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* Feb. 25, 26, 27, 28.
* June 17.

CAPTAIN W. F. WAKE-WALKER, OFFICER COMMANDING H.M.S. "DRAGON" (DEFENDANT) ..... } APPELLANT;

AND

STEAMER COLIN W. LIMITED AND ST. LAWRENCE TANKERS LIMITED (PLAINTIFFS) ..... } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

(QUEBEC ADMIRALTY DISTRICT)

Maritime law—Collision—Evidence of negligence—Damage—Liability—vessel sunk when moored at wharf—Damage—Onus—Findings of trial judge—Assessors—Care and nautical skill.

The British cruiser H.M.S. *Dragon*, in command of the appellant, shortly before 9 o'clock in the morning and in fair weather, when about to enter Victoria Basin in the harbour of the city of Montreal to take up her allotted berth at the cross-wall at the inner end of the basin, collided with and sank the respondents' oil bunkering steamer *Maplebranch* which was lying at the time securely moored alongside the steamer *New Northland* which was docked at the wharf in a section

* PRESENT:—Duff C.J. and Rinfret, Cannon, Crocket and Davis. JJ.

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just outside the entrance to the basin, on the north side of the harbour. The oil tanker *Maplebranch* had received orders to deliver a quantity of oil to the *New Northland* on the morning of the collision and she proceeded, without previously notifying the Harbour Master's office in conformity with certain regulations of the Montreal Harbour, to dock the section where the *New Northland* was moored and tied up alongside it about fifteen minutes before the collision occurred. According to the evidence, the appellant observed the *Maplebranch* cross over from the entrance to the basin and go alongside the *New Northland* when he was at a distance estimated by him at about a mile away though at that time he was not able to identify the vessel or to judge the distance of it from the entrance to the basin. It is also common ground that a strong cross current runs diagonally across the entrance of the basin toward the north shore at a speed of from five to six knots. The evidence shows further that a motor vessel, the *Saguenay Trader,* had arrived in the basin the previous afternoon and docked on the south side, bow towards the west; and, just as the *Dragon* was approaching the entrance to the basin, the *Saguenay Trader* was being turned about at her berth by her crew, her stern lines being fast to the pier and she merely drifting round with the wind; and the appellant alleged that, when he observed this motor vessel apparently swinging out across his course, he believed that she was going to get into his way and that he had to stop and reverse the *Dragon's* engines and that the cross-current then carried the *Dragon* over against the *Maplebranch* with no fault on his part. The action was brought by the respondents, Steamer Colin W. Limited, as registered owner of the steamer *Maplebranch,* and St. Lawrence Tankers Limited, as beneficial and managing owner or operator of the steamer *Maplebranch,* and as owner also of the cargo on board her, jointly claiming $100,000 against the appellant as officer commanding H.M.S. *Dragon* for damages by collision alleged to have been caused solely by the improper and negligent navigation and mismanagement of the *Dragon* by the appellant.

Held, Rinfret and Crocket JJ. dissenting, that the appellant should be held liable. The appellant, having collided with the *Maplebranch* at her moorings in broad daylight, the onus rested upon him to satisfy the Court that there was no fault upon him which directly caused the collision, and the trial judge has affirmatively found that there was such fault; and where the trial judge, as here, is not only an experienced local judge in Admiralty, but had the assistance of two assessors to advise him upon matters requiring nautical or other professional knowledge and arrived at a conclusion of fact upon conflicting testimony, it would need a very clear case of error for this Court, without the assistance of any assessors, to reverse such a finding. —The position of the *Maplebranch* has no bearing on the question of the appellant's liability, for, even if there were some technical breach of one of the Harbour regulations in bunkering the *New Northland* without first notifying the Harbour Master, that would have no legal consequence because of the fact that the appellant had a full view of the *Maplebranch* in ample time to avoid a collision with her. There is no place in this case for the application of the doctrine of contributory negligence to the *Maplebranch:* if there was any negligence, it was remote and antecedent and was not a proximate cause of the collision.—Also, assuming that there was some fault on the part of the vessel *Saguenay Trader,* if there was fault as well on the

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part of the appellant, the respondents not being guilty of any contributory negligence would be entitled as a matter of law to recover the whole of their loss from either of the ships that was in fault; and therefore the vital question before the Court was whether there was absence of negligence on the part of the appellant.

Per Rinfret and Crocket JJ. dissenting.—

In the case of a collision in broad daylight between a ship under way and one securely moored and an action brought against the moving ship for the recovery of damages resulting therefrom the defendant is not obliged, in order to absolve himself from liability or blame, to prove that the collision could not have been avoided in any possible way, but only to prove that it could not have been avoided by the exercise of ordinary skill and care on his part or on the part of the officers and men, for whose conduct he was responsible, in the particular circumstances in which they were placed. If he clearly proves that the collision was the necessary consequence of the intervention of a third ship in his course and that he and his officers and men were not at fault in the creation of that emergency he fully discharges the onus the law imposes upon him for running into a ship at anchor or securely moored and the defence of inevitable accident is thereby established. The finding of the trial judge that the defendant had not satisfied him that the collision was an inevitable accident was apparently based upon the assumption that the defendant should have foreseen that a vessel at or near the basin the defendant ship was entering might move and that it was his duty to have "his ship in hand to meet any eventuality." In this he prescribed a higher standard of duty for the defendant than the law warrants. The defendant's duty was, not to foresee and have his ship in hand to meet and guard against any and every eventuality which might possibly happen, but merely to exercise that degree of care and nautical skill, which is generally looked for in a competent seaman, to avoid such risks as might in the proved circumstances reasonably have been anticipated by him. There is no finding or suggestion, in the trial judgment, of any evidence pointing to any possible negligence on the part of the *Dragon* other than in following the course it did in approaching the basin, of any failure to keep a sufficient lookout before the *Saguenay Trader* was first observed across her course within the basin and of any lack of nautical skill respecting the orders to stop her engines and reverse. When these orders were given the evidence clearly shews that the *Dragon* was face to face with an imminent peril. Unless, therefore, she herself had been guilty of some negligence which contributed to bring that peril about, her commanding and navigating officers, being then in the agony of an imminent collision, could not properly be held to be accountable for any failure to exercise even ordinary care or nautical skill. There was no evidence upon which it could properly be found that there was any prior negligence upon their part which contributed to bring about the emergency. In these circumstances the *Dragon* should have been held blameless.

The City of Peking Case (6 Asp. 396) disc.

APPEAL from the Exchequer Court of Canada, Quebec Admiralty District, P. Demers J., maintaining an action brought by the respondents jointly claiming the sum of

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$100,000 against the appellant as officer commanding H.M.S. *Dragon* for damage by collision, the appellant being condemned to pay the damages sustained by the respondents, the same to be assessed upon a reference to the registrar of the Exchequer Court of Canada assisted by merchants.

The material facts of the case and the questions at issue are stated fully in the above head-note and in the judgments now reported.

Geo. A. Campbell K.C., John Kerry K.C. and *R. C. Harvey-Jellie* for the appellant.

R. C. Holden K.C. and *A. D. P. Heeney* for the respondents.

The judgment of Duff C.J. and Cannon and Davis JJ. was delivered by

DAVIS J.—In broad daylight and in fair weather the British cruiser H.M.S. *Dragon* in command of the appellant, when about to enter what is known as the Market (or Victoria) Basin in the harbour of the city of Montreal to take up her allotted berth at the cross-wall at the inner end of the basin, collided with and sank the respondents' oil bunkering steamer *Maplebranch* which was lying at the time securely moored alongside the steamer *New Northland* which was docked at the wharf in section 23 just outside the entrance to the basin. The *Dragon* had a length of 470 feet and a beam of 41 feet and at the time of the collision was inbound from the city of Quebec. It seems unfortunate that the Master of the Montreal Harbour should have allotted to the British cruiser such an inconvenient berth to be reached through a comparatively narrow entrance, and while the Harbour Commission is not a party to this action and has not been called upon to justify the designation of the particular berth, it is a little difficult to refrain from comment upon what appears to have been a most inappropriate location for the *Dragon*. Just at the entrance to the basin, the *Dragon's* starboard side, at a point about 100 feet from her stern, struck the starboard side of the *Maplebranch* and the *Dragon's* starboard propeller cut into the *Maplebranch* and she sank. The *Maplebranch* had a length of approximately 232 feet and a beam of 35·5 feet.

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This action by the owners of the *Maplebranch* (respondents) is to recover from the Officer Commanding the *Dragon* (appellant) the damages sustained by them and under the circumstances it plainly rested upon the appellant to satisfy the Court that there was no negligence on his part. In the *City of Peking* case (1), the Judicial Committee laid down the rule very definitely that the fact of a vessel under steam colliding with a ship at her moorings in daylight is *prima facie* evidence of fault and her owners cannot escape liability except by proving that a competent officer could not have averted the collision by the exercise of ordinary care and skill.

Counsel for the appellant, in endeavouring to support the plea of inevitable accident, complained of the conduct of the *Maplebranch* itself and also of the conduct of a motor schooner, the *Saguenay Trader,* which was at the time of the accident in course of being turned about at her berth within the harbour.

Dealing firstly then with the charges against the *Maplebranch.* It is contended that under certain regulations of the Montreal Harbour she was not entitled to be lying alongside the *New Northland* and that her presence there was an impediment to the *Dragon* entering the basin to take her allotted berth. But the evidence is clear that the appellant observed the *Maplebranch* cross over from the entrance to the basin and go alongside the *New Northland* when he was at a distance estimated by him at about a mile away though at that time he was not able to identify the vessel or to judge the distance of it from the entrance to the basin. The appellant admits that when he was about 200 or 300 yards below the *Maplebranch* he was able to estimate her position and if he had thought then that there was any danger to the *Maplebranch* he could have stopped earlier than he did. He went on, thinking he could go in successfully with the *Maplebranch* where she was. The Navigating Officer of the *Dragon* was asked how the *Maplebranch* bore at the time the engines of the *Dragon* were stopped.

Q. You were not worrying at all about the *Maplebranch* at that stage?

A. Not at that stage.

(1) (1888) 6 Asp. 396.

Q. But for this schooner (i.e., the *Saguenay Trader*) you think the *Maplebranch* would not have interfered with your entry?

A. I am quite certain of it.

The position of the *Maplebranch* has no bearing on the question of the appellant's liability for even if there were some technical breach of one the Harbour regulations in bunkering the *New Northland* without first notifying the Harbour Master, that would have no legal consequence because of the fact that the appellant had a full view of the *Maplebranch* in ample time to avoid a collision with her. In *Cayzer, Irvine & Co.* v. *Carron Company* (1), the House of Lords had to consider an action brought in the Admiralty Division in respect of a collision off Blackwall Point. The appellants' steamship, the *Clan Sinclair,* had come out of the South West India Dock on the north shore of the Thames nearly opposite the curve of Blackwall Point about 1.30 p.m. on the 9th of March, 1883, and proceeded down river against the tide under her own steam and with a tug attached, at about three to four knots through the water. The respondents' vessel, the *Margaret,* was at the same time steaming up the river with the tide at from five to six knots over the ground. The Court of Appeal had held that upon the true construction of Rule 23 of the Thames Rules the *Clan Sinclair* had broken the rule in not easing so as to prevent herself from proceeding lower down the river than was necessary, when she first ought to have seen the *Margaret,* and held that both vessels were to blame. The House of Lords reversed the order of the Court of Appeal on the ground that even assuming, but without deciding, that the construction put by the Court of Appeal on Rule 23 was correct and that the *Clan Sinclair* had transgressed that rule, yet such transgression was not the cause of the collision; that ordinary care on the part of the *Margaret* would have enabled her to avoid the collision, and that she alone was to blame. I quote the words of Lord Blackburn at p. 883:

> Then it is said that the collision was owing to the *Clan Sinclair* being where it was. Undoubtedly in one sense that is so. If the *Clan Sinclair* had been some hundred yards higher up the river, the fact which made it a matter of rashness for the *Margaret* to run where it did run would not have existed. But that is not a sufficient ground for saying that the fact of the *Clan Sinclair* being there was the cause of the accident. The *Clan Sinclair* would not have been there at the time when it was there if it

(1) (1884) 9 App. Cas. 873.

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had not been that the vessel did not ease and wait so soon perhaps as it ought to have done; but that was not the cause of the accident, but that the *Margaret,* knowing where the *Clan Sinclair* was, attempted to pass between it and the *Zephyr* where there was not sufficient room. Undoubtedly the *Maplebranch* would not have been sunk had she not been where she was but whether she was rightly or wrongly there, having regard to the local regulations of the Montreal Harbour, the appellant had full view of her in broad daylight and there is no place in this case for the application of the doctrine of contributory negligence to the *Maplebranch.* If there was any negligence, it was remote and antecedent and was not a proximate cause of the collision.

Turning now to the charges against the motor schooner, the *Saguenay Trader,* the owners of which are not parties to the action, but whose conduct, the appellant contends, was the direct and sole cause of the unfortunate occurrence. The *Saguenay Trader* was a small motor schooner 103 feet long. At all material times she was tied at her regular allotted berth within the basin, at the Victoria Pier (which forms the south side of the basin), starting at a point about 75 feet from the end of the pier. As the *Dragon* was approaching the entrance to the basin this schooner was being turned about at her berth by her crew; her stern lines were fast to the pier and she merely drifted round with the wind, the turning operation taking about ten or twelve minutes. The defence of the appellant is that to avoid striking the schooner it became suddenly necessary for him to stop and reverse the *Dragon's* engines and that a cross current then carried the *Dragon* over against the *Maplebranch* and that there was no fault on his part; in other words, that it was an inevitable accident. The trial judge said,

> There is no question that if the *Saguenay Trader* had not started to turn when the *Dragon* was approaching the basin there would have been no accident to anybody.

Counsel for the appellant very naturally seized upon that sentence in the reasons for judgment of the learned trial judge and sought to put the entire blame upon the *Saguenay Trader.* It may be that if the *Saguenay Trader* had not been turning round at her berth at the time the *Dragon* was about to enter the basin, it would not have been necessary for the appellant to stop and reverse the engines of the *Dragon* when he did, but that observation does not

carry us any distance in determining what was the proximate cause of the damage to the *Maplebranch*. I cannot find that the *Saguenay Trader* was committing any wrongful act in turning round at her berth or that she in any way contravened Regulation 28 of the Harbour regulations which provides that

> The master or person in charge of any vessel wishing to move from one berth to another in the harbour must first obtain permission from the Harbour Master.

The *Saguenay Trader* was not moving from one berth to another. The Harbour Master had given no orders or directions to the *Saguenay Trader* or to any of the other boats that were lying in the harbour with respect to the arrival of the *Dragon*. The *Saguenay Trader* had been allowed to come in and go out and to turn on arrival or departure without permission each time from the Harbour Master and so far as the appellant knew (he had received no assurance that none of the boats in or around the basin would be moving about) the *Saguenay Trader* might have been merely departing on a voyage. But assuming that there was some fault on the part of the *Saguenay Trader*, though I cannot find any, if there was fault as well on the part of the appellant as on the part of the *Saguenay Trader*, the respondents, not being guilty of any contributary negligence, would be entitled as a matter of law to recover the whole of their loss from either of the ships that was in fault. *The Devonshire* (1). The vital question before us therefore is whether there was absence of negligence on the part of the appellant. It cannot properly be said, it seems to me upon the evidence in this case, that the appellant was suddenly put in the agony of a collision. The movement of any one of the several boats that were in or about the entrance to the basin was something to be reasonably anticipated by the appellant and with respect to which, having regard to the neck of the bottle as it were through which he had to pass, he should have had his ship under control to meet.

Within the basin beside the *Saguenay Trader* were the motor schooner *Zénon C.* (85 feet long), lying just west of the *Saguenay Trader* on the south side, and, on the north side, the *Tadoussac* (350 feet long) and the *Richelieu*, another large steamer. Just outside the basin, in section 23

(1) [1912] A.C. 634.

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of the wharf, stood the *New Northland* (287 feet long with a 47-foot beam) and alongside her the *Maplebranch*. Somewhat farther down the wharf was H.M.S. *Dundee*. The trial judge specifically found that the movement of the *Saguenay Trader* was "something unexpected by the *Dragon*, but in the opinion of the Court it was one of those eventualities a mariner should guard himself against."

Having collided with the *Maplebranch* in broad daylight it rested upon the appellant to satisfy the Court that there was no fault on his part which, either alone or in common with some fault on the part of the *Saguenay Trader*, directly caused the collision. It is said that under all the circumstances it is a hardship to hold the appellant liable but it would be an equal hardship to the owners of the *Maplebranch* and her cargo if sympathy for the appellant were to enter into the determination of the action. The question is whether or not the appellant has discharged the onus that lay upon him to establish that he was not guilty of what the law regards as negligence. The learned trial judge has had much experience as the local Judge in Admiralty at Montreal and he had the advantage of two assessors appointed under the provisions of Rule 112 of the General Rules and Orders regulating the practice and procedure in admiralty cases in the Exchequer Court of Canada. It is plain that the trial judge decided the matter, as he was bound to do, in accordance with his own opinion as to the law and the merits, though he adopted, as he was entitled to adopt, the advice of the assessors upon those phases of the action which required nautical knowledge and practical seamanship. Such a judgment ought to be given great weight by an appellate court and we ought not to interfere with it unless upon our own examination of the evidence, unassisted as we are by assessors, we are led to an irresistible conclusion that there is manifest error in the judgment. Counsel for the appellant in their very able and exhaustive argument before us have failed to satisfy me that there was no fault directly causing the damage, on the part of the appellant. The trial judge went farther and found affirmatively that there was fault on the part of the appellant. We may conveniently examine now the evidence upon which the learned trial judge undoubtedly rested his finding of fault.

West, the Navigating Officer of the *Dragon,* made a black line on exhibit D-1 to indicate the course which according to him the *Dragon* followed from the time she went under Harbour Bridge up to the time her engines were stopped. If this course was followed, the *Dragon* did not alter to starboard until she had reached a point about opposite the *Maplebranch* and at least three or four hundred feet out in the river from the north shore. On the same chart, exhibit D-1, Captain Lacouture of the *Maplebranch* indicated in blue pencil the course which the *Dragon* appeared to him to have taken. Captain Lacouture said that when he first noticed the *Dragon* altering her course she was about 1,000 feet below the entrance to the basin; he was standing on the bridge of the *Maplebranch* watching the *Dragon* approaching. He said that he only saw the *Dragon* broadside, indicating that the *Dragon* had altered her course at that time to starboard, and that when the bow of the *Dragon* passed the bridge of the *Maplebranch* the distance between the *Maplebranch* and the bow of the *Dragon* was only about 60 to 65 feet. At that time the *Dragon* was about parallel to the *Maplebranch.* Symons, the Harbour Master of Montreal, when asked from his knowledge of the current, if the *Dragon* coming in followed "anything like the course" marked with the blue pencil could she expect to get safely into the basin, said that it all depended on the speed she was travelling, that it is not the usual course for a long ship, it might do for a small vessel 100 or 150 feet long, but that a long vessel should be farther out as she passed the wharf where the *New Northland* was moored and that if a long ship got as close to the shore as indicated by the blue pencil he would expect her to have a lot of difficulty getting in, unless she could move very fast, and in any event the current would be very much inclined to swing her down on the moored ships. The *Dragon's* records and the evidence of the appellant and of West, the Navigating Officer, indicate that the alteration to starboard was made by the *Dragon* at 0842. The entry in the Navigating Officer's note-book reads.—

0842

Altered course to starboard, 30 degrees.

West stated that while he thought he used only 10 degrees of starboard helm, the ship actually turned 30 degrees. The appellant himself, at the trial, said

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I had to use 30 degrees of wheel to get a swing quickly because the current was on my starboard bow. She hung rather, and I started with 15, and told the Navigating Officer to give her more, and he gave her 30 degrees of wheel to bring her around.

And he said that it was about 1,000 to 1,200 feet, from the end of the pier, when he altered the course to starboard, and West had testified that they starboarded about 1,200 feet below the pier. But when the *Dragon* altered her course to port at 0839 to steer on buoy 201-M she was almost 1,000 feet below the Harbour Bridge, as shown by chart exhibit D-9. She was making 11½ knots through the water and continued on this course for only three minutes, until 0842, when she altered the 30 degrees to starboard and continued on this new course for a similar period of three minutes until 0845 when her engines were reversed and the helm put hard aport.

The respondents' contention at the trial was that the alteration to starboard was a good deal farther down the river than the course plotted on chart exhibit D-9 indicates and that the *Dragon* turned in at a point down the river which brought her in close to the shore too soon. There was considerable evidence at the trial by eye-witnesses to the accident that the *Dragon* was too close to the shore and was already in a dangerous position while she was still considerably below the *Maplebranch*. Captain Hatfield was standing on the port side of the *New Northland*, at the rail, and in his judgment the *Dragon* swung "a little bit too sharply." He did not particularly notice the *Dragon* until her bow was half her length astern the *New Northland*. Now the *New Northland* was between 450 and 475 feet below the Victoria Pier and the length of the *New Northland* herself was 287 feet and half the *Dragon's* length was 235 feet, making in all about 1,000 feet that the bow of the *Dragon* was below the pier at the time Captain Hatfield says he first saw her. O'Hearn, 3rd Officer of the *New Northland*, was near her stern where he had gone to dip the colours. He testified that when the *Dragon* was about half her length below the stern of the *New Northland* she was only 80 or 90 feet outside that ship. He had never seen a ship so close to the north side when trying to enter the basin and he testified that the *Dragon* was never out in the position shown on the sketch filed by the appellant as exhibit D-2. Bouchard, 2nd Officer of the *New Northland*, testified that he thought there was danger when

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he first saw the *Dragon* about 300 feet below the *New Northland* and that the *Dragon* was in opposite the basin and was not in the position shown on the appellant's sketch, exhibit D-2. Le Calvez, a waiter on the *Tadoussac,* testified that when passing the *Dundee* (which was moored below the *New Northland*) the *Dragon* was only 40 or 50 feet out from her and that when about three of her own lengths below the Clock Tower at the end of the pier, the *Dragon* "took an inward course into the basin." While the witness may not be exact in his estimate of the distances, he placed the *Dragon* dangerously close to the north shore and not out in the river as indicated by the course marked by West on the chart exhibit D-1. Sioui, another waiter on the *Tadoussac,* testified that when the *Dragon* was at least a length below the *Maplebranch* he realized that there might be a collision and that as the *Dragon* came on, her bow was between 50 and 60 feet from the *Maplebranch* and that she was never out opposite the pier as indicated on the appellant's sketch, exhibit D-2. Murphy, who was on the top deck of the *New Northland,* saw the *Dragon* when she was around shed 24, just below the *Dundee,* and he estimated that she was then probably 150 or 200 feet from the *Dundee* coming toward the basin. Captain Gagnon from the deck of the *Saguenay Trader* saw the *Dragon* when she was a little below the *New Northland.* He said she was coming fast and was heading for about the middle of the basin, and he could see only her port side. The effect of Gagnon's evidence is that the *Dragon* was up opposite the entrance to the basin while still below the *New Northland* and was never out opposite the end of Victoria Pier and close to it, as the appellant contends. There was substantial evidence that when the *Dragon* stopped and reversed her engines she was already near the north shore and practically on top of the *Maplebranch.* Against all this evidence, the appellant and his Navigating Officer West said that the *Dragon* took the outer course as indicated generally by the black line on sketch exhibit D-1.

Upon this conflicting testimony the trial judge came to the conclusion that the course "at first" followed by the *Dragon* was more as indicated by the black line than by the blue line on exhibit D-1 but that she did not follow that course throughout and "turned too early, or, if you prefer,

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too sharply." The language is unfortunately somewhat loose but I think indicates plainly that in the judgment of the Court the proper course to have taken was the course indicated throughout by the black line and that in point of fact the appellant did not keep to that course and that his failure to do so led him into difficulty when confronted with the movement of the *Saguenay Trader* and directly caused the collision of the *Dragon* with the *Maplebranch*. It is common ground that there is calm water in the basin but that a strong current runs diagonally across the entrance of the basin toward the north shore at a speed of from five to six knots. "For this reason," as counsel for the appellant very frankly state in their factum, "vessels approaching the basin must steer well to port and far out from the north shore." Counsel for the appellant further state in their factum that "The earlier a vessel turns in, the sooner will the navigator be able to perceive anything in his course; but to turn too early means that the current will carry the ship to the north shore before it can safely cross it." There is really no difficulty in appreciating the trial judge's finding that the *Dragon* "turned too early, or, if you prefer, too sharply."

While I think the onus lay throughout the case upon the appellant to satisfy the Court that there was no fault upon him which directly caused the collision, the learned judge has affirmatively found that there was such fault; and where the trial judge, as here, is not only an experienced local Judge in Admiralty but had the assistance of two assessors to advise him upon matters requiring nautical or other professional knowledge and arrived at a conclusion of fact upon conflicting testimony, it would need a very clear case of error for this Court, without the assistance of any assessors, to reverse such a finding.

In my opinion the appeal should be dismissed with costs. The question of liability for the cargo is open on the reference directed to be had but if there is any doubt on that point, as suggested during the argument, the order of this Court may make it plain. One of the respondents, the steamer Colin W. Limited, was the registered owner of the *Maplebranch* but its co-plaintiff, St. Lawrence Tankers Limited, was the beneficial owner as well as the owner of the cargo laden on board her. The former company may have been a necessary and proper party to

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the action but the recovery of judgment should have been limited to the latter company, and the judgment at the trial may be corrected if counsel for the appellant think it necessary.

The judgment of Rinfret and Crocket JJ. (dissenting) was delivered by

CROCKET J.—This appeal comes to us directly from a decision of the Local Judge in Admiralty for the district of Quebec (Mr. Justice P. Demers) in an action brought by the respondents, Steamer Colin W. Limited, as registered owner of the Str. *Maplebranch,* and St. Lawrence Tankers Limited, as beneficial and managing owner or operator of said Str. *Maplebranch,* and as owner also of the cargo laden on board her, jointly claiming $100,000 against the defendant as Officer Commanding H.M.S. *Dragon,* for damage by collision alleged to have been caused solely by the improper and negligent navigation and mismanagement of the *Dragon* by the defendant.

The collision occurred in the Harbour of Montreal on Monday, August 13, 1934, shortly before 9 o'clock a.m., while the *Maplebranch* was lying tied up alongside the Str. *New Northland* on the north side of the harbour and while the *Dragon,* upbound from Quebec, was about entering Market Basin to dock at its western wall, where her Commanding Officer had been notified by the Harbour Master she was to dock. The *Maplebranch* sank soon afterwards as a result of the collision.

The Harbour Master's office had been informed by wireless through H.M.S. *Dundee,* which was docked below the *New Northland,* on Saturday afternoon that the H.M.S *Dragon* would arrive at 9 o'clock on Monday morning, but this information was not communicated to any of the vessels moored in or about the basin, though steps were taken to see that the west wall was clear to receive the warship on her arrival.

The *Maplebranch* was a twin screw oil tanker of 1,649 registered tonnage, 238 feet long, with a beam of 35 feet 6 inches. Having received orders to deliver a quantity of oil to the *New Northland* on the morning of August 13, she proceeded without previously notifying the Harbour Master's office from the Racine wharf to dock section 23,

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where the *New Northland* was moored, and tied up alongside the last named steamer only ten or fifteen minutes before the collision occurred. The beams of the two vessels thus lying side by side extended 82·8 feet into the harbour from the wall of the dock and this at a point only a few hundred feet below the entrance to the basin.

It appears that the Commanding Officer of the H.M.S. *Dragon,* when at a distance he estimated to be about a mile east of the Market Basin, had observed the *Maplebranch* cross over from the entrance to the basin and come alongside the *New Northland,* though he was not then able to identify either vessel or in a position to judge the distance of the two vessels from the entrance of the basin, according to her case. Just before the *Dragon* got to the Harbour Bridge she altered her course to port, steering on gas buoy 201, on the south side of the ship channel, and continued in that direction until she reached a position at a distance variously estimated as from 1,000 to 1,500 feet from the east end of Victoria Pier, the inside northerly wall of which forms the southerly side wall of Market Basin. At this point, her case was, the defendant altered her course to starboard and steered for the end of Victoria Pier. It should here be explained that a cross current sweeps across the basin entrance in a northeasterly direction upon dock sections 23 and 24. Having been advised by the pilot, who had been assigned to the ship at Quebec for the Montreal trip, that this current was a six-knot current, the defendant in approaching the basin increased his speed from 87 to 100 revolutions which, it seems, means 11½ knots through the water and about 8 to 8½ over the ground. When the *Dragon* got within 500 or 600 feet of the line of the entrance to the basin or about half way from the point at which she had altered her course to starboard the current began to swing the vessel sideways towards the entrance of the basin, which measures 312 feet, as the defendant had anticipated it would, and then, when the bow of the warship was pointing towards the northeasterly corner of Victoria Pier, the defendant, according to his case, for the first time saw over that point of the pier a vessel moving within the basin not far from the entrance. As the *Dragon* approached the entrance of the basin, the defendant, who was in command of the ship and on the

bridge with his navigating officer, another Lieutenant-Commander, a number of signalmen and the pilot—the latter on the port side of the platform—was heading his ship, on account of the cross current, outside the basin, and could not see any of the vessels—it seems there were three of them—which were moored on the south side of the basin, these being hidden from his view by the clock tower and sheds on the pier. He was steering to port to allow for the set of the current. He could see, however, the vessels which were moored along the north side of the basin. One of these was the *Tadoussac,* 350 feet long with a beam of about 70 feet, a passenger steamer of the Canada Steamships Line, which, it seems, had docked earlier in the morning, partly within and partly without the entrance to the basin, the stern of the latter being about 65 feet west of the bow of the *New Northland.* Some distance west the *Richelieu,* another passenger of the Canada Steamships Line, lay along the nort wall of the basin. The vessel, which the defendant saw over the pier moving in the basin from the position indicated, turned out to be the *Saguenay Trader,* a motor vessel, 103 feet long. It had arrived in the basin the previous afternoon and docked on the south side, bow towards the west, in a space of 175 feet, which had been marked off and allotted by the Harbour Master for the Verrault Shipping Co., commencing at a point about 75 feet from the eastern end of the pier.

It seems that when the *Dragon* altered her course to starboard at 8.42 a.m. while south and east of Victoria Pier the *Saguenay Trader* was turning around at her berth for the purpose of more conveniently discharging some cargo on the dock. This movement was made without giving any notification to the Harbour Master or the Harbour Master's office and in violation, as both the Harbour Master and the Dock Master alleged, of the regulations governing the movement of ships in the harbour.

The result was that when the *Dragon* got closer to the basin entrance with the cross current gradually swinging her into a position paralleling or nearly paralleling the north wall of the basin the defendant observed this motor vessel swinging out across his course and believed that she was going to get into his way. The Chief Yeoman of the *Dragon* said that when he first saw the motor vessel it was about at an angle of 45 degrees from the wharf and swinging out

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very quickly as the *Dragon* was approaching. Confronted with this emergency when, as he estimated, the *Dragon* was at a point approximately 150 to 200 yards from the end of Victoria Pier the defendant stopped his engines and immediately afterwards—the navigating officer says 12 or 15 seconds later—ordered full speed astern, and then hard aport. The warship moved on towards the basin at a reduced speed. Her bows passed into the still water of the basin but her stern, still in the cross current, was swung over while the ship was still moving forward slowly, so that her starboard propeller, which was situated about 100 feet forward of the extreme end of the stern, caught the *Maplebranch* and ripped some of the plates off her hull. " Owing to the fact," the officer commanding explained, " that I had to pull the ship up while she was still in the current instead of in the still water in the basin the current caught my stern and swung it over so that it hit the *Maplebranch.*"

The *Dragon,* after hitting the *Maplebranch,* continued to move forward in the basin and passed the *Saguenay Trader* by about 15 or 20 feet. In executing her turning movement the *Saguenay Trader* did not use its own power but relied entirely upon the force of the wind from the west to turn her round while lines from her stern held her to the wharf, so that in turning she must at one time have had her stem projected into the basin at least 103 feet. The *Dragon* herself was 470 feet long with a beam of 41 feet.

By consent of counsel all evidence made at the formal investigation of the collision before the Wreck Commissioner in August, 1934, was made part of the trial record in the Admiralty Court subject to the right of the parties to recall the same witnesses or to call new witnesses in their discretion. In pursuance of this agreement the Commanding Officer and the Navigating Officer of the *Dragon* were recalled and gave evidence in the Admiralty Court before the learned trial judge and his assessors, supplementing in some particulars that which they had previously given before the Wreck Commissioner. Only two other witnesses gave evidence in the presence of the trial judge, one of whom, a photographer, merely identified a photograph which had been produced at the Enquete. The other (Sioui) was a waiter on the *Tadousac,* who gave an account of what he had seen from the stern of the main deck of that ship. So that the trial was one in which the learned

judge with the exceptions just indicated had not the advantage of seeing the witnesses as they gave the evidence upon which he decided the case, which I think in a case of such importance as this was unfortunate.

His Lordship held that the principal issue was as to whether the defendant had proved that the collision was an inevitable accident, and that the defendant had not satisfied him that it was. He therefore ordered judgment for the plaintiffs and referred the case to the Registrar, assisted by merchants, for the assessment of damages.

I have already summarized the essential facts as they appear from the evidence of the defendant, his navigating officer and other witnesses, which I have thought it well to do at the outset in order to get a clear picture of the collision as explained from the defendant's standpoint.

On the part of the plaintiffs it was sought to shew that the *Dragon,* after passing under the Harbour Bridge, which, it seems, is 3,300 feet below the easterly line of Victoria Pier, altered her course to the north in the middle of the ship channel and then gradually drew in towards the *Dundee* and the *Maplebranch* until she got in a position less than 100 feet out from these vessels; one witness put it as low as 40 feet out from the side of the *Maplebranch.* It is clear from the learned trial judge's reasons that he did not accept this evidence, for he expressly held that the evidence shewed that the line at first followed by the *Dragon* was more as indicated by the defendant and his witnesses, though stating that the court was of the opinion, as were also the assessors, "that the *Dragon* turned too early, or if you prefer, too sharply."

It was sought also by the plaintiffs to prove that the *Saguenay Trader* had completed her turning movement in the basin and was lying alongside the wharf again at the time the *Dragon* altered her course to starboard. This evidence the learned trial judge seems to have rejected also, for he states that there was

> no question that if the *Saguenay Trader* had not started to turn when the *Dragon* was approaching the basin there would have been no accident to anybody.

There is no doubt there is a well recognized rule in the Admiralty Courts of Great Britain as well as of Canada that the fact of a ship under way running in broad daylight into a ship at anchor or securely moored, as the learned

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trial judge found the *Maplebranch* was here, creates a presumption that the collision was caused by the negligence of the moving ship. This presumption is, of course, not absolute, but is one which can only be effectually rebutted by clear proof that the collision was not wholly or in part so caused, that is to say, by clear proof that there was no negligence on the part of the moving ship, which caused or materially contributed to cause the collision sued for, or in other words, that the collision could not possibly have been avoided by the exercise of ordinary care and ordinary nautical skill on the part of the moving ship. If it could not have been so avoided it is, so far as the moving ship is concerned, "an inevitable accident" within the true meaning of that expression so often used in maritime law. If it could have been so avoided, the defence fails. That, I apprehend, is the clear result of the authorities on the question of the proof of inevitable accident, as now generally recognized. See *The Batavier* (1); *The Marpesia* (2); *The Sisters* (3); *The Annot Lyle* (4); *The Merchant Prince* (5); *The Schwan and The Albans* (6); *The Steel Scientist* (7); *The Clarissa Radcliffe* (8).

The law as it affects the adequacy of proof of inevitable accident is perhaps most concisely summed up in the following passage from the judgment of Dr. Lushington in *The Thomas Powell* v. *The Cuba* (9).

> To constitute an inevitable accident it was necessary that the occurrence should have taken place in such a manner as not to have been capable of being prevented by ordinary skill and ordinary diligence. We were not to expect extraordinary skill or extraordinary diligence, but that degree of skill and that degree of diligence which is generally to be found in persons who discharge their duty.

Whether the person sued exercised such skill and care manifestly can only be determined on a full consideration of all the conditions and circumstances in which he found himself, as in any action based on negligence. It must be borne in mind in all cases, whether the defendant be charged with negligence causing a collision with a ship at anchor or a collision with a ship under way, that he is not

(1) (1845) 2 W. Rob. 407.
(2) (1872) L.R. 4 P.C. 212.
(3) (1876) 1 P., 117.
(4) (1886) 11 P.D. 114.
(5) (1892) P. 17.
(6) (1892) P. 419.
(7) (1926) 25 Lloyd's List, L.R. 325.
(8) (1930) 36 Lloyd's List, L.R. 298.
(9) (1866) 14 L.T., at 603.

obliged, in order to absolve himself from liability or blame, to prove that the collision could not have been avoided in any possible way, but only to prove that it could not have been avoided by the exercise of ordinary skill and care on his part or on the part of the officers and men, for whose conduct he was responsible, in the particular circumstances in which they were placed. If a defendant clearly proves that the collision sued for was the necessary consequence of the intervention of a third ship in his course and that he was not at fault in the creation of that emergency he fully discharges the onus the law imposes upon him for running into a ship at anchor. Proof by a preponderance of evidence, as in all civil actions, is all that is necessary to establish the defence of inevitable accident in such a case.

With all respect it seems to me from my study of the trial judgment and of the evidence that the learned judge prescribed for the defendant a higher standard of duty than the law warrants. I have already quoted two of His Lordship's findings, viz.: "that the *Dragon* turned too early or, if you prefer, too sharply," and that "if the *Saguenay Trader* had not started to turn when the *Dragon* was approaching the basin there would have been no accident to anybody."

As to the first of these findings its meaning is not clear in itself, but His Lordship explains it in the two following paragraphs:

> I am told by my assessor that the proper way of entering that basin on account of a current running from Victoria Pier towards section 23 of the wharf is to keep a course well southwest of the extremity of Victoria wharf,—at a certain moment, a few hundred feet off this point, to proceed slowly in the current until she is in proper position to enter the basin. This permits the ship to thus attain safely the dead water of the basin. Of course, if you turn too sharply, on acount of the current you must maintain the speed otherwise you are carried by the current against the wharf, but the entrance to be safely executed must be as I have said, and diagonal.
>
> If the manoeuvre had been as I have said, the defendant would have got his ship in hand to meet any eventuality. By taking the other course, there was the risk of an intervening ship in the basin.

These two paragraphs no doubt shew that His Lordship adopted the opinion of his assessor (the record states there were two assessors and doubtless His Lordship meant both of them) as the proper course to enter the basin, but that does not mean that there was any negligence on the part of the *Dragon* in following the course it actually did follow

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in approaching the basin, or that, if there were any failure to exercise ordinary skill in not following the suggested course, such failure was the direct cause of her hitting the *Maplebranch*.

It is unfortunate that there is no record of the precise questions which were submitted to the assessors for their advice and no other record of their advice than that contained in the paragraph of the judgment above quoted, for, as it is there stated, it is not of a very clear or definite character. Whether it was intended to indicate the proper way for a vessel of the *Dragon's* length and navigating characteristics to approach and enter the basin or the proper way for all vessels, regardless of their size, to approach and enter, it is difficult to say, but if it was intended to lay down a course for all vessels alike, and in all conditions of wind and weather, it is clear from the evidence that it is not the course which has been usually followed. As to keeping a course well southwest of Victoria Pier, that is precisely what the evidence shews the *Dragon* did until she was within a distance, according to the defendant, of 1,000 or 1,200 feet. Nothing is said about a vessel changing her course from well southwest of the extremity of Victoria Pier, but at a certain moment, a few hundred feet off this point, it is said she is to proceed slowly in the current until she is in a proper position to enter the basin. There must, however, obviously be some turning to starboard from such a course, if a vessel is to enter a basin on the north shore of the river before she can proceed slowly in such a cross current as has been described.

I confess I cannot understand just what is meant by the finding in the preceding paragraph that the *Dragon* "turned too early or, if you prefer, too sharply," for it seems to me that the farther west she proceeded on her course southwest of Victoria Pier, the more sharply she would have to starboard into the cross current, while the farther east she was, i.e. the sooner she turned to approach the entrance to the basin, the less sharp would be her turning angle. Be this as it may, we are told, presumably on the advice of the assessors: "Of course, if you turn too sharply, on account of the current you must maintain the speed, otherwise you are carried by the current against the wharf, but the entrance to be safely executed must be, as I have said, and diagonal." I take this to mean that if a vessel does not

follow the course first suggested and proceed slowly in the current until she is in a proper position to enter the basin, but instead turns more sharply into the cross current she must maintain her speed to avoid being carried against the wharf, and enter the basin diagonally, heading towards the northwest. My greatest difficulty with the assessors' opinion is to understand how a vessel, which simply proceeds slowly in the current from a course well southwest of Victoria Pier, is less likely to be carried by the cross current against the wharf or a ship moored there than if she turns sharply into the cross current and maintains her speed.

Whatever the suggestion may be, however, it cannot well be held that the failure to precisely follow one course in preference to the other even points to the possibility of negligence causing the collision with the *Maplebranch,* when the trial judge has expressly found that had it not been for the action of the *Saguenay Trader* there would have been no accident to anybody. This last mentioned finding can mean nothing else than that, had it not been for the intervention of the third ship, the *Dragon* would have passed safely into the basin on the course she was following, and no other conclusion in that regard is in my opinion reasonably possible on the evidence. In any event there is nothing in connection with the finding regarding the too early or too sharp turning of the *Dragon* to shew that any consideration was given either by the assessors or the learned trial judge to her unusual length or her navigating characteristics, with which her navigating officers were so familiar, or to any other facts or circumstances, which might affect the question as to whether ordinary care and skill were exercised in adopting the course she did.

It was strongly urged in behalf of the defendant that the finding as to the too sharp turning should in any case be disregarded for the reason that it was not even suggested on the trial and that the defendant accordingly had no opportunity of answering it. It is true that paragraphs 15 and 16 of the statement of claim allege that the defendant altered his course to starboard too soon and that he directed his ship too much to starboard and attempted to bring her up the harbour too close to the north shore, but this claim had reference, I think, clearly to the plaintiff's attempt to prove that she turned to starboard at a point

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indicated by the captain of the *Maplebranch* on exhibit D-1 and followed the course marked by him in blue. The bulk of the evidence of the plaintiff's witnesses was directed to this feature of the case, but was rejected by the trial judge, and, so far as I can discover, attention was not anywhere called to any specific negligence in turning either too soon or too sharply from the course the *Dragon* was following well southwest of the extremity of Victoria Pier at the point where the evidence shews he did turn to starboard to make his entrance to the basin. This fact itself, it seems to me, affords a perfectly sound basis of objection to the learned trial judge's finding upon that point, even if there were no other. See *Dominion Bridge Co.* v. *Str. Philip J. Dodge.* (1)

It is quite apparent to me, however, from the judgment itself that the true explanation of His Lordship's essential finding that the defendant had not satisfied him that the collision was an inevitable accident, lies in the fact that the learned judge assumed that the defendant should have foreseen "that a vessel at or near that basin might move" and that it was his duty to get "his ship in hand to meet *any* eventuality." "By taking the other course" (i.e., I assume, the first one suggested by the assessors) His Lordship says "there was the risk of an intervening ship in the basin," and later he adds:

> Of course, this movement of the *Saguenay Trader* was something unexpected by the *Dragon* but in the opinion of the Court it was one of those eventualities a mariner should guard himself against.

It is especially in respect of these last mentioned findings that I think His Lordship misdirected himself as to the extent of the defendant's duty. The defendant's duty, as I conceive it under the law, was, not to foresee and have his ship in hand to meet and guard against any and every eventuality which might possibly happen, but merely to exercise that degree of care and nautical skill, which is generally looked for in a competent seaman, to avoid such risks as might in the proved circumstances reasonably have been anticipated by him.

We have before us unquestioned proof that the Harbour authorities had notified the defendant that the west wall of the basin would be reserved for the docking of the *Dragon* on her arrival and that the defendant had notified them of the precise hour his ship would arrive. Indeed the learned

(1) [1936] 1 W.W.R. 94.

trial judge not only points this out at the outset of his judgment, but deprecates the omission of the Harbour authorities to notify the ships at or near the basin that the *Dragon* was to arrive at 9 o'clock, and plainly states that this omission "explains this unfortunate collision." He says:

> The defendant evidently expected that, as a matter of courtesy, the wharf authorities would have given such a notification and would have paid attention to stop all movements of the ships but he had not been told so, and in the opinion of the Court, he should have foreseen that a vessel at or near that basin might move. The fact is that before he reached Jacques Cartier bridge, he saw the movements of the *Maplebranch*.

It seems to me that the mere fact that the defendant had not been told that the Harbour authorities had actually done what it so obviously was their duty to do, cannot well be held to make it negligence for the defendant to assume that the Harbour authorities had performed their duty and that as a consequence no ships would be allowed to move in or about the entrance to the basin that might foul or obstruct the course of so long a ship in entering to dock at the berth which had been assigned to her.

As to the *Maplebranch* herself, the suing ship, it is conclusively shewn that in taking up her position alongside the *New Northland* without permission from the Harbour Master's office and in violation, as both the Harbour Master and the Dock Master affirmed, of the by-law governing the movement of ships in the harbour, increased the difficulties of any vessel which might have to enter the basin. This fact, while perhaps not affording in itself proof that she contributed to bring about the collision, is nevertheless a fact which must be taken into account in determining whether the *Dragon* herself was guilty of any lack of ordinary care and nautical skill which caused or materially contributed to cause the collision, and I am not at all sure that under the authorities the fact of her doing an act so manifestly wrong would not preclude her from fastening the whole burden of the collision upon the *Dragon*, even had the officers of the warship been guilty of any negligence which contributed to bring about the collision.

There is no finding or suggestion in the trial judgment of any evidence pointing to any possible negligence on the part of the *Dragon* other than in the particulars I have mentioned, no failure to keep a sufficient lookout before the *Saguenay Trader* was first observed across her course

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within the basin, and no lack of nautical skill respecting the orders to stop her engines and reverse, though many questions were put on the investigation and trial directed to this end. The undoubted fact is that when these orders were given the *Dragon* was face to face with an imminent peril and that, unless she herself had then been guilty of some negligence which contributed to bring that peril about, the warship's Commanding and Navigating Officers, being then in the agony of an imminent collision with the *Saguenay Trader,* could not properly be held to be accountable for any failure to exercise even ordinary care or nautical skill. Unless, therefore, there was some prior negligence upon their part which contributed to bring about the emergency she must be held blameless.

I have already shewn, as I respectfully think, that the only findings of the learned Judge in Admiralty which could point to the possibility of any negligence on the part of the defendant's ship before she encountered the *Saguenay Trader* in a situation of danger were not justified in law or by the evidence.

In my opinion it has been clearly proved by a marked preponderance of evidence, not only that the *Dragon* would never have hit the *Maplebranch* had it not been for the action of the *Saguenay Trader* in starting to turn around in the basin when she did, as the learned trial judge himself has expressly found, but that the collision sued for would never have occurred had not the *Maplebranch* herself been in the position which she took up wrongfully and without permission, and that there is no evidence upon which it can reasonably be found that the officers of the *Dragon* failed to exercise that degree of care and nautical skill which the law requires in order to entitle the plaintiffs to succeed. The defendant has fully discharged the whole onus which the law placed upon it.

I would therefore allow the appeal and dismiss the action with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Campbell, McMaster, Couture, Kerry & Bruneau.*

Solicitors for the respondents: *Meredith, Holden, Heward & Holden.*