TORONTO ADMIRALTY DISTRICT.

1911
April 6.

THE DUNBAR AND SULLIVAN DREDGING COMPANY.....PLAINTIFFS,

AGAINST

THE SHIPS "*AMAZONAS*" AND "*MONTEZUMA*" AND THE DAVIDSON STEAMSHIP COMPANY.

DEFENDANTS.

Shipping—Collision—Jurisdiction—Contributory Negligence.—Evidence.

1. To establish contributory negligence in the case of a collision, the evidence must be clear and definite.
2. A collision occurring in Canadian waters between foreign vessels places the owners of the damaged ship under the protection of Canadian law, and the court has jurisdiction to entertain an action for damages. The *Milwaukee*, (11 Ex.C.R. 179) followed.

THIS is an action brought by the plaintiffs against the Steamers *Amazonas* and *Montezuma* and the owners the Davidson Steamship Company, to recover damages for injuries to the *Brian Boru*, a dredge belonging to the plaintiffs, as the result of a collision which took place on the night of the 28th day of September, 1908.

The trial of the case took place at Windsor, before the Local Judge for the Toronto Admiralty District, on the 20th and 21st days of December, A.D. 1910. A written argument subsequently was put in on which judgment was reserved.

The facts of the case are set out in the reasons for judgment.

F. A. Hough, for the plaintiff;

The witnesses all agree that the collision took place about 2 a.m. Sept. 29th, 1908, that the night was dark with a moderate strong westerly wind blowing.

The dredge was at anchor working on her contract with her attendant scow lashed alongside.

If the contract of making this channel was a legitimate and proper one, as it unquestionably was, the dredge and the scow, which was a necessary part of her equipment, were in a perfectly proper place, and the only place in which they could be in while engaged in the performance of that contract at that particular time.

The contract was being carried on under the instructions of the Government engineers, pursuant to clause 35 of the contract, and the contractors were not in any way obstructing navigation, being entirely outside of the navigable channel, as marked by the lights and buoys at that time. The dredge was stationary, being at anchor and at work on her contract at the point indicated above.

The *Amazonas* and *Montezuma* were bound down the river full speed, which they never slackened from the time they left the Rouge until they reached their destination. The *Amazonas* could tow the *Montezuma* seven miles an hour. Added to this there would be the force of the current over the Lime Kiln Crossing. Defendants' witnesses put the current at four or five miles an hour, although their preliminary act fixes it at seven miles an hour, which they cannot be heard to contradict.

However, the better judgment of those working at the crossing that night places the current at about five miles an hour, which would mean that the defendant ships passed the place of collision, where plaintiffs' dredge was anchored, at the rate of 12 miles an hour,

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or one mile every five minutes, 2,112 feet in two minutes, 1,056 feet in one minute.

The witnesses who were on the defendant ships swear positively that they passed down the westerly side of the Lime Kiln Crossing channel, the *Amazonas* within 50 feet of the buoys and lights marking the westerly limit of the channel, and the *Montezuma* "trailing off in the wind," but not more than 100 feet from this westerly row of lights. It is absolutely clear, however, that the defendant ships could not have been in this channel as marked by the lights and buoys, and that they could not have followed the course their navigators appear to think they followed, otherwise they would not have passed within at least 200 feet of the dredge, and there could have been no collision.

These witnesses, on the other hand, all agree that the *Amazonas* passed within about fifty feet of, and unquestionably the *Montezuma* collided with, the scow. It follows, therefore, that the defendant ships were quite out of the channel at the time of the collision and that those in charge of them did not know where they were. This is also made apparent by the evidence of Capt. Hayberger, master of the *Amazonas*, who says that he saw the row of lights marking the west side of the channel and kept within fifty feet of them all the way down; that he saw no lights to the east of him, except the north one, until he got down to Malden, the next light below the south lightship, when he got back into the channel again.

It appears therefore that the row of lights which the captain says he held up to within fifty feet of, were the row marking the east side of the channel, instead of the west side, and that as a matter of fact while passing through this most dangerous part of the whole river, he and his crew and the master and crew of his consort, lost their bearings altogether.

The general rule is that a vessel at anchor in a proper place observing the precautions required by law is not liable for the result of a collision with a moving vessel.(1)

And passing vessels should give the anchored vessel a sufficiently wide berth to pass by in safety, taking into consideration the effect of wind and current and other contingencies of navigation as may reasonably be anticipated. (2)

And it has been held that whether the anchored vessel is in an improper place or not the vessel in motion must avoid her if practicable and can only exculpate herself by showing that it was not in her power by adopting any practicable precaution to have prevented the collision. (3)

In an action founded on a collision between a vessel at anchor and one in motion the burden of proof is upon the latter to prove that the collision was not occasioned by any negligence on her part. See the *Annot Lyle*, (4) see also the *Indus*, (5).

In *Marsden on Collisions*, p. 30 et seq. it is laid down: "The general rule that a vessel under way is *primâ facie* in fault in a collision with a ship at anchor applies,

(1) A. & E. Enc. of Law, Vol. 25, page 940;
Commander-in-Chief 1 Wall. (U. S.) 43 affirming 4 Fed. Cas. No. 2216.
The Lady Franklin, 2 Lowell (U. S.) 220.
The John H. May, 52 Fed. Rep. 882.
The Buffalo (C.C.A.). 55 Fed. Rep. 1019.
The Steven Decatur, 108 Fed. Rep. 446.

(2) The John H. May, 52 Fed. Rep. 882.
The D. H. Miller, (C.C.A.) 76 Fed. Rep. 877.
Wilhelmsen v. Ludlow, 79 Fed. Rep. 979.
The Minnie, 100 Fed. Rep. 128.
The Langfond, 102 Fed. Rep. 699.
The Aller, 38 U.S. App. 549.

(3) The Clarita, 23 Wall. (U.S.) 14.
The D. S. Gregory, 6 Blatch. (U.S.) 528.
Green v. The Helen, 1 Fed. Rep. 916.
The Shaw, 6 Fed. Rep. 923.
The Mary Nettie Snudberg, 100 Fed. Rep. 887.

(4) 11 P.D. 114.

(5) 12 P. D. 46.

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although the latter is in an improper place, or has no riding light, provided that the former could with ordinary care have avoided her. 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 collision whatever."

In the *Batavier* (1) Dr. Lushington was of opinion that even if a ship is brought up in the fairway of a river, if the other could with ordinary care have avoided her, the latter should be held solely to blame.

Dredging vessels when at work and stationary, have the rights of vessels at anchor. (2).

The defendants seek to rebut the presumption of their liability in having collided with a ship at anchor, by setting out the fact of a prior collision of the *Montezuma* with the ship *Osler*, which took place a short distance above the North lightship, and which they allege caused the *Montezuma* to sheer into the dredge.

These plaintiffs, however, are in no way to blame for the collision between the *Montezuma* and the *Osler*, and even if the *Osler* could be proved to be at fault, it would be merely a question of a right of contribution against her on the part of the owners of the *Amazonas*.

The evidence, however, does not prove any negligence on the part of the *Osler*, but rather that even before defendants met the latter ship, they were not following the "starboard hand rule", and were on the wrong side of the channel. From the evidence of these same independent witnesses it further appears that this collision caused no perceptible sheer on the part of the *Montezuma*.

(1) 2 W. Rob. 407.
(2) American Dredging Co. v. The Bedowin 1 Fed. Cas. No. 299.
The D. H. Miller (C.C.A.) 76 Fed. Rep. 877.
The Virginia Ehrman, 97 U. S. 309

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But however this may be, the *Osler* did not touch the *Amazonas*, did not therefore affect her steerage way, and could not be in any way responsible for her taking the wrong course through the Lime Kiln Crossing, which she evidently did, and her consort with her. Nor had they any other excuse for not following the proper channel, for according to the evidence of Colbourne nothing passed over the crossing either way for over half an hour afterwards, and they had an absolutely clear course.

From the facts also that the *Amazonas* passed within fifty feet of the dredge and that the *Montezuma*, notwithstanding the alleged sheer caused by her impact with the *Osler*, or the force of the wind, causing her to trail off as described by some witnesses, was able to follow her steamer within little more than 50 feet, it is apparent that had the *Amazonas* taken the proper course as marked by the lights and buoys, her consort, the *Montezuma*, would have been able to follow that course within little more than 50 feet leeway, notwithstanding her impact with the *Osler*, or the force of the wind.

The defendants further seek to establish contributory negligence on the part of the plaintiffs on the ground that the captain of the dredge when he saw the collision impending "should have dropped the dump scow astern of the dredge, and then raised his anchor spuds, and let the dredge, and scow swing with the current." This is the only fault or default attributed to the plaintiff ship by the defendants' preliminary act, by which they are bound.

It is clear from the evidence, however, that until they reach the bend in the channel at the North lightship, the usual and proper course of down-bound boats, from upwards of 2 miles above the bend, would take

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them head on to the point where the dredge was at work the night of the collision, and until they passed the lightship and failed to make the turn following the lights and buoys marking the channel, there would be nothing to indicate to those on the dredge that the down bound boat was not going to follow the proper course, and unless there was something unusual to prompt them to do so, there would of course be no reason for those on the dredge to have dropped the dump scow astern or raised their anchors, or taken any other steps with a view to avoiding a collision. And if the down bound boat took a long turn at the lightship, she could come comparatively close to the dredge within 200 or 300 feet, before a collision would appear to be imminent to the people on the dredge. At the rate of speed at which they were moving they would go 300 feet in less than $\frac{1}{2}.0$ seconds.

Defendants further contend that plaintiffs were at fault in not having a man aboard the dredge specially designated as lookout, though it does not appear, in view of the foregoing situation, how such a lookout could have observed anything to indicate that a collision was pending any sooner than did those on board, who as some of the witnesses put it, were all supposed to be on the lookout, and unless such lookout could have discovered the danger at least two minutes before the collision took place, or while the defendant ships were practically half a mile away, he could not have been of any assistance in avoiding it.

It is quite clear, therefore, from the situation existing here that had there been a dozen lookouts nothing unusual would have been apparent to them until the defendants' ships got within 500 feet at most, of the dredge, therefore the absence of a specially detailed lookout did not in any way contribute to this collision.

It has been held, however, that "a vessel anchored in a place where other vessels are not reasonably to be expected to anchor need not maintain an anchor watch."

See the *Erastus Corning* (1).

And when such a watch is necessary "it is sufficient to have someone of the crew on deck, though without any specific duties assigned him". *Seabrook* v. *Raft of Railroad Cross Ties* (2).

Defendants further set up that their ships blew alarm signals to warn those on the dredge of the impending danger, and that the latter should then have taken steps to avoid the collision.

If the statements of Capt. Hayberger and the witness Gaunia are to be believed, all these signals were blown before the collision between the *Montezuma* and the *Osler*, and because that collision appeared threatening. It was impossible then to tell what effect this collision would have, even if it did take place, and it is absurd to say therefore that these signals, if blown, were intended for a warning to those on the dredge, or that there was anything then present to indicate that a collision was imminent between the *Montezuma* and the dredge.

Plaintiffs submit, however, that the defendants' evidence as to these signals is not such as to enable the court to find that they were given at any particular time or place, or that they had any bearing whatever on the subsequent collision with the dredge, or that they were given at all.

It is clear, however, that there was no time to complete either of the manœuvres suggested by the defendants from the moment the collision could have been seen to be imminent, or from the time the alarm signals are said to have been given, which according to

(1) 25 Fed. Rep. 572. (2) 40 Fed. Rep. 596.

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Capt. Hayberger would be "close to a minute" before the crash.

In answer to this question in their preliminary act the defendants say the *Amazonas* was kept as close to the north light as she could be, and the *Montezuma* followed in tow as closely as she could. The captain of the *Montezuma* signalled to the dredge to drop their dump scow astern, and called out to raise the spuds or anchors of the dredge. Further comment is unnecessary on the manner in which these measures to avoid the collision were carried out, or on their effectiveness.

When the collision became imminent to those on the dredge, orders were given to raise the anchors and get clear. It may be that to have attempted to let the scow go would have been better judgment, and perhaps could have been accomplished more quickly. However, in the "agony of collision" the former course seemed best to the captain of the dredge, and he gave the orders accordingly.

It may be also that either of these manœuvres would have been unwise under the circumstances, for if there had been time to carry them out, they might have resulted in much greater damage, with perhaps loss of life as was the opinion expressed by Capt. Mains.

And in the *Norge* (1) it was held that "on the approach of another vessel a dredge at work should keep its position."

However this may be, the law is clearly laid down that an error of navigation or judgment committed "in extremis" is not to be deemed a fault in the vessel committing the error where the peril is produced solely by the mismanagement of those in charge of the other vessel, nor will it relieve the latter from liability, though it directly contributes to the collision (2).

(1) 55 Fed. Rep. 347.
(2) The Bywell Castle, 4 P. D. 219.
The Ship Cuba v. McMillan, 26 S. C. R. 651.
The Cape Breton v. the Richelieu & Ontario Navigation Co. 36 S. C. R. 564.

In their search for an excuse for having collided with a ship at anchor the defendents plead in paragraph 6 "that neither the *Brian Boru* nor the dump scow moored alongside had proper lights".

The evidence showed, however, that the dredge had her own electric plant, with which she and her attendant scow were brilliantly lighted. Defendants urge however, that there should have been a light on the scow itself, but the evidence of all those familiar with the workings of a dredge is that such is not customary, and is entirely unnecessary while the scow is alongside the dredge, as it is abundantly lighted from the latter's plant.

Capt. Johnson says that coming up on the *Osler* on the night of the collision, he saw the lights of the dredge a couple of miles off and saw the scow lying alongside her half a mile away.

Capt. Hayberger himself says he saw the dredge's lights from Ballard's Reef, practically two miles away; and he should have expected her to have an attendant scow alongside.

Notwithstanding this he brings his ship and her consort right down onto the dredge. Is it to be presumed that he would have altered his course one fraction of an inch in coming down this two mile stretch, if there had been a coal oil lantern on the corner of the scow? And after he had brought his ship sufficiently close to make such a lantern discernible in the glare of the electric lights, as Anderson, mate of the *Montezuma*, says "If the scow had been lit up with a dozen lights at each end, they couldn't have done more than they did to avoid striking it".

The jurisdiction of this court is determined by the *Colonial Courts of Admiralty Act, 1890; The Merchant*

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Shipping Act, 1894, as applied by the *Admiralty Act* R.S.C., chap. 141, secs. 3, 4 and 5.

This jurisdiction extends over so much of the boundary lakes and rivers as are within the Canadian side of the International boundary line. See *Regina* v. *Sharp* (1) ; *Rex* v. *Meikleham* (2).

The waters within which this cause of action arose, and within which the defendant ships are admitted to have been seized, are all in the County of Essex in the Province of Ontario.

Neither the United States nor any other foreign country can have any jurisdiction over them, and unless they are beyond the jurisdiction of every court,—a sort of neutral ground within which tort-feasors may do as they wish,—they must be within the jurisdiction of this court.

And the court has jurisdiction whether or not the vessels or the parties belong to a foreign nation or that the matters complained of occured in foreign waters, provided the property is within the jurisdiction and the jurisdiction of the persons is acquired (3).

Subject to the general limitations of Courts of Admiralty as to subject-matter, water and places, such courts have jurisdiction of libels *in rem* for injuries to and by vessels without regard to the citizenship of the parties, nationality of the vessels or place of injury.

In England and in Canada the Admiralty Courts by the Act of 1861 giving them jurisdiction of "any claim for damages done by any ship" have jurisdiction of actions *in rem* and *in personam* for injuries by vessels to persons and property wherever situated, the test of

(1) 5 O. P. R. 135.
(2) 11 O. L. R. 366.
(3) 1 A. & E. Enc. of Law (2nd ed.) page 652.
The Diana, Lush. 539.
The Griefswald, 1 Swab. 430.
The Courier, Lush. 541.
The Johann Friederich, 1 Wm. Rob. 36.

jurisdiction being the origin rather than the place of the injury. (1)

In the *Johann Friederich* (2) in which the court was held to have jurisdiction where a Danish ship was sunk by a Bremen ship, Dr. Lushington said:— "An alien friend is entitled to sue in our courts on the same footing as a British born subject, and if the foreigner in this case has been resident here and the cause of action has arisen *infra corpus comitatus*, no objection could have been taken.

All questions of collision are questions *communis juris*, but in the case of mariners' wages, whoever engages voluntarily to serve on board a foreign ship necessarily undertakes to be bound by the laws of the country to which such ship belongs, and the legality of his claim must be tried by such law. One of the most important distinctions therefore, respecting cases where both parties are foreigners, is whether the case be *communis juris* or not. If so, then parties must wait until the vessel that has done the injury has returned to its own country, this remedy might be altogether lost, for she might never return, and if she did, there is no part of the world to which they might not be sent for their redress".

Although it is clear, that the jurisdiction of this court extends over the waters within which this cause of action arose, and the waters within which the defendant ship are admitted to have been seized, the defendants urge that by reason of Article 7 of the Ashburton Treaty, the jurisdiction cannot be enforced by a seizure of the offending ships while they are passing through these waters, because this treaty declared these waters should be equally free and open to the ships, vessels and boats of both parties to it.

(1) 25 A. E. Enc. of Law. p. 1007; Mersey Docks etc., Board v. Turner (1893) A.C. 468.

(2) 1 Wm. Rob. 36.

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The natural and ordinary meaning of these words would appear to make them applicable to an attempt by one of the parties to close to navigation any portion of the waters covered by the treaty, as in the present controversy over the proposed Long Sault dam in the St. Lawrence river, rather than to oust the jurisdiction of either country over that portion of these waters within their respective sides of the boundary line, or the right to enforce that jurisdiction by due process of law.

There can be no question that this court would have power to exercise its jurisdiction by seizure of an offending ship if she came to anchor within these waters. Its exemption from seizure therefore (if it be exempt) must depend on its keeping moving. In other words as long as the offending ship "keeps moving", although in the waters included within the jurisdiction of this court, the order of the court cannot be enforced against it; and if an offending ship cannot be seized at the instance of these plaintiffs while passing through these waters, and within the jurisdiction of this court, it could not be seized at the instance of a British subject who had been damaged by her within in its own territory, and who could therefore be obliged to seek redress in a foreign Court, unless indeed the wrongdoer should be so obliging as to stop long enough to enable the warrant to be served. (See section 685 of the *Merchant Shipping Act* of 1894.

It is quite clear therefore that the Act contemplates that the process of the Court shall be effective over vessels moving as well as stationary, and this is the practice all over the world.

The only reported decision from which the contrary view might be taken is the old Scotch case of *Borjesson*

v. *Carlberg*, (1) where a Norwegian vessel which had started from the port of Greenock on an ocean voyage, was pursued by a tug manned by thirty armed men, and captured by force of arms. Here the seizure was set aside on the ground that the mode of arrest had been made "nimiously and oppressively". This decision did not go so far as to say that the process of the court could not be effective against a moving vessel, but held that the manner in which the warrant was enforced was improper, and as stated by the Lord Chancellor it was purely and simply a question of practice.

The plaintiffs, however, submit that the right to use these waters, which is all that the Treaty, on the face of it, appears to reserve to the parties to it, does not oust the jurisdiction of the courts of the respective countries over such part of the waters covered by the Treaty as may be within their respective boundary lines, nor does the fact that she keeps under way while passing through them exempt an offending ship from the consequences of her acts. On the contrary the very fact that she is a wrong-doer deprives her of the right of free passage, which the Treaty otherwise gives her. The present case, however, is distinguishable from the *D. C. Whitney* case (2) in that in the latter the cause of action arose in the harbour of Sandusky, Ohio, in the United States of America, while in the case at bar, the collision took place in the County of Essex within the jurisdiction of the court.

The plaintiffs submit, therefore, that this collision was caused by the failure of the defendant ships to obey the "starboard hand rule" in coming down this narrow channel, and by their getting out of the channel altogether at the point where the collision took place.

Further, that the defendants have not only failed to satisfy the onus thrown upon them to prove that they

(1) 3 App. Cas. 1316. (2) 38 S. C. R. 303.

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were not negligent, or that the plaintiffs were guilty of contributory negligence, but the plaintiffs have been able to go much further than were obliged to go in order to succeed, and have proved that the damages have been caused solely by the negligence of the defendants.

The cause of action arose in Canadian waters, and within the jurisdiction of this court. The defendant ships are admitted to have been seized in Canadian waters within this jurisdiction. (1)

Canada has never, by Treaty or otherwise, surrendered her sovereignty over these waters and as long as she retains that sovereignty, her Courts having jurisdiction in the premises, will administer justice therein by due process of law.

J. H. Rodd for defendants:

On the 29th day of November, 1909, a motion was made before the Local Judge in Admiralty at Osgoode Hall asking that the writ of summons issued herein and all subsequent proceedings be set aside on the ground of want of jurisdiction. The motion was refused but leave given in the order to renew the objection on the hearing.

At the trial of the action the objection was renewed and the material used upon the motion offered in evidence and the objection was reserved and the trial proceeded with.

The objection to the jurisdiction is two fold,—First, the material used upon the motion and put in at the trial shows that at the time the writ and warrant were issued, and the affidavits in support were made, the ships were not in Canadian waters. The only authority for the bringing of the proceedings against the ships as plainly appears by the evidence is sub-section (a) of section 13 of the Admiralty Act, and if the plaintiff

(1) See Dunbar & Sullivan Dredging Company v. Milwaukee, 11 Ex.C.R. 193.

is not within the requirements of that sub-section then the suit was not properly instituted. That subsection says that a suit may be instituted when "The ship or property, the subject of the suit is, *at the time of the institution of the suit* within the district of such Registry."

This as appears by the evidence was not the case. The suit was instituted in September and even the constructive seizure did not take place until about the middle of October.

This objection was raised and discussed in the case of the *D. C. Whitney* (1) and the objection was held to be a valid one. See especially at page 311 where it is said "I do not think it is possible to successfully argue that the right to initiate an action, make affidavits and issue a warrant, can exist before the foreign ships even come within our territorial jurisdiction."

Then the second objection to the jurisdiction is upon still broader grounds. It is admitted that the ships are of United States registry, that their owners are Americans and that the ships were seized while passing from one American port to another, but through Canadian waters. It is admitted that the plaintiffs are also citizens of the United States doing work for the Government of their own country, and the only excuse for bringing the suit in a Canadian Court is that the injury to the plaintiff's dredge was done in Canadian waters. Is that enough? It is submitted that it is not. The evidence shows that defendant ships have been engaged entirely in connection with shipping on the Great lakes and the rivers dividing Canada from the United States, which by the Ashburton Treaty were made common highways for ships of both countries, and are by the effect of that Treaty entitled to free and

(1) 38 S.C.R., 30.

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uninterrupted passage while passing through, as these ships were, when the seizure herein was made.

It is submitted that the matter is concluded by the case of the *D. C. Whitney*, above cited. The present case is in every respect the same as the one cited with this single exception, that the collision took place in Canadian waters. I refer particularly to page 309. It is true that at page 310 of the judgment the court referred to the fact that in that case the wrong doing, if any, took place in a foreign port; but the learned Judge premised his reference by the statement that he could not see "how there could be a *pretence* of jurisdiction" so that even if such a circumstance had existed it would have been simply a *pretence* of jurisdiction and no more. The whole tenor of the judgment in that case shows that the decision rests upon broader grounds.

I have not overlooked the judgment in the case of the *Milwaukee* (1) The judgment, however, went off on the point that there had been a voluntary submission to the jurisdiction, and the learned Judge in giving judgment refers at page 181 to the difference between the two cases. It is true that in the judgment there is an academic discussion of the questions raised in the *Whitney* case, and it is apparent that the learned Judge did not agree with the judgment of the Supreme Court, but it is submitted that the decision of the latter court must be and is binding upon us.

Then part 10 of the *Merchant Shipping Act*, which by Sec. 517 is made applicable to all of His Majesty's Dominions, may be referred to. It is therein provided when and for what offence a foreign ship may be seized when within the territorial jurisdiction, viz, when such ship has in any part of the world done injury to

(1) 11 E. C. R. 179.

a British ship. The maxim *expressio unius exclusio alterius* applies and under no other circumstances can a foreign ship be forcibly brought into a British port or be detained.

Then upon the facts it is submitted the plaintiffs cannot succeed. Let us first look at the position of the dredge and scow and assume that the plaintiffs' evidence upon this question is to be accepted. There is no doubt upon the evidence that they were within the 600 foot channel, having a depth of seventeen feet, which had existed and been in use for many years but one that was being deepened. Of the 600 feet at least 400 feet have been completed and Captain Maines at page 74 says "it was 450 easy" and Munn at page 103 says the same. The plaintiff Dunbar at page 20 says that the channel had been completed "with the exception of 50 feet of the east edge" though not thrown open to navigation. The dredge must have been a little distance from this outward. The dredge was 28 feet wide and the scow 25, so that according to the plaintiffs' evidence they were distant from the East side of the old channel over one hundred feet, and if the evidence of Captain Maines and Edward Munn is to be accepted (and they were called on behalf of the plaintiff) distant less than 50 feet from the marked channel.

Then as to the distance from the turn at the North light ship, the plaintiffs are bound by their Preliminary Act which says 500 yards south-east from North light ship, and the evidence fully warrants the conclusion that this is about correct, though some of the witnesses gave even a greater distance and of course some gave less.

Now all the witnesses for the defence testify that the defendant ships were following the usual and proper

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course and holding up against a strong wind with the tow tailing off a little. Captain Johnson of the steamer *Osler* naturally, to account for striking the tow and to save himself, says he was being crowded to the east side of the channel. The evidence of Captain Maines, however, at page 78, bears out the statement of the defendants' witness. He was watching the boats as they approached the light ship and says they were following the usual channel. He admits he was not watching all the time after that but as soon as the turn was made he saw the danger. There is no doubt that the *Osler* struck or rubbed the tow and threw her out of course. Captain Maines frankly admits that there was no fault in the tow, and the only fault alleged is that the steamer went too far over.

The captains and the crews of both the *Amazonas* and the *Montezuma* all swear positively that this is not the fact, and the only other two men who saw the boats coming down were Maines and Johnson, and they do not agree. Then could it be so that the steamer crowded over to the east side of the channel as she passed the dredge ? Her length is 287 feet, the tow 360 feet, and the line from 300 to 400 feet making a total length of nearly 1000 feet. If the plaintiffs' evidence were true the tow, tailing off as it was to a considerable extent, would have struck the dredge itself beyond a doubt as the scow was well up forward of the dredge. The circumstances bear out the evidence of the defence that the steamer was held well up to the west side of the channel, and that the tow, being thrown out of her course by the upbound steamer, was the cause of the accident without fault of the tow.

There is, however, grave fault on the part of those in charge of the dredge. She was in fact anchored in a place where under the circumstances of the night

she was an obstruction to navigation. The dredge and scow were there by virtue of a contract which provided in the strongest and most definite terms that this was not to be done, and necessarily so. Those in charge of the dredge were guilty of still graver faults. It was anchored beyond question in one of the most dangerous parts of the river, and whatever might be said as to the necessity of a watch or look out in the day time there should be one at night and beyond question such a night as this.

The evidence of the plaintiffs' witnesses show the necessity of looking out, though that part of their duty is badly performed.

But even as it is, and without the look-out, the accident could have been avoided if the men on the dredge had taken the proper precaution when they in fact did see the ships and saw that the tow was likely to strike. The simplest thing to have done was to have thrown off the lines of the scow, which undoubtedly could have been done in a moment or two, and the scow being well in advance of the dredge with its front pockets loaded would have immediately gotten in motion. But even if as stated by some of the plaintiffs' witnesses, the force of the wind might have held her stationery till the tow reached it, yet being free no injury would have been done to the dredge, but the scow would have simply been shoved ahead.

Instead of doing the thing they ought to have done the crew attempted to get the dredge in motion ; and the plaintiffs, by their workmen, are not only therefore guilty of contributory negligence but are entirely at fault. See the *Hemminger* v. Ship *Porter*. (1) ; the *Ogemaw* (2).

(1) 6 Ex. C. R. 154 & 208. (2) 32 Fed. Rep. 919.

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GARROW, L. J., now (April 6th, 1911) delivered judgment.

On September 29, 1908, the barge *Montezuma* in tow of the steamship *Amazonas* collided with the *Brian Boru*, a dredge belonging to the plaintiffs, anchored and at work in what is called the "Lime Kiln Crossing" in the Detroit river, thereby causing injury to the dredge and interrupting the dredging operations of the plaintiffs until the injuries were repaired. The collision occurred about 2 a. m. The night was dark with a moderate wind blowing from the west. The dredge was from the United States and was working under a contract with the United States Government at the time of the collision, that Government having undertaken the deepening and widening of the channel in question, so as to give a width at the point in question of 600 feet. Of this the westerly 400 feet had been completed and lights on each side placed for the use of navigation and was the proper channel in use for such purpose. A portion of the remaining 200 feet had also been completed, the work being continued along the face from the westerly side of the completed 400 feet, and the dredge at the time of the collision was situated about 150 feet to the east of the easterly side of such 400 feet channel. There was also a scow alongside, attached to the dredge, for use in the dredging operations. This scow was upon the west side of the dredge and it was with the scow that the *Montezuma* actually collided, although the impact also injured the dredge.

The collision, it is not disputed, occurred upon the Canadian side of the International boundary, and therefore in Canadian waters. The ships were both foreign, from the United States, where also the defendants, their owners, reside.

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The collision itself is not disputed, but the defendants say they are not liable because (1) the collision was not the result of negligence; (2) that there was contributory negligence in not maintaining a light and a lookout or watchman on the scow, and in not casting off from the dredge when they saw, or should have seen, that a collision was likely to occur; and (3) that this court is without jurisdiction, the parties and the ships all being foreign, although the collision occurred in Canadian waters.

I am against the defendants on all three of their contentions, which I will consider in their order.

As is, I think, not infrequent in collision cases, the evidence of the crews does not harmonize, those of the dredge accusing while those upon the ship excuse as best they can. The case, however, so far as the the facts are concerned, does not, in my opinion, turn upon any fine points in the evidence which, taken as a whole, really leaves no doubt that the navigation of the ships on the occasion in question was greatly at fault. The dredging operations had been going on for years and the captains of both ships knew that the dredge was working at or near where she actually was on the night in question. Her electric arc lights were lighted and were visible for more than a mile. In order to work, she had to be well lit up, and also to be anchored. The tow line between the ships was between 300 and 400 feet in length. This seems to be unnecessarily long, but I cannot on the evidence say that it was negligently so. They were proceeding down stream with a current of about four miles an hour in their favour, steam up, and a westerly wind blowing. About 1000 feet up stream or northerly from the dredge, the direction from which the ships were coming, there is a slight turn towards the south-

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west in the channel. Until that turn is reached, the course of vessels approaching down stream towards where the dredge would be, about on the dredge, and at the turn the proper course necessarily changes in order to keep within the 400 feet channel. And good navigation, concurring in this respect with what would seem reasonable even to a lay mind, requires that even in ordinary circumstances a ship proceeding down stream with another ship in tow, in approaching and on reaching this turn should keep close to the westerly bank. This is fully recognized even by the defendants' witnesses, the captains and seamen on board of the ships, for they all say that that is what they did. I do not, however, accept their statements. The first mate of the *Osler* (a steamship bound up stream, which the defendants passed at a little above the bend) an intelligent and wholly disinterested witness, said that the *Osler* was at the extreme easterly side of the 400 feet channel, and while in that position "the steamer *Amazonas* and tow was hugging us down close, they were close also to us, they were too close altogether", with the result that "the port quarter of the barge rubbed lightly the port quarter of the *Osler*, but not enough to hinder the steerage way of the *Osler* nor yet of the barge as far as I could tell"; and this is corroborated by the evidence of other witnesses. That, then, being shown to be the position just above the bend, the next position which in my opinion is clearly proved by the evidence is that the *Amazonas* passed the dredge and scow at a distance of about 50 feet to the west of the scow. Mr. Neff, Captain of the dredge, puts the distance at not over 50 feet and says the vessel was to the east of the easterly line of the 400 foot channel. Mr. Pennock, the engineer of the dredge, says "I saw the *Amazonas* coming close

to us, she was out of the channel, she was about 50 feet from the dredge, she was running us pretty close; she was off the channel altogether". Evidence to the same effect was also given by Alexander Anderson and John Breault, deck-hands on the dredge, and this class of evidence was scarcely disputed. The plaintiffs' witnesses were not even cross-examined as to it, and it was not specifically contradicted by any one called for the defence, although Charles Ahlstrom, the mate on the *Amazonas*, not in answer to questions asked by the learned counsel for the defence but by myself, after much hesitation and an evident attempt to avoid the answer, finally said "Well, it must have been a couple of hundred feet or so off, anyway. Q. A couple of hundred feet to the west (i.e. the ship)? A. Yes sir,—more or less, I cannot say". Under the circumstances I place no reliance on this evidence. Then we have the evidence of Mr. Anderson, the master of the *Montezuma*, who said that until they met the *Osler*, the *Montezuma* had been following quite regularly the line of the *Amazonas*. Upon passing the *Osler*, he says they were within 75 feet of the west bank of the channel, following the *Amazonas* in range. The wind about which so much, too much in my opinion, is said, appears not to have bothered them down to that moment. Then came the slight touch of the *Osler*, and it and the wind and the current are blamed for having sent the *Montezuma* so far out of her course as to strike the scow, which must have been at least 500 feet easterly from the westerly bank of the 400 foot channel, which all the defendants' witnesses say they were so closely hugging or attempting to hug. I do not believe them; I believe the plaintiffs' witnesses, that the leading ship, the *Amazonas*, was to the east of the 400 foot channel, and therefore

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entirely out of her proper course when abreast of the dredge. The dredge was a fixture. We know almost to a foot where it was, namely, its easterly side between 150 to 180 feet to the east of the easterly side of the completed 400 foot channel. The width of the dredge was 28 feet and of the scow 25 feet. Deducting those would still leave the extreme westerly side of the scow almost 100 feet to the east of the easterly bank of the 400 foot channel, or entirely out of the way of vessels who were not at that time, as every one knew, intended to pass beyond the limits of that channel as defined by the lights and buoys.

The dredge with its scow was therefore where it had a perfect right to be. It was anchored and at work. It was brilliantly illuminated, so much so that all its immediate surroundings, including the scow, were plainly visible at a considerable distance, and there was absolutely no excuse in the circumstances for the collision, which in my opinion was entirely due to the careless and negligent navigation of the leading ship, the *Amazonas*.

Nor was there in my opinion any reasonable evidence of contributory negligence on the part of the plaintiffs. The absence of a light on the scow as a contributing cause, considering the brilliancy of the lights on the dredge, borders on the absurd; so under the circumstances does the objection as to the absence from the dredge or scow of a person charged with the duty of watchman. There is more reason perhaps in the suggestion that the plaintiffs' servants might by casting off the lines of the scow have set her loose, and thus either prevented or at least mitigated the damages; but the evidence is in my opinion wholly insufficient to justify fixing the plaintiffs with any fault in that respect. A plaintiff, otherwise faultless,

is not to be put in fault simply because in a momentary crisis caused by another's carelessness, he does not make as much of the moment as a witness, in cold blood, after the event, thinks he might have done.

I have great doubts about the signalling which the plaintiffs' witnesses say took place. Mate Johnston on the *Osler* did not hear the danger signal (5 blasts) which they are sure were given when near the *Osler*, neither did Mr. Colbourne above, nor Captain Maines below, who were in positions to hear if it had been given. It is an unsual signal, and to a mariner, one likely, I think, both to be observed and remembered. At all events I accept the evidence of those who were on the dredge, that whether these signals were or were not given they were not heard upon the dredge. When Mr. Neff, the captain of the dredge, the first to see the *Amazonas* when abreast of the dredge, saw her, he looked back to see where the barge in tow was, and seeing its position it was then for the first time that he or any one on the dredge became really aware of danger.

He at once ordered the dipper, which was down, to be taken up, and the men to go to their posts to get up the anchors, but before the men could even get there the crash came; and little wonder, as a slight calculation will show, for assuming that the speed was 7 miles an hour, or about 600 feet per minute, they had only that time in which it took the *Montezuma* to traverse the length of her tow line, say 350 feet, or a little over half a minute to do it in. And even if the lines had been thrown off as the defendants suggest, I am not at all convinced that the scow would have floated down stream fast enough and far enough to have saved the dredge from the collision. The scow was partially loaded and was lying flat against the side of the dredge.

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The set of the current and of the wind were both unfavorable, and it was all a matter literally of moments. Upon the whole I think as I have said before, that the attempt to establish contributory negligence wholly fails.

The remaining question is as to the jurisdiction of this court. I had to consider this question on the defendants' preliminary motion to set aside proceedings, which I refused, but reserved leave to renew at the trial. No new facts however appeared upon the trial, and I therefore remain of the opinion I then expressed. The subject was considered and the same conclusion arrived at by my late learned and careful predecessor in the *Milwaukee*, (1) upon somewhat similar facts, which he quite properly, in my opinion, distinguished from the *D.C. Whitney* (2), so much relied on by the defendant, upon the ground that in the latter the collision occurred in United States waters. In this case the plaintiffs' property was injured while in Canadian territory, and therefore under the protection of Canadian law, by the negligence of the servants of the owners of the ships who are the defendants here. The cause of action arose and continued from the moment of the collision down to the commencement of the proceedings. See the *Bold Buccleugh* (3) . The arrest was therefore a mere step in the course of enforcing rights which in a way depended upon the arrest itself to confer jurisdiction, as was apparently the situation in the *Whitney* case.

Sec. 18, of *The Admiralty Act* (R. S. C., 1906, chap. 141) upon which the defendants rely, has relation to procedure, and not primarily at least, to jurisdiction.

The jurisdiction of the court is conferred by sections 2 and 3 of that Act, and by the Imperial Statute, *The*

(1) 11 Ex.C.R. 179. (2) 38 S.C.R. 303.
(3) 7 Moo. P. C. 267.

Colonial Courts of Admiralty Act, 1890. And by sub-sec. 2 of sec. 2 of the latter statute a Colonial Court of Admiralty, subject to the provisions of the Act, is given the same jurisdiction over "the like places, persons, masters and things" as the Admiralty jurisdiction of the High Court in England, whether existing by virtue of any statute or otherwise, and may exercise such jurisdiction in like manner and to as full an extent as the High Court in England. Sec. 3 provides that the legislature of a British possession may declare any court of unlimited civil jurisdiction to be a Colonial Court of Admiralty, and provides for the exercise by that court of its jurisdiction under the Imperial Act, and limits territorially or otherwise the extent of such jurisdiction.

Under these provisions the Canadian Parliament enacted the statute first before referred to (as originally passed), and conferred jurisdiction in Admiralty upon the Exchequer Court of Canada. By sec. 4, this jurisdiction is conferred in the broadest terms as that "which may be had or enforced in any colonial Court of Admiralty under the *Colonial Courts of Admiralty Act, 1890.*" Sec. 6 provides that the Governor General in Council may from time to time constitute any part of Canada an Admiralty District, and establish at some place within the Admiralty District a Registry of the Exchequer Court on its Admiralty side, and divide an Admiralty District into one or more Registry Divisions. Sec. 7 establishes the Province of Ontario as an Admiralty District, subject to alteration by the Governor General in Council. Sec. 8 provides for the appointment of Local Judges, and sec. 10 provides that the Local Judge shall, within the district for which he is appointed, have and exercise the jurisdiction and the powers and authority relating thereto of the Judge

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of the Exchequer Court. Then comes sec. 18 which under the title "Procedure" begins "Any suit may be instituted *in any Registry* when" &c., the whole very clearly intended not to limit the general jurisdiction of the court, but to supply a guide in the case of a possible conflict between two or more Registry districts. The confusion seems to arise from confounding Admiralty Districts with Registry Districts, the two not being by any means identical, or at least necessarily so.

Sec. 685 of *The Merchant Shipping Act,* 1894, (Imperial) which, by sec. 712, is made applicable to all Her Majesty's Dominions, enacts that when any district within which a court has jurisdiction either under that or any other Act or at common law, for any purpose whatsoever, is situate on the coast of any sea or abuts on or projects into any bay, channel, lake, river or other navigable water, the court shall have jurisdiction over any vessel being on or lying or passing off the coast or being in or near that bay, etc., and over all persons on board of such vessel. Our jurisdiction is, under the several statutes to which I have referred, the same as that of the High Court in England, and that that court would under similar circumstances have had jurisdiction, seems clear. See Marsden on Collisions. (1) It is indeed a stronger case than the *Johann Friedrich* (2) in which the collision occurred at sea, and yet the action was maintained. Nor in my opinion does the special provision made in *The Merchant Shipping Act* for injury by a foreign ship to British property, impair the general jurisdiction asserted in such cases as the one to which I have just referred, as counsel for the defendants contended.

The other grounds upon which the defendants

(1) 6th Ed. 198 et seq.

(2) 1 W. Rob. 35.

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relied was, that by Clause 7 of the Ashburton Treaty, a right of free navigation over the waters in question was conferred. But it by no means follows that the further right was also conferred of exemption from the legal consequences of negligence or other wrongs committed by a United States vessel while in Canadian territory, or by a Canadian vessel in United States territory. That was not, so far as appears, in the mind of either of the high contracting parties, and certainly ought not to be lightly imputed to them.

There will, therefore, be judgment for the plaintiffs with costs, including the costs of the motion, and a reference as agreed at the trial, to take an account of the damages, including therein the damages caused by the loss of the use of the dredge while being with reasonable speed repaired.

Judgment accordingly.

Solicitor for Plaintiffs; *F. A. Hough.*

Solicitors for Defendants; *Rodd & Wigle.*