QUEBEC ADMIRALTY DISTRICT.

Between

THE NORTHERN ELEVATOR COMPANY, LIMITED..... } PLAINTIFFS;

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May 31.

VS.

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY..... } DEFENDANTS;

THE CANADIAN ATLANTIC RAILWAY COMPANY..... } PLAINTIFFS;

VS.

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY..... } DEFENDANTS;

THE OGILVIE FLOUR MILLS COMPANY..... } PLAINTIFFS;

VS.

THE RICHELIEU AND ONTARIO NAVIGATION COMPANY ..... } DEFENDANTS;

Maritime law—Shipping—Tug and tow—Damage by overtaking ship—Displacement wave—Right of action—Pleadings—Amendment.

These were actions arising out of the sinking of the barge *Huron* in the Soulanges Canal on the night of the 8th May, 1905, such accident being charged by the plaintiffs to be due to the negligence of the defendants, owners of the steamer *Hamilton*, which overtook and passed the *Huron* while being towed through the said Canal laden with wheat on the said date. The plaintiffs alleged that the *Hamilton* passed the tug and tow at such an excessive rate of speed that owing to the suction produced by the passage of the *Hamilton* through the water, and to her displacement wave, the *Huron* was driven against the bank of the canal and subsequently sank.

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Held that as the plaintiffs had failed to show that the accident to the *Huron* was the result of negligence of those on board the *Hamilton*, and that as the evidence supported the allegation of defendant that the accident was due to the improper and unskilful navigation of the *Huron*, the actions must be dismissed.

ACTIONS for damages alleged to have arisen from careless navigation in the Soulanges Canal.

The cases were consolidated for the purposes of trial. The facts are stated in the reasons for judgment.

Reasons for Judgment.

C. A. Pope for plaintiffs;

A. R. Angers, K. C. and *A. E. deLorimier* for defendants.

DUNLOP, L. J., now (May 31st, 1907) delivered judgment.

The plaintiffs, in the respective cases, as owners of the barge *Huron* and the cargo with which she was laden, are suing the defendants for damages sustained by the vessel, claiming $3,551.46; and for the loss of the cargo caused by the defendants steamer *Hamilton* claiming $35,884.64.

A long and voluminous *enquête* has been taken, and the evidence discloses that about 11.23 p.m., on the 8th of May, 1905, the barge *Huron* referred to in the pleadings, in the service of The Canada Atlantic Railway Company, in tow of the tug *Ida*, of the Canadian Towage & Transportation Company, whilst on a voyage from Coteau Landing to Montreal, was about one and a quarter miles below the head lock in the long level of the Soulanges Canal; that the barge *Huron* was laden with a cargo of 37,500 bushels of wheat, of which 24,000 bushels were consigned to the plaintiffs, the Northern Elevator Company, Limited, the owners thereof, at Montreal, the balance being consigned to the Ogilvie Flour Mills Company at Montreal; that at such time there was no wind; the weather was clear, and the canal lighted by electricity.

The *Ida*, with the *Huron* in tow, was proceeding downwards at the rate of about a mile and a half per hour. Some short time previous the lights of the *Hamilton* were seen at a distance of about a mile from the stern of the *Huron*. The *Hamilton* approached the tug and her tow at a moderate rate of speed, the tug and her tow having been previously sighted by the *Hamilton* shortly after she left the lock. The *Hamilton* overhauled and passed the said vessels on their port side.

It appears to be conceded generally that the tow at the time the *Hamilton* passed was a mile and a quarter from the foot of lock No. 5. Cherry, the first officer of the *Hamilton*, says that it took him 15 or 20 minutes from the foot of the lock No. 5 to the time of his passing the tow. Allowing that the *Hamilton* did not gather way fully immediately, and that she slowed down some considerable distance astern of the tow, and that the engines were put dead slow when the *Hamilton* began to overlap, I am satisfied that the *Hamilton* did not make a speed greater than four miles an hour from the time she began to overlap the tow, slowing to about three miles an hour when she was passing the tow.

Unbiassed witnesses state that it takes thirty minutes to prepare lock No. 5 for a vessel, and five to six minutes to lock through. Therefore, the tow would have a start of about 35½ minutes of the *Hamilton*. Estimating the speed of the *Hamilton* at four miles an hour, which would be a liberal estimate, it would take her 18½ minutes to go a mile and a quarter and reach the tow. Eighteen and a half minutes added to 35½ make 54 minutes. If the tow will go a mile and a quarter in 54 minutes she will go about a mile and a half an hour. Therefore, the speed of the tow is estimated at about a mile and a half an hour. The entire length of the canal was stated by witnesses to be 14 miles. The *Hamilton* had already passed the upper approach and lock No. 5, and found herself at

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the foot of lock No. 5 at about 11.05 p.m. It is stated that she passed out of the last lock at 2.10 a.m., thus giving her three hours and five minutes to make under 13½ miles from foot of lock No. 5 to foot of lock No. 1. Witnesses say that it takes, on an average, 7½ minutes to lock through each of the four locks through which the *Hamilton* had to pass after leaving the foot of lock No. 5. Therefore, we deduct 30 minutes from the three hours and five minutes, as the time occupied in passing the locks, and we deduct from the distance the length of the four locks, and calculation shows that the *Hamilton* went about five miles an hour through the unimpeded waters of the canal from the foot of lock No. 5 to the foot of lock No. 1. Taking into consideration the calculated speed, it seems an impossibility for the *Hamilton* to have created a displacement wave of the size that was asserted by Hebert (the only witness who made a positive statement to that effect), drawing, as he states, three feet of water from under the bottom of the barge, which was drawing twelve feet six.

The evidence shows that neither the course nor motion of the tug was materially affected by the passing of the *Hamilton*, which certainly would have been so had there been a displacement wave of the size contended for, as the tug was so much smaller, and her draught so much lighter than the barge *Huron*.

In addition to the evidence of the officer and crew of the *Hamilton* as to the speed of the *Hamilton* reference might be made to the evidence of Marchand, the engineer of the tug, who states that the *Hamilton* passed the tug and its tow at what he termed "easy way," meaning that the *Hamilton* had been eased off as she was passing the tow.

It might be remarked that the tow after the *Hamilton* had passed gave no distress signals, and consequently the *Hamilton* was perfectly justified in continuing her

course; and, as a matter of fact, the master and crew of the *Hamilton* did not know that any accident had occurred until they passed the stranded barge the next day on their return trip from Montreal.

The *Hamilton* received no notice whatsoever of the accident, nor did she get any notice of the survey on the cargo or its sale. The first notice of any claim being made upon the Richelieu Company, the defendants in this case, was made on the 8th of January, 1906, eight months after the accident occurred. In reference to the delay in giving notice, reference might be made to Pritchard's Admiralty Dig. (1) as follows: "It is always to be lamented when suits for damages or actions of any other description are not brought until a considerable length of time after the occurrence of the accident, as the memory of the witnesses cannot be so accurate as when deposing to a recent occurrence. The crew, also, being dispersed, renders the evidence more difficult to procure. If, therefore, the evidence is not so ample or precise as it ought to be, the complainant must take all the consequences arising from his own delay."

The defendant by its counsel strongly commented upon this, stating that no notice of the claim was given before the 8th of January, 1906, when all the crew was dispersed, and that some of the most important witnesses that should have been produced before the court, amongst others, the man at the wheel, could not be found.

Although the vessel was stranded on the 8th of May, she was brought to Montreal on the 13th of May. The cargo, which was a total loss, was sold about that time. All the damage had occurred and was known on the fifteenth of May. That was the day the master made his protest. In his protest he attributes no fault whatever to the defendants. He knew all the damage that had been incurred, and he simply entered his protest

(1) Practice in Cases of Damages, Vol. 1, No. 285, p. 448.

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accordingly. That was the protest of the 15th of May, 1905. The protest of the 2nd of June charged for the first time the defendant with responsibility.

The court, availing itself of the valuable services of Captain James J. Riley, nautical assessor, in this matter, submitted the following questions to him, which, with his answers, are hereinafter referred to :—

"1. Do you consider that under the facts of this case the steamer *Hamilton* was properly navigated and that all possible precautions were taken by the master and crew to avoid the accident which resulted in the stranding of the barge *Huron* on the north side of the canal, when the *Hamilton* overhauled and passed the tug *Ida* and her tow on the evening of the 8th of May about one and a quarter miles below lock number 5 in the long level of the Soulanges canal at about 11.23 p.m.; if not, state in what particulars the navigation of the *Hamilton* was faulty, and what precautions should have been taken to avoid the accident in question, that were not taken?

"A. I consider that all reasonable precautions were taken by the master and crew of the *Hamilton* to avoid accident in approaching and passing the tug *Ida* and its tow, the barge *Huron*, and that the steamer *Hamilton* was properly navigated and proceeding at an ordinary, moderate and prudent rate of speed on approaching and passing the tug *Ida* and its tow, the barge *Huron*, and at the time of the passing of these vessels I calculate the speed of the *Ida* and its tow to be about one and a half miles an hour, and the speed of the *Hamilton* to be about three miles an hour. Furthermore, in my opinion, it seem impossible that the *Hamilton*, with her draught and at the rate of speed established, could have made a displacement wave of a size sufficient to draw three feet of water from under the bottom of the *Huron*, which was drawing twelve feet six without affecting course or motion of the tug boat, which according to the evidence

was not materially effected by the passing of the *Hamilton*.

"2. State if, in your opinion, the tug *Ida* and her tow, the barge *Huron*, were properly navigated on the occation above referred to considering the locality and the circumstances of the present case, and were all precautions taken by the master and crew of the said tug and tow to avoid an accident, when said tug and her tow were overhauled and passed by the steamer *Hamilton* in said canal; if not, state in what respects, if any, the tug and its tow were improperly navigated and what precautions should have been taken to avoid an accident that were omitted?

"A. In my opinion the navigation of the tug *Ida* and barge *Huron* was faulty in the following respects: The barge *Huron* at the time in question was navigated too close to the south bank of the canal, and the tug *Ida* does not seem to have had sufficient power to keep the tow lines taut, and thus, control its tow when the *Hamilton* was passing her. The wheelsmen were young and comparatively inexperienced, and the evidence shows that the captain of the barge left the steering of the *Huron* entirely to his discretion instead of giving them specific orders and seeing that such orders were carried out or else taking the wheel himself if he apprehended danger.

"In my opinion the tow should have been kept further away from the south bank, as it had the option of position when it departed from a mid-channel course to allow the *Hamilton* to pass, and the *Hamilton* would, doubtless, have kept out of the way of the tug *Ida* and its tow in any safe course that the tug *Ida* and its tow had chosen.

"3. Did the accident in question, which resulted in the stranding of the barge *Huron* in the Soulanges Canal, on the evening of the 8th of May, 1905, arise from unavoidable circumstances without fault being attributable to the steamship *Hamilton*, the tug *Ida* or its tow, the barge

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Huron, or was it caused from the fault of the said steamship, tug, barge, or their master, crew, or persons in charge, and if so, from which of them?

"A. In my opinion the accident in question was caused solely by the fault of the tug *Ida*, and her tow, and the persons in charge thereof; without fault being in any way attributable to the steamship *Hamilton*, her master or crew."

Regarding the evidence of the masters of the tug *Ida* and the barge *Huron* as to the speed of the steamer *Hamilton* being about ten miles an hour, I have to say that a skilful and prudent navigator who was being overtaken in the canal by a steamer, the speed of which he estimated at ten miles an hour, and who commanded a vessel that was likely to be affected by the wave that would be caused by such a speed would know that the first effect his vessel would feel would be the bow wave that would raise the water under her, impel her and throw her stern off, or, in the case under consideration, towards the south bank. If from any cause he wished to remain in the course he had chosen he should have put his wheel a, port until the influence of the bow wave was nearly expended, and then have reversed his wheel to counteract the effect of the recoil or backflow of that wave that would have effect as the overtaking vessel sped on, and that would draw the water from under the slower vessel into the space that had to be filled by the displacement of the steamer. The few spokes of the wheel to starboard, as the steamer was approaching the barge, acted with the onward or bow wave of the steamer and helped to throw the barge toward the south bank instead of keeping her off it. In this respect the barge was improperly and unskillfully navigated. There is no evidence to show that the tug put on an extra spurt of speed to compensate for the impulsion, nor to use her rudder to offset the influence of the wave on the bow of the barge

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Huron. In which respect the tug was in fault. Though the speed of the *Hamilton* was three miles, need for the same operation of the rudder existed, in lesser degree, so long as there was any displacement wave that would affect the *Huron*.

It was for the plaintiff to point out any neglect on the part of the *Hamilton*. There can be no question but that she had a right to pass the *Ida* and *Huron*. She was in position where she could overtake them, and had a perfect right to overtake them. Now, was their negligence on the part of the *Hamilton ?*. None can be shown. She slackened speed when she saw the other vessels ahead. She blew two blasts of her whistle to warn those vessels that she was going to pass them, and when she approached these vessels she slackened speed again down to about three miles an hour, which was as slow as it is possible for her to go without stopping completely ; and by putting the helm to starboard, the *Hamilton* was directed to a position within about 12 feet from the north bank of the canal, and passed the tow at a prudent rate of speed.

It may be noticed that at page 2 of the evidence of Lasalle, he states that about three minutes after the *Hamilton* passed the barge *Huron*, the captain of the *Huron* cried out she was sinking. Now, it is said that at time she had three feet of water in her hold. It seems impossible that she could have filled to the extent of three feet in three minutes, and Herbert says that she had about three and a half feet in her when she reached the north bank of the canal, about 30 minutes after the accident.

If Lasalle's statement is correct, she must have been damaged before the *Hamilton* reached her. She could not have taken so much water in that short space of time.

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Again, at page 5, Lasalle says in answer to the question: "Did you notice at what rate of speed the *Hamilton* was coming?" He says: "Well, she was coming down in my opinion between ten and ten and a half miles an hour." Again, he says the *Huron* was astern of the tug when the *Hamilton* passed, straight with the course of the *Ida*." If that is so, it was not the overtaking of the *Hamilton* that caused the damage at all. It had no influence according to Lasalle, since the *Huron* kept on her course straight with the course of the *Ida*.

It may be stated that, according to my view, the withdrawing of three feet of water by the *Hamilton* passing the barge was an impossibility, and that when a witness swears to a thing which is impossible or incredible, no weight is to be attached to his evidence. Upon this point I might refer to the American and English Encyclopedia of law (1.)

"Where the facts are not credible, or are improbable in view of the circumstances, no superior credit is given to the testimony of the vessel's own witnesses."

This is exactly in point here, and as I view the case, no superior credit is to be given to Herbert's evidence when he says that three feet of water was withdrawn from under the barge *Huron* and that she struck the bottom of the canal. The evidence of Lasalle and the evidence of Hebert are fully contradicted by Leboeuf and Mire.

And again at p. 76 Leboeuf contradicts himself by saying that the barge touched at the bow.

The accident appears to me to be attributable to the plaintiff. There were two youths at the wheel, Lebou 17 years of age, and Mire 19 years of age, when the accident occurred. They were without much experience. They were on their first trip that season and yet we find that they were left at the wheel to use their own

(1) Vol. 25, p. 1020.

discretion in the event of any contingency arising. They received no steering orders from the master of the barge, or the officer in charge of the tow, and very properly the nautical assessor put the following questions to Hebert at page 90:—

Q. I would like to ask the witness a question. In all these movements of the wheel—this starboarding a little, and the other movements—were they all ordered by you."

A. I told him to take care of the wheel.

Q. I want to know if the various movements of the wheel referred to by the witness Mire were each of them special orders by you?

A. No, what I told him was to be careful, and he knew his work. He told me he could do his work. All I told him was to pay attention.

Is that the duty of an officer in command of a vessel at night, to rely upon the discretion of two youths of 17 and 19 respectively, when he should have stood by them and given the proper orders and seen that they were executed?

In their pleadings the defendants set up in paragraph 21 of their defence, that the plaintiffs have no interest to bring the present action, having been paid and indemnified for the said accident by the underwriters of the insurance company. As regards the owners of the barge, this has no application. The barge as proved by the evidence, was not insured. The question therefore is pertinent only as regards the owners of the cargo. It has been held in many Admiralty cases, and I think it has been almost the universal practice in Admiralty that defendants cannot set up by way of defence the fact that plaintiffs have been indemnified for their loss by the insurance company.

In this connection, the case of *Simpson* v. *Thompson*, (1) might be referred to, where it was held as follows:

(1) 3 App. Cas. 279.

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"There is no independent right in underwriters to maintain in their own name and without reference to the person insured, an action for damages to the thing insured."

And again (1) "They can assert any right which the owners of a ship might have asserted against a wrong doer for damages, for the act which has caused the loss, but this right of action for damages they must assert not in their own name, but in the name of the person insured."

Reference might also be made to the case of *Mason* v. *Sainsbury*, (2) *Darrell* v. *Tibbits* (3).

Arnould on Marine Insurance, (4) says: "The underwriter has no independent rights of his own, and cannot even sue in his own name."

Porter on Insurance, (5) says it is no defence to an action by the assured against the party causing the damage that the insured has been paid by the insurers.

Our own Court of Appeal has held in the same sense in the case of the *Richelieu and Ontario Navigation Co.* v. *Lafreniere* (6). The circumstances in that case were almost identical with those in this case. The same ground of defence in law was raised, and the plaintiff's action was maintained.

I am of opinion therefore that the actions were properly brought in the names of the respective plaintiffs.

At the trial application was made by plaintiffs to amend their statement of claim and also their preliminary act by striking out in paragraph 3 of plaintiff's statement of claim the word "two" in the fourth line thereof, and substituting therefor the word "three," so as to agree with the evidence, and also to amend article 7 of the preliminary act by striking out the word "two" in the

(1) See 3 App. Cas. at p. 284.
(2) Dougl. 61.
(3) 5 Q. B. D. 560.
(4) 7 ed. sec. 1231.
(5) 4th ed. p. 256.
(6) 2 L. N., 204.

fourth line thereof, and substituting therefor the word "three," so as to agree with the evidence, the whole in accordance with rule 67, their object being to plead that the speed of the tug *Ida* and its tow, the barge *Huron*, was three miles an hour instead of two miles an hour, as originally alleged by them.

This application was strenuously opposed by counsel for defendant, on the ground that the plaintiffs cannot be permitted to amend their preliminary act, and contending that the motion so made should be rejected. Amongst other authorities, *Williams and Bruce's Admiralty Practice* ed. p. 369, was cited, as follows :

"The object of the rule requiring preliminary acts is to obtain a statement *recenti facto* of the leading circumstances of the case, and to prevent either party varying his version of facts so as to meet the allegation of his opponent. The court will never allow a party to contradict his own preliminary act at the hearing, and an application on behalf of a party to amend a mistake in his preliminary acts will not, if opposed, be entertained by the court. The preliminary acts are not allowed to be opened without an order of the judge or the registrar."

I am of opinion that neither the statement of claim nor the preliminary act, whether it is looked at as a pleading or not, can be amended under the circumstances of this case, because the evidence does not show that the tug *Ida* and the barge *Huron* were proceeding at the rate of three miles or more per hour, but at a much less speed. The motion is therefore dismissed with costs.

Numerous authorities have been cited by the respective counsel, and amongst others two recent cases decided in the United States. The first is the case of the *Kaiser Wilhelm der Grosse* (1) decided in the District Court, S.D., New York, on the tenth of February, 1905, and the other is the case of the *Ashbury Park*, (2) decided in the District

(1) 134 Fed. R. 1012. (2) 136 Fed. R. 269.

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Court, E.D., New York, June 7th, 1905. In both these cases decrees were granted against the steamships, very properly, as I view it, on the ground that the said steamships had been proceeding at too great a rate of speed, and that the damage complained of was caused by the displacement waves. Both steamers were large ships, of high power, propelled by twin screws, and owing to their great speed and power their displacement waves were distinctly proved to have caused the damage complained of. These cases are scarcely applicable to the present case, the steamer *Hamilton* being a paddle-wheel steamer of moderate power and light draught, but little more than half the draught of the barge *Huron*, and no proof having been adduced showing that the damage complained of was caused by her displacement wave. It seems to me inevitable that if there had been a displacement wave made by her of the size contended for by the witness Hebert, the course of the *Ida* must have been materially affected, which has not been proved, and, moreover, both the *Huron* and the tug *Ida* would have shipped water, which has not been proved.

It may be observed that the voyage in question was the first voyage of the *Huron*, and that she wintered at Collins Bay in the ice, and no satisfactory proof has been adduced that she had been properly caulked previous to the voyage in question.

On the whole case, I am therefore of opinion that plaintiffs have totally failed to prove the material allegations of their statement of claim, reading as follows, to wit: "That the *Hamilton* overhauled and passed the tug *Ida* and her tow, the barge *Huron*, at such an excessive and dangerous rate of speed that owing to the suction produced by the passage of the *Hamilton* through the water, and to her displacement wave, the *Huron* was driven against the bank of the canal and suffered severe damage." And I am further of the opinion that all reasonable pre-

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cautions were taken by the master and crew of the *Hamilton* to avoid accident in approaching and passing the the tug *Ida* and her tow, the barge *Huron*, and that the steamer *Hamilton* was properly navigated and proceeding at an ordinary, moderate and prudent rate of speed in passing the tug *Ida* and her tow, the barge *Huron*.

Consequently, I dismiss the actions of plaintiffs with costs.

Judgment accordingly.

Lafleur, MacDougall & Macfarlane, solicitors for the plaintiffs.

Angers, DeLorimier & Godin, solicitors for defendants.