after dark up the St. Lawrence River, and at a point in Lake St. Louis, east of Lightship No. 2, she observed the lights of the tug *Glide* with a tow of barges coming down, and about three thousand five hundred feet distant. Just about this point the channel becomes comparatively narrow and the current swift, making navigation difficult. Under Art. 25 (b) of the above last mentioned rules the descending steamer has the right of way, but must signal the approaching steamer what side of the channel she elects to take. The *Glide* signalled that she was going on the southern side. Under the circumstances it would have been prudent for the *Norwalk* to stop, but she took the risk of keeping on her course and was swung by a cross-current toward the southern side of the channel, which brought her into collision with one of the barges of the tow. It was shown that the *Norwalk* did not keep as far to the northward as she might have done.

Held, that the *Norwalk* was guilty of negligence, and was solely to blame for the collision.

THIS was an action for damages arising out of a collision between a steamer and a tow of barges in the St. Lawrence river.

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The facts are stated in the reasons for judgment.

A. R. Holden, K.C., and *E. E. Howard* for plaintiffs; *A.R. Clarke, K.C.*, and *A.R. Angers, K.C.*, for the ship.

DUNLOP, D. L. J., now (May 12th, 1909,) delivered judgment.

[After stating the allegations in the pleadings, and the grounds upon which Alexander D. Thomson was allowed to intervene in the action, the learned trial judge proceeded as follows :]

The evidence in this case is more than usually contradictory, even for a collision case, but a great many things are no longer in dispute which were apparently in dispute under the pleadings. For example, the dimensions and cargoes of the vessels, their ownership, the course followed by the tug and tow and the course followed by the steamer *Norwalk* up to the moment just before the collision, the channel, its direction, width and depth, more particularly in the neighbourhood of the St. Louis Lightship No. 2 near where the collision occurred—all are no longer in dispute.

The tug *Glide* belonging to plaintiffs left the Soulanges Canal on a voyage to Montreal on the afternoon of the 23rd October, 1907, having in tow two barges belonging to plaintiffs, the *Winnipeg*, a large barge about 180 feet long with a load of from about 1,200 to 1,300 tons, and the barge *Jet*, about 145 or 150 feet long with a load of flax-seed, having a gross tonnage of about 600 or 700 tons. The barges were lashed abreast to the *Glide* by a seven inch hawser, and the barges were lashed very firmly together by at least four lines from their respective timber-heads. In fact they were lashed as close as they possibly could be, and they formed as it were one ship.

It has been established that this was the correct mode of towing two barges down Lake St. Louis, although

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one barge might be, as was the case in the present instance, considerably smaller than the other. Now it was one of the principal charges made against plaintiffs in defendant's preliminary act and defence that this was an improper mode of towing; but no proof has been adduced to contradict the evidence of plaintiffs' witnesses that this was the ordinary way of bringing such barges down the lake; because, as the experts said, the tug had a much better control over the barges when lashed together in this way.

It has been also established that as you descend Lake St. Louis, coming near the Chateauguay Light, termed "Lightship No. 3," the channel narrows; and it continues narrowing till immediately below the St. Louis Lightship, termed "Lightship No. 2." Just below this lightship it widens out again. The channel there is proved to be in a north-easterly direction as far as a little below Lightship No. 2, where it turns eastward. The channel itself does not bend until opposite the black buoy, the lower of the two black buoys which are placed below the Light, being indicated on the chart (plaintiffs exhibit No. 2). The descending vessel taking the southern part of the channel would continue on its course without any alteration, if it kept in the centre of the south part of the channel, until 500 or 600 feet below Lightship No. 2, where it would take the bend east for Lachine.

The charts show, and practically all the witnesses state, that at Lightship No. 2 the channel, for boats of fourteen feet draft, is at least 400 feet wide, with the lightship practically in the centre of the channel. It is important to observe that this measurement is taken in the narrowest part of the channel, not north and south, but slightly north-west and south-east, in order to get it as narrow as that.

Mr. Fusey, an engineer, who was examined as a witness on the part of the plaintiffs, was cognizant of the

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whole matter and took the soundings and prepared the departmental chart (plaintiffs' exhibit 2), states in his evidence, and the charts confirm what he says, that in taking a line between the two black buoys east of Lightship No. 2, the width of the channel north and south is 850 feet, of which about 200 feet lies to the south of the east and west lines through the lightship, and 650 feet lies to the north of the east and west lines through the lightship.

It is proved that at Lightship No. 2 there is a strong current coming down from the channel of the Ottawa river, which is shown in the chart to be in a north-westerly direction, and sets across the channel towards the south.

The witnesses state that the current runs from two to three miles or more an hour, setting in a southerly direction across the channel, that is to say, that at Lightship No. 2 it would strike vessels a little on the quarter, almost abeam; then after they take the bend below the lightship would strike them more and more astern; a little further down it would strike them exactly astern. It will be seen hereafter that this current has an important bearing on the case.

As to the weather on the evening of the accident, which occurred about 7 p.m., all agree that it was clear though dark, and that there was a light wind blowing from the north or north-west. The lights on all the vessels are well proved. Both the *Glide* and *Norwalk* carried regular lights. The tow carried the regulation lights, to wit, a red light was carried on the *Jet* on the port side, and a green light on the *Winnipeg* on the starboard side. All went well with the *Glide* and tow from the time they left the Soulanges Canal until near the Lightship No. 3, when a steamer, the *Norwalk*, was seen, which afterwards came in collision with the barge *Jet* and evidently struck with great force her port bow shortly after the *Glide*

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and her tow had rounded the Lightship No. 2. The steamer *Norwalk* evidently struck the barge *Jet* with great force as the 7-inch hawsers by which the barges were towed were broken, causing the barges to break away from the tug and each other, thereby causing great damage to the *Jet* and practically destroying her cargo.

Now, taking into consideration the nature of the channel and its width and dimensions at or near where the collision occurred, in order to determine whether the *Norwalk* and the tug and its tow were properly managed at and previous to the time of the accident, which is after all the crucial point in the case, it is necessary to determine if possible the exact place where the collision occurred. It may be remarked that it is admitted on behalf of the *Norwalk* that they knew and recognized that a tug with a tow was descending the lake when about 3,500 feet away from it, as testified by Captain Goodrow, the master of the *Norwalk*. In view of this fact, if there had been proper management of the vessels, the collision should have been avoided.

It will be necessary, in order to discover who was responsible for the damage, to examine the very voluminous evidence taken in this case with care.

I find it proved, first, that the tow had come straight down the channel from Lightship No. 1 to Lightship No. 2, and that at the time of the collision the barge was heading a little to the south and swinging to port, that is to say to the south with wheel aport, and the tug was pulling also in the same direction. I find it proved, secondly, that the collision occurred when the cabin of the *Jet* was opposite Lightship No. 2, and, thirdly, that the *Jet* was from 20 to 30 feet to the south. In my opinion it has also been established, although on this point the evidence is contradictory, that the *Norwalk*, as well as the barges, were at the moment of the collision in the waters south or south-east of Lightship No. 2.

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Kennedy, on the *Glide*, swears that he saw the light of Lightship No. 2 over the bow of the *Norwalk* immediately after the collision. O'Connor and Mahoney saw it about a minute after the collision.

It is established, furthermore, that the *Jet* is about 138 feet between perpendiculars, and therefore about 145 feet over all; and that the cabin of the *Jet* is from 15 to 20 feet from her stern.

Having carefully examined all the evidence in this case I am of opinion that the collision occurred about 125 feet below, that is, east or south-east of Lightship No. 2. This is virtually confirmed by what the witnesses Moreau, Malette and Cholette state.

The witnesses for the *Norwalk* say that the collision took place from 50 to 75 feet below the lightship. In my opinion the witnesses on the tow were far better placed to judge the position of the *Jet* with regard to the lightship than those on the *Norwalk*, and it is reasonable to say that they were in a position to be certain that at the time of the collision the cabin of the *Jet* was opposite Lightship No. 2. But the witnesses on the *Norwalk* had to depend on their estimate of the distance of a light across a stretch of water on a dark night; and nothing could be more deceptive.

The channel is that portion which is either naturally of a depth of 14 feet, or has been dredged to a depth of 14 feet, and can be easily traced on the chart by noting the soundings; and the scale of the blue print chart produced showing the soundings is 400 feet to the inch. From the chart it will be seen that the narrowest part of the channel is a line through the first black buoy and the lightship, where it is about 440 feet wide. But it is important to note that the width through the point of collision, whether the collision occurred 50, 75 or 125 feet east of the lightship, is, as shown on the chart, and, as stated by the witness Fusey, about 850 feet wide; and

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it is the same width for 400 or 500 feet below, where it narrows slightly, but continues of ample width for nearly a mile below Lightship No. 2. It will be seen that the channel a few feet below Lightship No. 2 widens quickly to an extent of 850 feet, and there is at least 850 feet to the north of the line between the two black buoys, as is established by the chart and the evidence of the witness Fusey.

All defendant's witnesses contend that the tug and tow went north of the fairway of the channel; while plaintiff's witnesses swear exactly the opposite.

I think it was wrong to say that the lightship lies east and west, and that the channel was only 440 feet wide where the collision occurred. It was 440 feet wide at the shoals, which are westward and north-westward of the lightship, but the channel is much wider where the collision occurred.

The fairway swings up very much further north than the east and west line between the lightship. The principal part of the bend in the channel is considerably below the lightship, as the witnesses show and the chart establishes. All the expert witnesses say that the *Norwalk* should have stayed below when she saw a tug and tow coming down and recognized it as such; except Chestnut, the pilot of the *Norwalk*, upon whom the responsibility must fall if plaintiffs succeed in their action.

It has been proved, as I stated before, that the *Norwalk* recognized that a tug and tow was coming, when it was distant from the *Norwalk* about 3,500 feet. Captain Goodrow says that when he got to the turning buoy, which is about 3,500 feet east of the lightship, he saw the lights of a tow and recognized it as such. Though the experts say it would have been prudent for the *Norwalk* to have stayed below, it was not contended by plaintiffs' counsel that there was any statutory regulation to that effect; but it seems to me it was one of the duties which rested upon

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the *Norwalk* so to do in order to avoid the danger of a collision by meeting a tug and tow in a portion of the channel proved to be dangerous owing to the fact of its being comparatively narrow, and the very material fact that there was a strong cross-current. It seems to me that the current accounts to a great extent for the manner and place in which the collision happened; as it was shown that the *Norwalk* did not take this sufficiently into consideration. The pilot, Chestnut, seems entirely to have ignored the current; and Captain Goodrow frankly says he did not know of the existence of the current at the time of the collision but he knows it now. He was interrogated and answered as follows:—

"Q. I presume you know the channel changes its direc-
"tion shortly above that?

"A. A trifle, yes.

"Q. So that you get the current in a different position
"with regard to your boat shortly above that?

"A. I did not know then, but I do now.

"Q. You were relying on Chestnut for that kind of
"thing?

"A. Yes sir.

"Q. How soon after did you learn this?

"A. I don't know."

When the *Norwalk* decided not to stay below, as she could easily have done, as has been established in this case, notwithstanding what the pilot Chestnut says, she took the risk of coming on, and if in default must be responsible for the consequences of taking that risk. All the other witnesses say it was perfectly safe for upcoming vessels to slow up and stop, so far as the current is concerned, anywhere in the reach below Lightship No. 2; and experts say that is what they would have done if they had been in the position of the *Norwalk* and saw a tow coming down, particularly at night, in order to avoid meeting it in a narrow channel near Lightship No. 2,

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and more particularly in view of the cross-current. The *Norwalk* had plenty of time to have taken that precaution, but having taken the risk of coming on, should have kept as far to the northward of the channel as possible. This she did not do. Captain Goodrow does not seem to have known this, and they were coming along holding their course, just to clear Lightship No. 2 by 10 feet. There was a powerful cross-current which began to bear on the vessel and make it edge or sag off, and the result was that they found themselves in the southern part of the channel, as the current had been drifting the *Norwalk* continually towards the south, and I find the collision occurred in the southern part of the channel at the place above mentioned.

The material question in this case is as to the management of the *Norwalk* and the tug and tow immediately before and at time of the collision; because no one seems to have imagined there was any danger of a collision until it actually happened. I am of opinion it was imprudent in the *Norwalk* not to stop. I find she took the risk of coming on. I find further that there was nothing to prevent the *Norwalk* keeping further north than she did, as it is shown she just cleared Lightship No. 2 by ten feet; and that the collision might have been avoided if reasonable care and skill had been employed in the navigation and management of the *Norwalk* by its master and officers and crew. The *Norwalk* did not respect the right-of-way that the tug and tow was entitled to.

With respect to the sketch made by Captain Goodrow when examined, (fyled as Exhibit D-3) purporting to show the position of the boats at the time of the collision, I do not think that it shows the true position of the vessels at the time of the collision. This sketch is simply a rough copy of the plan or sketch defendants' exhibit No. 2, which was produced subject to plaintiffs' objection, and

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has not been proved. I refused to allow Captain Goodrow to refer to this plan owing to the objections made by counsel for plaintiffs.

These objections are now sustained; and inasmuch as this plan has not been proved, I order it to be removed from the record.

It seems to me strange that on the night of the accident, which is proved to have been fine though dark, with little wind, that those on board the *Norwalk* should not have heard three blasts twice repeated by the tug *Glide*, and which has been conclusively proved to have been the customary signal in those waters notifying up-coming vessels to check down, and also that they should not have seen the lights on the tow, while it is proved that they heard the one blast given by the *Glide* indicating that she was keeping to starboard. It has been proved that the whistle of the *Glide* was a loud and hoarse whistle, and could be heard a considerable distance off.

Another fact worthy of remark is that the witnesses examined by defendant say that when the collision occurred, the shock was but a slight one, and a glancing blow. Now it is proved beyond all question that the blow was a severe one, that the bow of the barge *Jet* was stove in; and she immediately filled with water; that the seven inch hawsers, comparatively new, which fastened the barge *Winnipeg* and *Jet* to the tug *Glide* were broken, and the barges at once separated; that the ropes fastening the barges together were broken; that two of the crew of the barge *Jet* at once jumped into the barge *Winnipeg* to save themselves. It was also shown by the evidence of two of defendant's witnesses that they in any event considered the collision a serious one in view of what they did. I refer to the evidence of Johnston and Ellis.

The pilot Chestnut of the *Norwalk* seems to have been very uncertain as to the course he should take. His evidence shows, (and more particularly the statement he

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made at the enquiry held before the Wreck Commissioner, and which in his evidence he has admitted to be correct) that he first intended to pass to the south of the lightship, but was reluctantly compelled, as he states, to go to the north. What he stated before the Wreck Commissioner, and what he admitted to be correct, is as follows:—

"Q. When did you first get the impression that the "quarters were going to be narrow?

"A. When I passed the upper Gas buoy.

"Q. That was the place where you realized that the "quarters were going to be close?

"A. Yes, that he was coming. I saw I would have to "take the north side, and said to myself that I did not "want to go there. I was kind of hanging off to let him "get past, and then go in behind him. He came over "between "C" and "F" [This refers to marks on a plan "produced before the Wreck Commissioner.] "In fact "I thought he was past us when he struck us, because the "tug was past us and I supposed he would follow right "after her".

Now with respect to the contradictory evidence as to the part of the channel where the accident occurred, all plaintiffs' witnesses swear positively that when it occured, the tow and barges were in the channel south of the lightship, while defendant's witnesses swear as positively it was in the channel north of the lightship. Pilot Chestnut says the barges were north of the lightship.

These are his words: "I did not think of going into "the south channel. I gave her [the tow] the whole "channel, and got to the north side myself. That is why "I went up past the Gas buoy as far as I did". It will be seen that this is contradicted by what he said before the Wreck Commissioner, where he states "I would sooner have gone to the southward, but could not".

As to the contention of the defendants that the *Norwalk* could not have been in the position where she was seen

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after the accident, it seems to me that the blow and the force she received when the collision occurred would have turned her round so that she could have cleared the lightship at least 10 feet. Now, what did this blow do to the *Jet*? It stove in her bows; it stopped her—she was going 5 miles an hour; it broke 2 seven inch hawsers and also broke the ropes fastening the barges together, turning the *Jet* athwart the channel. Yet it is contended by defendant's witnesses that it had no effect whatever on the *Norwalk* except to scrape a little paint off her bows. Here was a tow, consisting of two barges lashed together making one complete whole, both heavily laden. The *Winnipeg* was almost as large as the *Norwalk*. Her gross tonnage was over 1200 tons. The tonnage of the *Jet* was about 700 tons; and in addition to this there was the tug with two new seven inch hawsers pulling on its tow. So that we have practically a single vessel coming down with the momentum of the tug and those two barges together. They are coming down at five miles an hour, and collide with the *Norwalk*, which is coming up, more or less against the current, at a speed of almost three miles an hour. All this shows that the collision was a violent one; and I cannot conceive that it had no effect whatever on the *Norwalk*.

The *Norwalk* was a large steamer of about 881 tons register, heavily laden and proceeding on a voyage to Detroit. It has been proved that after she left Lachine on the evening in question, about 6.30 p.m., she twice touched bottom. Plaintiffs contend that this indicated she steered badly, while defendant says that this was owing to the unusual lowness of the water at that time. However, the fact remains that she did twice touch bottom shortly before the collision in question occurred.

It must be remembered in deciding this case that a tow of two heavy barges with a hawser of 125 feet in length would make it impossible for the tug and tow to stop or

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slow up more than would be safe in accordance with the necessity of controlling the tow, while there was nothing to have prevented the *Norwalk* stopping in the reaches below Lightship No. 2.

I am of opinion that the defendant made a mistake in assuming that the Lightship No. 2 lies east and west, and in assuming that the channel was only 440 feet wide at the place where the collision occurred. All the witnesses say that a tug with a tow descending Lake St. Louis, always hugs closely Lightship No. 2, so as to straighten out the tow when going down the channel; and that very often the tow sheers off.

Now in the present case, if the tow did sheer off a little so as to encroach on the northern half of the channel to the extent of 10 feet, as contended by some of defendant's witnesses, this would not in my opinion relieve the *Norwalk* from fault; for there was no occasion for her to pass the lightship so close as she did, as no matter whether the collision occured 50, 75 or 125 feet east of or below the Lightship No. 2, there was plenty of water in the north channel for the *Norwalk* to have kept out of the way; and if she had done what she alleges she did in her preliminary act and defence, there would have been, in my opinion, no collision; and it has been established that the channel was much wider at the place where the collision occurred, as I have stated above.

The authorities are clear that even if there had been some initial fault on the part of the tug and tow, which I do not find proved in the present case, yet the tug and tow, would not be responsible for the collision, if by the exercise of reasonable skill on the part of the master, officers and crew of the *Norwalk* the collision could have been avoided; and in my opinion such reasonable skill on the part of the master, officers and crew was not exercised at and before the collision. There was no occasion to have kept the *Norwalk* so close to Lightship No. 2 and

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there was nothing to have prevented her keeping farther to the north, where there was plenty of water.

Defendant contends strongly that the *Norwalk* was properly navigated, according to the evidence of the expert Macdonald, a witness examined on behalf of the plaintiff; but it must be remarked that this witness did not say that the *Norwalk* under the conditions existing at and previous to the collision, was properly navigated. On the contrary he states he should have remained below until the tug and tow had passed down, or kept well to the north side of Lightship No. 2. He was interrogated as to this, and answered as follows:—

"Q. If you were coming up the lake with one of the "steamers, such as you have described—that is a canal "size steamer—and you met a tow coming down, under "such conditions, when you would come abreast of her "about the light. What would your duty be under those "circumstances? That is if you had no signals from her "whatever?

"A. Well, if I met a tow anywhere near the light "coming down there, I would take the other side.

"Q. The north side of the lightship?

"A. The north side of the light.

"Q. Did you ever do that?

"A. Yes, sir.

"Q. More than once?

"A. Yes, sir, more than once.

"Q. And, if you were not going to take the north side "of the lightship, would you have any other course open "to you?

"A. Well, if I saw him coming into me in time, I would check down and wait below altogether. In order "to give him time to get out. I could go to the other side "if I wished"..... and further on he says:

"Q. If you did not know the north channel as well as "the south one?

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"A. I would not go.

"Q. What would you do then?

"A. I would wait below, outside. There is lots of "room there?

The lookouts, both on the *Norwalk* and on the tug and tow, may not have been as efficient as they should have been, but I do not think that this contributed at all to the collision.

Plaintiffs contend that the *Norwalk* should have stopped after the collision, and offered to render assistance which certainly was required as regards the barge *Jet*, which drifted down and stranded some distance above the Lachine Rapids. And part of her crew was afterwards rescued by a boat being sent after the tug had returned from towing the *Winnipeg* to a place of safety. But as the crew of the *Norwalk* say they did not hear any cries for assistance though it is proved that assistance was called for, as the tug was there, and the barges were near shore, I think under the circumstances as disclosed by the evidence, they were not in fault in going on as they did. I am of opinion that there would have been no collision if the *Norwalk* had stopped shortly after she recognized that the *Glide* and her tow were coming down; and she recognized that when they were about 3,500 feet away, as testified by Captain Goodrow.

I am further of opinion there would have been no collision if the *Norwalk* had kept further to the north, where she would have had ample water to have passed the tug and tow in safety.

The channel was that part of the lake which either naturally or dredged had a depth of 14 feet, as shown on the chart produced.

Now, even if, in the first instance, the tug and tow were in fault, which I do not find, yet if the collision could have been avoided by reasonable care on the part

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of the master, officers and crew of the *Norwalk*, the tug and tow would not be responsible for the accident.

Now on this point I might refer to a recent Admiralty case of the *Etna* (1) where Bucknill, J., referring to the management of the torpedo boat *Wear* which had been in collision with the steamer *Etna*, said: "He failed to "act [referring to the officer in charge of the torpedo "boat] until too late, and just failed to clear the *Etna* by "40 feet. It was agreed that on the authority of H.M S "*Sans Pareil* (2) the rules of common law as to negligence "applied, and that if the *Etna* was initially negligent "she might escape if by reasonable care and skill the *Wear* "could have avoided her; this, however, had not been "made out to his satisfaction, as the *Etna* was not only "negligent in getting in between the two lines of the "flotilla, but there had evidently been a bad lookout on "board, for she did not see the starboard division of the "flotilla at all." And the Judge, having regard to the negligent navigation of the *Wear* also, held both vessels to blame.

The decision in the torpedo case above cited shows that the *Sans Pareil* case is a binding authority on the Admiralty Court in England, and there, notwithstanding that the nautical assessors in the first court held that there was no negligence in the *East Lothian* in passing across the bows of the *Sans Pareil*, the court held as the *Sans Pareil* might with ordinary care have avoided the collision, she was alone to blame for the collision. This case was taken to appeal on the ground that there was improper navigation on the part of the *East Lothian*, and the damage sustained should have been in any event divided. Different assessors assisted the Court of Appeal, which confirmed the judgment of the court below, and which asked the assessors the following questions as mentioned at page 282 of the Probate Reports 1900 :—

(1) 24 T. L. R. 270. (2) (1900) P. 267.

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"Q. Was the *East Lothian* under the circumstances of "this case guilty of negligence in passing across the bows "of the *Sans Pareil?* And they answered 'it was improper navigation,'" which the Court of Appeal took to mean that the assessors did not advise them in the same way as the elder brethren in the court below, and accepted their advice so given.

Lord Justice Smith in giving judgment, at page 283 of the Probate Reports, 1900, said:—

"The well-known law of contributory negligence laid "down by Lord Penzance in the House of Lords in "*Radley* v. *The London and North Western Railway Co.* "(1) is 'that the plaintiff in an action for negligence "cannot succeed if it is found by the jury that he has "himself been guilty of any negligence or want of "ordinary care which contributed to cause the accident;' "but there is this qualification equally well established, "namely, that though the plaintiff may have been guilty "of negligence and although that negligence may in fact "have contributed to the accident, yet if the defendant "could, in the result, by the exercise of ordinary care and "diligence, have avoided the mischief which happened, "the plaintiff's negligence will not excuse him.' The case "of the *Margaret* (*Cayzer* v. *Carron Co.* (2), shows that "the common law doctrine is applicable to such a case "as that now before us."

Reference might also be made to the remarks of Lord Justice Williams who, at page 287, said:—

"The only remaining question is whether, applying "the common law rules to this matter, there is evidence "of such a state of circumstances that the plaintiff is "disentitled to recover. That there was negligence by "the plaintiff there can, to my mind, be no doubt. If "the advice of our assessors is right, there obviously "was, and, speaking for myself, I entirely agree with

(1) L. R. 1 A. C. 754. (2) L. R. 9 A. C. 873.

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"the view they take. But, according to the rule laid "down in *Radley* v. *London & North Western Railway* "*Co.*, that is not sufficient; you must show that the negli- "gence was of such a character that the defendant could "not with ordinary skill and care have avoided the acci- "dent. That rule applies equally in the Court of Admi- "ralty, where the practice is that if both ships are to "blame, the damage is to be divided; (See the *Margaret* "(*Cayzer* v. *The Carron Co.*). In that case Lord "Blackburn and Lord Watson made it clear that the "common law principle governs the Admiralty rule, "and that if the consequences of the neglect of plaintiffs "could have been avoided by ordinary care and prudence "on the part of defendants, the negligence of plaintiffs "would be no answer to the action."

In the case of the *Hamburgh Packet Co.* v. *Desrochers* (1) Burbidge, J., in rendering judgment, said :—

"The effect of the statute (referring to the English "statute) is to impose on a vessel that has infringed a "regulation, which is *primâ facie* applicable to a case, "the burden of proving not only that such infringement "did not, but that it could not by possibility have con- "tributed to the accident. That is the rule for which "the appellants contend, and it is no doubt the rule to "to be followed in Canadian courts in cases of collisions "occurring on the high seas, but it is not applicable "where the collision occurs in Canadian waters."

This must always be borne in mind when considering the English authorities, and such authorities prior to 1873 are only applicable, the English law having been then changed. Previous to that time the law was the same as the present Canadian law.

The case of the *Khedive* (2) is referred to at pp. 303 of 8 Exchequer Court Reports, as follows :—

(1) 8 Ex. C. R. 304. (2) L. R. 5 A. C. 876.

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"The alteration of the law in 1873 was an important "one. The occasion of it, and its effect, will be seen by "reference to the following cases. In *Tuff* v. *Warman* (1) "the defendant was charged with having so negligently "navigated a steam vessel in the river Thames as to run "against and damage the plaintiff's barge. The case "came before the Exchequer Chamber in 1858. The "effect of the decision cannot, I think, be better stated "than it was by Lord Blackburn in the case of the *Khedive*, "decided by the House of Lords in 1880 (2) : 'On the con- "struction of this and similarly worded enactments, it "has been held, in *Tuff* v. *Warman*, that though the "plaintiff had infringed the rules, and by his neglect "of duty brought the vessel into danger, yet if defendant "could by reasonable care have avoided the consequences "of plaintiff's neglect, but did not, and so caused the "injury, the plaintiff could recover, as under such circum- "stances the collision was not occasioned by the non- "observance of the rule'. This he adds 'prevented the "statute from producing the effect that those who framed "it wished ; but nothing was done until attention being "apparently called to the subject by the case of the ""*Fenham*," (3) section 17 of *The Merchant Shipping Act* "was enacted."

This was evidently one of the earlier cases referred to in the judgment of the Exchequer Court where the presiding judge said : (p. 305.)

"Where that happens [referring to the collisions in Canadian waters] "the rule to be followed is that estab- "lished by the earlier cases. It is necessary, then, in "considering the English authorities to distinguish "between cases decided before and those decided after "1873, when the Act was passed."

With reference to the jurisprudence bearing particularly on this case, it is well known that from the Victoria bridge

(1) 2 C. B. N. S. 740; 5 C. B. N. S. 573. (2) L. R. A. C. 892.
(3) L. R. 3 P. C. 212.

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down we are practically under the International Rules of the Road, that is to say, the Canadian Government has made the Imperial rules applicable in their entirety from the Victoria bridge down stream, but from the Victoria bridge upstream we are under the regulations as prescribed by Canadian Order-in-Council of the 20th April, 1905. These rules are printed in the first part of the volume of the Dominion Statutes 4 & 5 Edward VII., page lx. Art. 25b of these regulations is important, and reads:

"In all narrow channels where there is a current, and "in the rivers St. Mary, St. Clair, Detroit, Niagara and "St. Lawrence, when two steamers are meeting, the "descending steamer shall have the right of way and "shall, before the vessels shall have arrived within the "distance of half a mile of each other, give the signal "necessary to indicate which side she elects to take".

This was done by the *Glide* by giving the one blast of her whistle, indicating that she was keeping to starboard.

I would also refer to the case of the *Independence* decided by the Privy Council in 1861 (1). In that case the ship that met the tug and tow was in a much more favourable position than the *Norwalk* is in this case, because she was a sailing ship. This is what the Privy Council said when they held the sailing ship in fault [Per Lord Kingsdown:]

"A steamer unencumbered is nearly independent of "the wind. She can turn out of her course and turn into "it again with little difficulty or inconvenience. She can "slacken or increase her speed; stop or reverse her "engines, and can move in one direction or the other "with the utmost facility. But a steamer with a ship in "tow is in a very different situation. She is not in any-"thing like the same degree mistress of her own motions: "she is under the control of and has to consider the ship "to which she is attached. She cannot by stopping or

(1) 14 Moo. P. C. 103 at p. 115.

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"reversing her engines, at once stop or back the ship "which is following her. By slipping aside out of the "way of an approaching vessel, she cannot at once and "with the same rapidity draw out of the way the ship "to which she is attached, it may be by a hawser of con- "siderable length, and the very movement which sends "the tug out of danger may bring the ship to which she "is attached into it."

I would also refer to the case of the *American* and the *Syria* (1). This was a judgment of the Privy Council in 1874. In that case the *American* was found to blame; she was towing the *Syria* and both struck a sailing ship. Sir Robert Collier in delivering the judgment of the court commented upon the decision and the passage above quoted in the *Independence*, and the effect upon that decision of the promulgation of the new regulations for preventing collisions at sea. His words, at page 130, are as follows:

"It is true that this case [referring to the *Independence*] "was decided before the promulgation of the present "regulations for preventing collisions at sea, which in "terms direct that where the courses of two vessels "involve risk of collision, the steamship shall keep out of "the way of the sailing ship, and the sailing ship shall "keep her course, subject to due regard to dangers of "navigation and to special circumstances rendering a "departure from the rule necessary in order to avoid "immediate danger." He goes on to say:—

"But the rule of navigation though formulated, can "scarcely be said to have been altered by the regulations, "and the distinction taken between the relations of an "encumbered and unencumbered steamer is manifestly a "just one and still applicable."

Marsden on Collisions at Sea (2) thus summarizes the English jurisprudence:—

(1) L.R. 6 P.C. 127.

(2) 5th ed. p. 166 *et seq.*

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"It is obvious that a tug with a ship in tow has not "the same facility of movement as if she were unencum- "bered. She is not, in anything like the same degree, "mistress of her own movements. She cannot, by stop- "ping or reversing her engines, at once stop or back the "ship in tow".....He continues:

"In taking measures to avoid a third vessel she has to "continue her tow, and a step that would be right and "take her clear, if she were unencumbered, may bring "about a collision between her tow and the ship she her- "self has avoided. Although, therefore, it is the duty "of a tug with a ship in tow to comply, so far as is pos- "sible, with the regulations for preventing collisions, it is "also the duty of a third ship to make allowances for the "encumbered and comparatively disabled state of the "tug, and to take additional care in approaching her".

And at page 344 this author, referring to the require- ments for lights, states:

"The distinguishing lights of the tug are 'for the pur- "'pose of warning all approaching vessels that she is not "'in all respects mistress of her movements', and to show "that she is encumbered."

and at page 487 states:

"The Supreme Court in America has held that a vessel "undertaking to pass another in a narrow channel, or "navigating such a channel in weather that makes it "dangerous, does so at her own risk;"

and at page 444:

"In determining, therefore, what are the proper steps "for a ship to take in order to avoid another approaching "her in a winding river, the sinuosities of the river, and "also the usual course of vessels in the river, must be "taken into consideration;"

and at page 445:

"It has recently been held in the Admiralty Division "that it is a prudent rule in a winding tidal river, in the

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"absence of special regulations, for a steamship about to "round a point against the tide to wait until a vessel "coming in the opposite direction has passed clear, and "a steamship was held in fault for disregarding this pre-"caution;"

and at page 331:

"A vessel is not justified in delaying to take precau-"tions until the last moment, or in trusting to be able to "'shave' clear of the other. If by doing so she frightens "the other into taking a wrong step and a collision "occurs, she will be responsible for the entire loss."

Here, again, it may be said that even if it were true, which I do not admit, that the tug and tow were ten feet north of the line of the lightship, and if being there, considering the direction of the current and other attendant circumstances, constituted a fault, I am of opinion that under the principles laid down in the above cited authorities, the tug and tow could not be held responsible for the collision brought about by the *Norwalk*.

I would refer also to the case of the *Hibernian* (1).

The judgment was rendered in 1870, and the Privy Council judgment will be found in L. R. 4 P. C. p. 511: also to the case of the *Earl of Lonsdale*, (2) a judgment of the late Mr. Justice Stuart, where it was held:—

"Where a steamship ascending a river, before entering "a narrow and difficult channel, observed a tug approach-"ing with a train of vessels behind her, and did not stop "or slacken speed, and where she subsequently collided "with the tug and her tow, the steamer was held to blame "for not stopping when entering the channel."

This judgment was confirmed in the Privy Council; and the judgment of the Privy Council is reported in the same volume of Cook, page 163.

The American jurisprudence is to the same effect, and it is unnecessary to quote the cases at length, as a great

(1) 2 Stu. 148. (2) Cook's Adm. Rep. 153.

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many of the more important decisions are cited in plaintiff's written argument.

I might also state that Malette's evidence has been referred to, in which he stated it would not be proper navigation to go north of the line of Lightship No. 2; and this has been strongly urged against the plaintiffs on the assumption that the line of Lightship Number 2 runs east and west. But the line does not run east and west as shown by the charts, and as explained by Mr. Leger, but in a north-easterly and south-westerly direction. So that when the line of the lightship is properly laid, Captain Malette's evidence is perfectly explainable and seems to support plaintiffs' contentions; and this has been satisfactorily explained by Mr. Howard, one of plaintiff's counsel in his argument.

Having carefully examined the able arguments of the counsel, the authorities cited on both sides, and carefully examined the jurisprudence bearing on this question, and the evidence of record, I am of opinion that the defendant is solely to blame for the collision in question, and is responsible for the result in damages.

I am further of opinion that the collision in question could have been avoided if reasonable care and skill had been exercised by the master, officers and crew of the steamship *Norwalk*.

I am consequently of opinion that the said steamship *Norwalk* is solely responsible for all damages caused by the said collision; and I consequently find in favour of plaintiffs, and allow the plaintiffs' action. I condemn the defendant, the ship *Norwalk*, her owners and bail in the amount to be found due on plaintiffs' claim, together with costs of the principal action; and do further adjudge and order that an account be taken, and refer the same to the Deputy Registrar, assisted by merchants, to report the amount due. I further order that all accounts and vouchers, with reports in support thereof, be filed within

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six months after date of the present judgment; and that any amount to be found due by the defendant for damage to the cargo of the barge *Jet*, said barge being owned by the plaintiffs, be paid over in due course by plaintiffs to the said intervenant, who has been proved to have been the owner of the cargo of the said barge *Jet* when the collision in question occurred; and that defendant pay the intervenant the costs of his said intervention up to the date of its allowance.

Judgment accordingly.

Solicitors for plaintiffs: *McLennan, Howard & Aylmer.*

Solicitors for ship: *Clarke, Bartlett & Bartlett.*

Solicitors for intervening plaintiff: *Geoffrion, Geoffrion & Cusson.*