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March 19.

QUEBEC ADMIRALTY DISTRICT.

BETWEEN

THE HARBOUR COMMISSIONERS OF MONTREAL..... } PLAINTIFFS;

AND

THE SHIP *ALBERT M. MARSHALL*..... } DEFENDANT.

Collision—Liability—Breach of regulations—Presumption—Negligence—Proof—Collision with a vessel at anchor.

Held:—Under the Canadian navigation rules, a breach thereof creates no presumption that a collision following the same was due to it, and the party alleging negligence must establish it in the ordinary way.

2. Where a steamer collided with a dredge at anchor, it was held to be no defence that the dredge was lying in an improper place and did not exhibit proper lights, if it be shown that the collision could have been avoided by the exercise of reasonable skill and care on the part of the moving vessel.

ACTION for damages for collision.

The facts are stated in the reasons for judgment.

DUNLOP, L. J. now (March 19th, 1908) delivered judgment.

The plaintiffs, by their statement of claim, in effect, allege: That on the 8th October, 1906, at about 9.50 p.m. a dredge known as dredge No. 1 belonging to the plaintiffs, and used by them in their work for the improvement of the harbour of Montreal, which is under their control, was at anchor in the harbour, south of the ship channel, about opposite section 22; that there was a watchman on board the dredge at the time; and she was carrying the regulation anchor lights, that it was dark at the time but there was no rain, the wind was about south and was

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strong, the current flowed about towards the north, at a speed at from four to six statute miles an hour; that, at that time, the steamer *Albert M. Marshall*, John A. Duncanson, master, proceeding down-stream from out of the basin formed by the wharves and Mackay pier, ran into the dredge, the port bow of the ship striking the starboard quarter of the dredge; that the dredge was sunk and almost completely lost as a consequence of the collision; that the collision and damage and loss to the plaintiffs resulting therefrom were caused by the negligent and improper navigation of those on board the *Albert M. Marshall*, against which steamer is the presumption of fa lt, the dredge being at anchor; that the plaintiffs, without prejudice to this presumption and without admitting that the burden of proof is on them or that they are bound to give any details of the fault of the steamer, and without limiting their case to the faults hereinafter mentioned, mention among other faults of said *Albert M. Marshall*, which have caused the collision, the following; that the *Albert M. Marshall* ran into the dredge which was at anchor, plainly visible and lighted, when she could easily have avoided it; followed an improper course and should have steered so as to avoid the dredge; should have kept in the channel and on the west or city side of the dredge, particularly in view of the existing current and wind; that there was but an improper lookout; that there was no competent officer in charge, or on duty, or on deck, at the time; the pilot was incompetent and the equipment defective, both the engines, machinery and steerage gear; that, if unable to be controlled to avoid running into the dredge, which is not admitted but denied, the ship should have been kept above Victoria pier in still water, till conditions allowed of her proceeding down in safety; that the ship should have stopped and reversed, or altered her course when danger of col-

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lision began to exist; and that the ship did not stand by after the collision.

The plaintiffs claim a declaration that they are entitled to the damage proceeded for; the condemnation of the defendant (and the bail) in such damage and in costs; to have an account taken of such damage with the assistance of merchants; and such further or other relief as the nature of the case may require.

The defendant by defence and counter-claim in effect alleges: That the defendant is the owner of the American steamer *Albert M. Marshall* of 987 net tons register, and worked by engines of about 650 horse power nominal, with a crew of about 20 hands, which, on the 8th October, 1906, was bound on a voyage from Lake Ontario ports to Ha! Ha! Bay, without cargo; that about 9.40 p.m. of that day, the ship in the course of her voyage left lock No. 1 of the Lachine canal, port of Montreal; the weather was clear, but dark, with a heavy wind blowing from a south-westerly direction; that she was proceeding out from the lock under her own steam in the usual and proper way, slowing gathering way, at between three and five miles an hour; with regulation lights duly exhibited and burning brightly, and a good outlook was being kept on board of her; that those on board of the steamer saw two white lights ahead and some on the *Marshall's* port bow; that the lights, on account of their dimness, had the appearance of being a long distance away; that the white lights had been in view of the *Marshall's* watch a very short time, the *Marshall* meanwhile holding her course to starboard to overcome the drift of the wind and current, when suddenly, and while the dim lights appeared to be a long distance away, a house on what proved to be dredge No. 1 loomed up in the darkness close at hand, and on the port bow of the *Marshall*, and thereupon the *Marshall's* engine was rung up to full speed and her helm put hard-a-port in an effort

to throw her clear of the dredge, but directly it was seen that because of the strong wind and current the *Marshall* could not pass clear of the dredge, her engines were reversed in an effort to ease the blow of the collision as much as possible; that the *Marshall* was carried down almost broadside against the dredge, her port side coming in contact with the up-river end or spud-casing of the dredge, doing apparently but slight damage to the dredge but some damage on the port side of the *Marshall*; that after she had been carried against the dredge, her wheel was immediately put hard-a-starboard, and with great difficulty she was straightened down channel in the narrow water, without stranding or further disaster; that it was impossible for her to round at that place, and she therefore immediately sounded a signal for assistance to come to the dredge, and, while the *Marshall* was being carried down-stream by the current, one of the tugs laying near the scene of the collision came out to the dredge; that except as hereinbefore appears, the several statements in the statement of claim are denied.

The defendant charges among other faults of the plaintiff or their agents or servants, that may develop at the hearing—which faults the defendant reserves the right to urge, that they were at fault in the following particulars: in violating the law as to place of anchoring or fastening to the ground; in disregarding the perils of navigation in anchoring or being fastened and remaining where and as she was; in having an insufficient lookout; in not having the dredge provided with proper lights, and in not having proper lights so placed as to indicate that she was anchored or attached to the ground where she lay, and further, in that the lights she did display were dim and insufficient in size and quality, besides being misleading in that in that they did not indicate a vessel, either at anchor or aground; in failing to give any signals or alarm, as the *Marshall*, with her lights show-

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ing brightly, approached the dredge; in failure to give the pilot or officers of the *Marshall* notice that the dredge had been placed in the channel, which, until that date, had been in customary use by vessels bound down from the Lachine canal; in failure to move the dredge into shoal water after the collision, and in unnecessarily permitting her to sink in deep water near where she was struck; that no blame in respect of the collision, and resulting damage, is attributable to the steamer *Albert M. Marshall*, or to any of those on board of her.

By the way of counter-claim, the defendant says that the collision caused great damage to the *Albert M. Marshall*, and the defendant claims a declaration that the defendant is entitled to the damage asked under its counter-claim; the condemnation of the plaintiffs (and their bail) in the damage caused to the *Albert M. Marshall*, and in the costs of this action; to have an account taken of such damage with the assistance of merchants, and with such further or other relief as the nature of the case may require.

The contentions of the parties are disclosed in the pleadings of which I have given a synopsis.

As is usual in cases of this nature, each of the parties accuses the other of being in fault, for a multitude of reasons.

The evidence discloses that on the 8th October 1906, at about 9.50 p.m., the dredge known as No. 1, the property of the plaintiffs and used by them in works for the improvement of the harbour of Montreal, under the control of the plaintiffs, was placed in the harbour, south of what is called the south ship channel, about opposite section 22 of the harbour, at about the place indicated on the plan produced; that there was a watchman on board the dredge at the time of the accident; that she was carrying a light on the A-frame, about twenty feet above her deck and one light at the up-stream end, and one

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light on the down-stream end of a scow which was fastened to the dredge at her lower or down-stream end. That at the time of the accident in question, it was dark, but a clear night, as admitted by the defendant. There was no rain. The wind was about south-west, blowing at an estimated rate of from seventeen to twenty miles an hour. That the current flowed north-westerly at a speed of from five to six statute miles per hour; that at that time, about 9.50 p.m., the American steamer *Albert M. Marshall* of a burthen of 987 tons register and 650 horse power, manned by a crew of about twenty hands and drawing four feet forward and eleven and a half feet aft, was proceeding down stream, bound on a voyage from Lake Ontario ports to Ha! Ha! Bay, without cargo; that the steamer at the time in question was proceeding down-stream from the basin formed by the wharves and Mackay pier in the harbour of Montreal, and ran into and collided with the dredge, striking its starboard quarter; that the dredge was sunk and almost completely lost as a consequence of the collision, and the steamer *Albert M. Marshall* was also much damaged by it.

As a great number of English and American authorities have been cited by counsel, it might be well to state at the outset that in considering these questions it must be remembered that there is radical difference between our law and the law of England.

Under the English law a breach of the regulations creates presumption that a collision was due to that breach; while under the statute concerning shipping in Canada, R. S. C., c. 113, secs. 914 to 918, a mere breach of a regulation creates no presumption, and the common law applies, and the other side or party must prove the cause of the collision.

It is strongly contended in this case that even under the law of England, if the anchoring of the dredge in question in an improper place had been proved affirmati-

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vely, and that technically improper lights were shown and that there was no anchor watch (which facts of course are not admitted in the present case), and further, if shown that these defects or deficiencies had nothing to do with the collision, the dredge would have sufficiently rebutted the presumption of fault.

In a recent Admiralty case of *The Etna* (1), Mr. Justice Bucknill, referring to the management of the Torpedo Boat *Wear*, which had been in collision with the steamer *Etna*, said (in substance):

"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 autho- "rity of *H. M.* S. *Sanspareil* (2), the rules of common "law as to the negligence applied, and that if the *Etna* "was initially negligent, yet she might escape, if, by "reasonable care and skill the *Wear* could have avoided "her; this, however, had not been made out to his satis- "faction, 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 learned judge, having regard to the negligent navigation of the *Wear*, also held both vessels to blame. This case is cited in order to show that if there had been antecedent negligence on the part of the dredge, yet if the *Albert M. Marshall* could have avoided her by the exercise of reasonable care, the dredge could not be held responsible for the collision.

On this point, *Marsden on Collision* (3) says:

"The general rule that a vessel under way is *primâ* "*facie* in fault for a collision with a ship at anchor, applies, "although the latter is brought up in an improper place, "or has no riding-light, provided the former could with "ordinary care have avoided her.

(1) [1908] Prob. 269, at p. 281. (2) [1900] P. D. 267.
(3) Page 30, 5th ed.

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"It is the bounden duty of a vessel under way, whether "the vessel at anchor be properly or improperly anchored, "to avoid if it be possible with safety to herself, any col- "lision whatever. Even if a ship is brought up in the "fair way of a river, if the other could with ordinary "care have avoided her, the latter will be held solely to "blame".

The decision in the Torpedo Boat case above cited shows that the *Sanspareil* 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 *Sanspareil*, the Court held as the *Sanspareil* 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 damages 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 following question as mentioned at page 282 of the Probate Reports, 1900:

"Q. Was the *East Lothian*, under the circumstances "of this case, guilty of negligence in passing across the "bows of the *Sanspareil?*" 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 report, 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 damages can- "not succeed, if it is found by the jury that he has him-

(1) 1 App. Cas. 754.

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" self 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 negli- " gence 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 dili- " gence have avoided the mischief which happened, the " plaintiff's negligence will not excuse him. The case " of the *Margaret* (*Cayzer* vs. *Carron Co.* (1) shows that " the common law doctrine is applicable to such a case " as that now before us."

Lord Justice Williams, 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 be to my mind no doubt. If the " advice of our assessors is right, there obviously was, " and, speaking for myself, I entirely agree with 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 " accident. That rule applies equally in the Court of " Admiralty, where the practice is that, if both ships are " to blame, the damage is to be divided."

Lord Blackburn and Lord Watson made it clear in the *Margaret* (*Supra*) that the common law principle governs the Admiralty Rules, and that if the consequences of the neglect of the plaintiff could have been avoided by ordinary care and prudence on the part of the defendants, the negligence of the plaintiffs would be no answer to the action.

(1) 9 A. C., 873.

In the case of *The Hamburg Packet Co.*, v. *Desrochers* (1) the judge, in rendering judgment said :

" The effect of the statue (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 be " followed in Canadian Courts, in cases of collision on " the high seas, but it is not applicable where the colli- " sion 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* is referred to at page 303 of 8 Exchequer Court Reports as follows :

" 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* vs. *Warman*, " 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 Khe-* " *dive* decided by the House of Lords in 1880 : 'On the " construction of this and similarly worded enactments, " it has been held in *Tuff* vs. *Warman* that, though the " plaintiff had infringed the rules, and by his neglect of " duty put the vessel into danger, yet if the defendant " could, by reasonable care, have avoided the consequence " of the plaintiff's neglect, but did not, and so caused the

(1) 8 Ex. C. R., 304.

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"injury, the plaintiff could recover, as, under such cir-"cumstances, 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*, section 17 of the "Merchant Shipping Act 1873 was enacted".

This is evidently one of the earlier cases referred to in the judgment of the Exchequer Court, where the presiding judge said:

"Where that happens" (referring to the collisions in Canadians waters), "the rule to be followed is that "established by the earlier cases. It is necessary then, in "considering the English authorities, to distinguish bet-"ween cases decided before and those decided after 1873, "when the Act was passed".

Virtually, the the same thing was held in the case of The Ship *Cuba* (1), in which Mr. Justice King, in rendering the judgment of the Court, is reported to have said:

"Our Act uses the language of the earlier English Act "17-18 Vict. cap. 104, and enacts: 'If in any case of "collision, it appears to the Court, that such collison was "occasioned by the non-observance of the rules prescribed "by this Act, the vessel shall be deemed to be in fault, "unless it can be shown to the satisfaction of the Court, "that the circumstances of the case rendered a departure "from the rules necessary.' Accordingly it would seem "to be necessary, under our Act, to consider whether the "non-observance of the rule complained of did, or did not, "in fact contribute to the collision. Apart from the sta-"tutory definitions of blame and negligence, there seems "no difference between the rules of law and of Admiralty "as to what amounts to negligence in causing collision.

(1) 26 S. C. R. 661.

"(Per Lord Blackburn in *Cayzer* v. *Carron Co.* and in *The* "*Khedive.*) As applied to the case before us, the princi- "ple is that a non-observance of a statutory rule by the "*Elliott* is not to be considered as in fact occasioning the "collision, provided that the *Cuba* could, with reasonable "care, exerted up to the time of the collision, have avoid- "ed it. (The *Bernina* (1).

The rule is well known that a ship under way running into a vessel at anchor, whether anchored in a proper or improper place, is to blame, and can only relieve herself by saying that the accident was practically inevitable.

In the case of *The Batavier* (2) Dr. Lushington says as follows :—

"The presumption of law, where a vessel at anchor is "run down by another, I take to be this: That the "vessel running down the other must show that the "accident did not arise from any fault or negligence on "her own part, and for this reason, that the vessel at "anchor has no means of shifting her position, or avoid- "ing the collision; and it is the duty of every vessel "seeing another at anchor, whether in a proper or impro- "per place, properly or improperly anchored, to avoid, if "it is practicable and consistent with her own safety, any "collision. This is the doctrine not merely of maritime "law, but of common sense; it is the doctrine which pre- "vails on roads, where supposing a carriage to be stand- "ing still on the wrong side, it is no justification for "another running against it, though the latter be on the "right side. It is always incumbent on the person doing "the damage, to show that he could not avoid it, without "risk to himself".

This has always been the rule, and reference might be made to the remarks of Lord Watson in the *City of Peking* (3) :—

(1) 12 P. D. 36. (2) 10 Jur. 19.
(3) 14 App. Cas. 43.

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"When a vessel under steam runs down a ship at her "moorings in broad day light, that fact is by itself *primâ* "*facie* evidence of fault; and she cannot escape liability "for the consequences of her act, except by proving that "a competent seaman could not have averted or mitigated "the disaster by the exercise of ordinary care and skill".

These cases were referred to in the case of *Hatfield v. The Ship Wandrian* (1), where amongst other things it was held:

"That where a collision occurs between a ship in mo- "tion and one at anchor, the burden of proof is upon the "moving ship to show that the cause of such collision so "far as she was concerned was an inevitable accident, not "arising from negligent navigation. This burden is not "discharged by mere proof that the moving ship was "navigated with ordinary care and skill". (*The Schwan & Albano* referred to).

The case of *Hatfield* v. *Ship Wandrian* was confirmed in appeal by the Supreme Court of Canada (1)

Lord Esher in the case of *The Schwan & Albano* (2) said:

"The case of the *Annot Lyle* (3) raised a question as "to a great many of these definitions which were thought "to have been somewhat loosely expressed in the Admi- "ralty Court. It was a judgment given by Lord Hers- "chell, in the presence of myself and Fry J. who agreed "therefore, according to the report, that the definition of "the law with regard to this matter was as laid down by "Lord Herschell, and agreed with him in the deliberate "terms which he used, and these terms were:—'Under "these circumstances the burden is on the defendants to "discharge themselves from the liability which arises "from the fact that the *Annot Lyle* came into collision "with and damaged a ship at anchor. The cause of colli-

(1) 11 Ex. C. R. 1; 38 S. C. R., 431. (2) (1892) P. D., at pp. 427-8.
(3) 11 P. D., 114.

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"sion in such a case may be an inevitable accident not "arising from negligent navigation ; but unless the defen- "dants can prove this, the law is clear, and they are liable "for the damage caused by their ship.' All I can say is "that in a very long experience in the Admiralty Court "and dealing since that time with Admiralty Court judg- "ments there has always been a marked distinction bet- "ween the phrase "inevitable accident", and the phrase "mere negligence" and that "inevitable accident" is "a far larger term and meant to be a much larger term "than a mere case of negligence".

In the case of the *Indus* (1) where this matter was considered, the law is stated thus:

"It is the duty of a vessel in motion to keep clear of one "at anchor, if the latter can be seen, and if she does not "keep clear, then she must shew good cause for doing so. "In what way then could the defendants justify them- "selves? They could say that everything was done "that could be done by careful seamen, but that some "overwhelming storm occurred which prevented the "ship from being navigated as she ought to have been. "They could say that an entirely unforeseen accident "which could not have been prevented by proper manage- "ment occurred to the machinery with the same result. "There are yet other things which may be classed "under the head of law, known as inevitable accident, "which is a well known expression, and though it may "not be philosophically correct, answers its purpose; "but the defendants must clearly prove the occurrence "of such inevitable accident."

Now, these words were deliberately used with reference to what is taken to be a well known phrase inevitable accident, and which is a head of law well known and distinguished from the case of mere negligence. The ship in motion is not allowed in such a case to say merely

(1) 12 P. D. 46.

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'I was not guilty of an ordinary want of care and skill.' It must be shewn that it was an inevitable accident.

Availing myself of the power which this court has to invoke the assistance of a nautical assessor I have obtained the assistance of Captain James J. Riley, a mariner of experience, holding a certificate of competency as master from the British Board of Trade, No. 82599, now engaged in important public service as superintendent of pilots, and examiner of masters and mates, and a director of the nautical college, upon whose judgment and opinion I shall find it my duty to rely, and to whom I have submitted the following question, and whose answer is appended thereto :

"Q. Could the steamer *Albert M. Marshall*, under "the circumstances of this case, by the exercise of rea- "sonable care, on the part of the officers navigating her "have avoided the collision in question in this cause?

"A. I am of opinion that the steamer *Albert M.* "*Marshall* could have avoided the collision with the "Montreal Harbour Commissioner dredge No. 1 on the "night of October 8th, 1906 by the exercise of reasonable "care and skill."

This steamer, the *Albert M. Marshall*, seems to have been well equipped with all the requisites for safe navigation, and with a sufficient crew; but in passing I must remark that the master and the mate were navigating in waters that were outside of the limits mentioned on their licenses and that Onesime Hamelin, whom the master had engaged as a pilot had no license, nor branch. It is admitted by the master who was on the bridge, and by Hamelin who says that he took charge of the steamer *Albert M. Marshall* when she left the lower lock of the Lachine canal, that the lights (on the dredge) were seen when the steamer came to the end of the Mackay pier; and it is in evidence that the dredge No. 1 was placed at least 1,600 feet below the Mackay pier.

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It is stated by the master, that the two lights when seen were a little, or about half a point, on the port bow, and that they did not alter their bearing even when the *Albert M. Marshall* kept porting, or to use his own words: "He had ported his helm a little to allow for the current, "porting a little at different times as we always do, and "it did not seem to make any difference in the lights, "although we were watching them, thinking we were "going to catch up to some tow or something, and he "was keeping probably his own side of the channel, that "is the starboard side; and when we appeared to be about "100 feet, the dredge loomed up, and then the order was "given by the pilot to hard-a-port."

Onesime Hamelin also says that the lights (on the dredge) did not alter their bearing from the first, or, to use his own words, "they did not appear to be moving, "but I did not pay attention to that; I had shaped my "course to clear them," which testimony is borne out by the fact that when the dredge loomed up, it must have been at about the same bearing, because the master threw his helm hard-a-port to save him from "cutting into the dredge."

Both the master and Hamelin say they thought that the lights were on a tow, or on the stern of some small vessel going down-stream, and keeping on his own proper, that is the starboard, side of the channel. The presence of the lights should have been a sufficient indication to the navigating officer of the *Albert M. Marshall* that there was some sort of craft in the channel; and if he had been in doubt as to the nature or character of the lights, he should have followed the usual custom of mariners, and approached the lights at slow speed until he was sure of what they were (1.) The fact that the lights did not alter their bearing, although the *Albert M. Marshall* kept porting and porting, should have been a

(1) R. S. c. 79. Art. 23.

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warning of danger. I think I am right in saying that this rule would apply also to vessels that are being approached. If the lights were judged to be those of a tow, keeping on her own side of the channel, and if the *Albert M. Marshall* meant to take the tow's water, she should have followed the custom of the pilots on this river, and complied with rule 80 of the harbour commissioners regulations for the port of Montreal, and given one blast of her whistle signifying that she was directing her course to starboard. The absence of a responding signal on the part of the dredge would have warned the *Albert M. Marshall* not to pass to starboard. And if under the impression that it was a tow, why did not the *Albe t M. Marshall* comply with article 24 of chap. 79 R. S. C. ?

In view of the fact that the collision took place even though the *Albert M. Marshall's* engines were rung up full speed ahead, and the helm put hard-a-port, when the dredge loomed up a little on the port bow, I am of opinion that if, even at that time, say 100 feet away as is stated, the speed of the *Marshall* had been stopped, and her helm put hard-a-starboard the collision could have been avoided, as it is proved that she could be turned at a right angle very quickly on her helm. Hamelin says in a second or less, and, as the current runs in a north-westerly direction at that place, at the rate of at lea st five miles an hour, it would have helped her in the execution of that manœuvre, she would have gone on the Montreal or western side of the dredge ; by attempting to go to the eastward, or St. Helen's Island side, the whole force of the current was pressing her down on to the dredge.

The direction and force of the wind would not have been a serious bar to the *Albert M. Marshall's* passing to the Montreal side of the dredge, as it would at most only have been on her port quarter.

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I am of opinion that the navigating officer of the *Albert M. Marshall* misjudged both his distance from the lights, and the strength of the current, and thus failed in proper skill; and that by not approaching the dredge more prudently, he lacked in proper care, There was about 600 feet of navigable water between the dredge and the nearest point, i.e., Victoria pier, on the Montreal side of the harbour, and the *Albert M. Marshall* could have gone to that side of the dredge with all safety. There was about 300 feet of navigable water between the dredge and the St. Helen's Island shore for the *Albert M. Marshall's* draught of water; and if the *Albert M. Marshall* had determined to pass on that side, she should have shaped a proper course to that end, when she first saw the lights, and have taken care to widen the bearing between her and the lights as she approached them. The look-out man on the *Albert M. Marshall* was not giving his sole attention to looking out, but was engaged in other duties that were stated by him as having to be performed before he took his station as a lookout man.

If, as is admitted, the master of the *Albert M. Marshall* saw the lights 1600 feet off, it is evident that he should have seen them more clearly, say 300 feet off, in ample time to avoid them. The night was dark, but clear and without rain. The wind was blowing from the south-west at a rate of from fifteen to twenty miles an hour, and these weather conditions did not change from the time the *Albert M. Marshall* left the Mackey pier until she reached the dredge.

The rules above referred to were continued in force by section 193 of cap. 113 R. S. C., 1906.

Section 916, cap. 113 Revised Statutes of Canada still uses the language of the earlier English Act 17-18 Vict., cap. 104. As applied to the case now before me, the non-observance of a statutory rule or any regulation by the dredge in question is not to be considered as a fact

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contributing to the collision, provided the *Albert M. Marshall* could, with reasonable care exerted up to the time of the collision, have avoided it; and I am advised by the assessor, and I accept his advice, that if such reasonable care had been exerted by the *Albert M. Marshall* up to the time of the collision, the collision could have been avoided.

As to the question of antecedent negligence, in a case where the collision could have been avoided by the exercise of care and skill on the part of those navigating the vessel not originally in fault, it must be remembered that there is a material difference between the English and the American authorities, and the rule contended for by the plaintiff and on which he relies, and which the Court adopts is universally recognized in England and in Canada, but is not generally admitted in the United States. It follows that the American decisions on the consequences of mooring in an improper place, or on the antecedent fault of one ship, when the other ship, by ordinary care, could have avoided the collision, can have no material bearing on the present case.

I concur fully, for the reasons above stated, in the advice given me by the assessor, that the steamer *Albert M. Marshall* could have avoided the collision with the dredge No. 1, the property of plaintiffs on the night of the 8th November if reasonable skill and care had been exercised by the master, officers and crew navigating her.

As to the faults attributed to the dredge No. 1 by the defendant, I find that the lights were technically incorrect though burning brightly at the time of the collision; and that she was brought up in the channel south of what is called the south ship channel about opposite section 22 of the harbour and that the watchman on board was not on deck, when the collision took place. The non-observance by the dredge of any rules on these points is not to be considered as a fact contributing to the colli-

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sion, as the collision could have been avoided by the exercise of reasonable skill and care on the part of those navigating the *Albert M. Marshall*. Further reference might be made to the case of *The Ship Cuba* v. *McMillan* (1). where it was amongst other things held: "That the non-observance of the statutory rule "(Art. 18) that steamships shall slacken speed or stop "and reverse, when approaching another ship, so as to "involve the risk of a collision, is not to be considered "as a fact contributing to a collision, provided the same "could have been avoided by the impinging vessel by "reasonable care exerted up to the time of the accident."

I am advised by the assessor and find that if such reasonable care had been exerted up to the time of the accident in the present case, the collision in question could have been avoided.

Having carefully considered all the authorities cited on both sides, the evidence of record, and the advice given me by the assessor, I am 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 *Albert M. Marshall*, and I am consequently of opinion that the *Albert M. Marshall* and her owners, The Great Lakes & St. Lawrence Tranportation Company, are solely responsible for all the damages caused by the said collision; and I consequently find in favour of the plaintiffs and maintain their action with costs and dismiss the defendant's counter-claim with costs; and do further order and adjudge that an account be taken; referring the same to the deputy registrar assisted by merchants, to report the amount due, and order that all accounts and vouchers with the report in support thereof, be filed within six months from the date of the present judgment.

Judgment accordingly.

Solicitors for plaintiffs: *Geoffrion, Geoffrion & Cusson.*

Solicitors for defendants: *Atwater & Duclos.*

(1) 26 S. C. R. 651.