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*March 12, 13.
*March 23.

THE MONTREAL TRANSPORTATION COMPANY (DEFENDANTS) . } APPELLANTS;

AND

THE NEW ONTARIO STEAMSHIP COMPANY (PLAINTIFFS) . . } RESPONDENTS.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA, TORONTO ADMIRALTY DISTRICT.

Admiralty—Preliminary act—Amendment—Collision—Evidence.

In an action in admiralty claiming damages for injury to plaintiffs' ship, the "Neepawah," through collision with the "Westmount" belonging to defendants the preliminary act and statement of claim alleged that the port quarter of the latter struck the stern of the "Neepawah." The local judge, in his judgment, held that the evidence shewed a collision between the two ships stern to stern and, against objection by defendants' counsel, of his own motion allowed the statement of claim to be amended to conform to such evidence stating that its admission had not been objected to and that defendants were not misled.

Held, that such amendment should not have been made; that it set up a new case and one entirely different from that presented by the preliminary act and statement of claim and greatly prejudiced the defence; and that the local judge was wrong in stating that the evidence was admitted without objection as it was protested against at the trial.

Held, also, that errors in the preliminary act may be corrected by the pleadings but, if not, the parties will be held most strongly to what is contained in their act.

Held, per Davies, Maclennan and Duff JJ., that the plaintiffs had not satisfactorily established that the collision, even that charged under the amendment, had actually occurred.

Per Fitzpatrick C.J., that the evidence proved that no collision between the vessels took place.

Idington J. concurred in the judgment allowing the appeal.

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*PRESENT:—Sir Charles Fitzpatrick C.J. and Davies, Idington, Maclennan and Duff JJ.

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APPEAL from the judgment of the local judge for the Toronto Admiralty District of the Exchequer Court of Canada(1) in favour of the plaintiffs.

The material facts of the case are stated in the above head-note. The judgment of the local judge from which the appeal was taken is as follows:—

HODGINS Loc.J.—"Since the argument in this case I have re-read the evidence which I find to be conflicting in many particulars, and it has confirmed the impression I formed at the conclusion of the evidence that the plaintiffs were entitled to succeed.

"The plaintiffs' claim in this case is for damages caused to their steamer 'Neepawah's' propeller by the defendants' steamer 'Westmount,' and the main issue is whether the defendants' steamer, the 'Westmount,' bumped the plaintiffs' steamer, the 'Neepawah,' when passing her in the level between locks 23 and 24 in the Welland Canal on the night of the 20th October, 1904. The night has been described by several witnesses as 'a dark, rainy night'; and this fact and the conflicting statements of witnesses, so general in admiralty cases, have increased the difficulty of deciding to which side a preferable credence should be given.

"But the evidence as to the fact of the bumping of the 'Westmount' on the 'Neepawah' satisfies me that such bumping took place, and that together with what must have been the resultant pressure of the water on the 'Neepawah' caused by the swing of the 'Westmount' in straightening her course into the middle of the canal so as to enter the lock while passing the

(1) 11 Ex. C.R. 113.

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'Neepawah'—caused the 'Neepawah' to swing across the canal as described by several of the witnesses on both sides. See also *Cadwell* v. *The 'C. F. Bielman'* (1).

"The captain of the 'Neepawah' states that he heard the reversing bell of the 'Westmount' and that her reversing had the effect of turning her against the 'Neepawah' and moving her stern against his boat, and that he felt something touch his boat, and that his boat 'at once swung out,' the stern swinging to the bank, and the bow swinging out into the canal, and that when the stern swung over the bank the two flanges of the propeller wheel were broken by striking the stone side wall of the canal.

"The wheelsman, Laroche, states that he was at the wheel steering the 'Neepawah' and kept her straight but did not feel the bump, but was sure that the 'Westmount' had struck the 'Neepawah' 'because we changed direction instantly.'

"Legault, who was at the stern of the 'Neepawah' with a fender, states that the 'Westmount's' stern struck the 'Neepawah' between the aftermast and the boiler house about five or six feet from the stern of the 'Neepawah,' and shoved her on the bank and broke her wheel.

"McLeavy, one of the defendant's witnesses, states that when the steamers were passing their respective sterns were about three feet apart and that he saw the sterns come together and that they were coming closer together as they passed.

"Tracy, a lock tender, an independent witness on shore, states that when the 'Westmount' was head-

(1) 10 Ex. C.R. 155, at p. 156.

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ing to enter the lock, she was three or four feet away from the 'Neepawah,' that the 'Westmount' was about half way past the 'Neepawah' when she began to get straightened for lock 23, and that the sides of the after part of the end of the two boats came nearest together.

"Captain Milligan, of the 'Westmount,' states that all the time he was straightening the 'Westmount' he was shifting her stern over the centre line; and that when he was straight for the lock he would necessarily be twenty feet into his port water, and therefore there would not be room for the 'Neepawah' to lie between him and the shore. And he added that he would 'let it go' that the 'Neepawah' had got as far as the centre line,—but not across it,—though he afterwards varied this. The frequent changes of the position of the models made by this witness, and his admissions that he was only guessing has affected his credibility. And similar changes of the position of the models by others of the defendants' witnesses have caused me to hesitate in accepting their fairness in giving evidence. At first some of them placed the models anglewise across the canal, but when attention was called to such positions, some of them altered the anglewise for another position.

"There is another fact which is established by the evidence of the captain of the 'Westmount' that he commenced to straighten for the lock before he had passed the 'Neepawah' and that he thereby got into the 'Neepawah's' water. The rule of the road provides that 'in narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies to the starboard side of such vessel.' The 'fairway' mentioned in this

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rule has been defined by Bargrave Deane J. in *The 'Glengariff'* (1) thus: 'A fairway is practically defined by this article to be the midchannel. There is no rule which says you must keep in the fairway, but the rule says that you must keep to the starboard side of the fairway or midchannel in narrow channels.' The waterwidth of the canal between locks 23 and 24 is 108 feet; the 'Westmount's' beam is 43 feet, and the 'Neepawah's' beam is 41 feet. But the 'Westmount' began to straighten her course and thereby to get out of her starboard water and into the 'Neepawah's' water before she had passed the 'Neepawah' and thereby violated this rule of the road. I must also find that the 'Westmount' further failed to observe the rules of the road which direct crossing steam vessels to 'keep out of the way of the other.' These violations of the rules of the road led to the bumping of the stern of the 'Neepawah' which I find was the primary cause of the propellor wheel of the 'Neepawah' striking the boom or wall of the canal and breaking two of its blades.

"The defence raises an objection to the plaintiffs' preliminary act in that article 13 states that 'the parts of each ship which first came into collision were the port bow of the 'Westmount' and the port quarter of the 'Neepawah' abreast of the kitchen.' The plaintiffs' statement of claim alleges substantially the same that the 'Westmount' sheered on the 'Neepawah' and struck her on the port side abreast of the kitchen, and forced her stern against the boom along the stone wall * * * by reason whereof the 'Neepawah's' screw came in contact with the said boom and two of her propeller blades were broken.

(1) [1905] P.D. 106.

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"The rule of practice is that no mistake in the preliminary act can be amended unless an application to amend is made before trial. *The 'Vortigern'*(1). But in *The 'Frankland'*(2), Sir Robert Phillimore while refusing to allow the preliminary act to be amended, allowed an amendment of the pleadings—adding that it would be competent to counsel 'to comment on the discrepancy between the pleading and the preliminary act.' And in *The 'Miranda'*(3), the same learned judge said: 'The parties in an action of damages are not bound in their pleadings to repeat any errors or omissions which may exist in their preliminary act; and it is open to them in their statement of claim, or statement of defence to state correctly any facts which may have been omitted or erroneously stated in their preliminary act.'

"Apparently from these decisions the only penalty for errors and omissions in the preliminary act is that they may be 'commented upon by counsel.' But they could be amended if an early application for leave to amend had been made.

"In the *'Dictator'*(4) the court allowed an amendment of the writ by increasing the amount of the claim after judgment; and the plaintiffs were subsequently allowed to sue out execution for the increased amount allowed by the amendment of the writ(5).

"But in *The 'Alice' & The 'Rosita'*(6), the rule that a party seeking redress for an injury can only recover

(1) Swab. 518.
(2) L.R. 3 A. & E. 511.
(3) 7 P. D. 185.
(4) [1892] P. 64.
(5) [1892] P. 304.
(6) L.R. 2 P.C. 214.

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'secundum allegata et probata' was held to apply only to cases where the averments alleged in the pleadings were material to the issue. While I must find that the statement of claim incorrectly states the locality of the collision between the two steamers, I think the statement of defence is rather helpful in determining the locality of the bumping by stating that the 'Neepawah's' bow, being light, fell out from the bank and across the canal astern of the 'Westmount' as the latter passed. * * * The 'Westmount' was in her own proper water, and at a considerable distance from the point (*i.e.,* the bow) which the alleged impact of the vessel is said by the plaintiffs to have taken place.'

"This pleading, I think, indicates the locality more fairly than the plaintiffs', that the impact was not near the bows of the two vessels, but somewhere near their sterns—which the evidence warrants me in finding. And as the plaintiffs' pleading has not apparently misled the defendants, and as the points as to the preliminary act and pleadings were not taken at the opening, or early in the case, I think the plaintiffs may have leave to amend their pleading, as it seems the defendants have not been prejudiced.

"After the amendment the decree will be for a reference to the registrar to assess the damages and to tax the plaintiffs their costs of the action and reference."

Geo. F. Henderson K.C. and *Francis King* for the appellants. The preliminary act cannot be amended. Errors therein may be corrected by the pleadings, but if not so corrected the act will govern;

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Williams & Bruce Ad. Prac., 3 ed., p. 369; *Secretary of State for India* v. *Hewitt* (1).

The amendment after judgment was manifestly improper. See *The "Miranda"* (2); *The "Frankland"* (3); *The "Vortigern"* (4), as to the absolute necessity of fair notice of the material facts.

Lynch-Staunton K.C. and *Logie* for the respondents. This court will not reverse on questions of fact. *The "Picton"* (5); *The SS. "Arranmore"* v. *Rudolph* (6).

The pleadings in an action in admiralty can be amended if the preliminary act cannot and the discrepancies between the two is only a ground of comment by counsel. See *The "Frankland"* (3); *The "Miranda"* (2).

The pleadings did not mislead the defendants and the learned judge was justified in allowing the amendment. *The "Alice" & The "Rosita"* (7).

THE CHIEF JUSTICE.—By the judgment appealed from, the local judge in admiralty (Toronto District), found that a collision occurred between the defendants' (appellants') ship "Westmount" and the plaintiffs' (respondents') ship "Neepawah," and that, for the resulting damage, the defendants are liable. There is the usual order for a reference to the registrar to assess the damage.

The collision is alleged to have taken place be-

(1) 60 L.T. 334.
(2) 7 P.D. 185.
(3) L.R. 3 A. & E. 511.
(4) Swab. 518.
(5) 4 Can. S.C.R. 648.
(6) 38 Can. S.C.R. 176.
(7) L.R. 2 P.C. 214.

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tween 11 o'clock and midnight on 20th October, 1904, in the stretch of water known as the level between locks 23 and 24 on the Welland Canal. This stretch is said to be 744 feet long and 110 feet wide at its widest part. The boats are each full Welland Canal size; about 250 feet long and 45 feet wide. The night was dark and rainy. This action was entered on the 5th March, 1906,—almost seventeen months after the occurrence and the witnesses were examined in April and May, 1907. The entry in the log of the "Neepawah" made at the time by the captain is:

"Broke my wheel between lock 23 and 24 at 11h 30m p:m:"

No mention is made of the "Westmount" or of a collision.

It further appears that a protest was made by the captain of the "Neepawah" and, although at the trial notice to produce was served, it was not forthcoming.

We are, therefore, without the aid of the written records usually made when a ship has been in collision.

We have this further difficulty,—that, in the plaintiffs' preliminary act, dated 22nd March, 1906, the port bow of the "Westmount" and the port quarter of the "Neepawah," abreast of the kitchen, are the parts of the ships which, it is alleged, first came in contact; and, in the statement of claim, the collision is described as having occurred in this way:

The "Westmount" sheered on the "Neepawah" and struck her on the port side abreast the kitchen;

so that, in this respect, the parties went to trial practically on the statement of facts contained in the preliminary act. The captain of the "Neepawah" in his

examination for discovery says that the bluff of the "Westmount's" bow struck the "Neepawah's" stern.

The judge, notwithstanding all this, finds on the evidence that there was a collision and

that the impact was not near the bows of the two vessels, but somewhere near the sterns.

It is to be observed that the evidence to support this finding was admitted against the protest of the defendants' counsel, made at the beginning of the trial, and that no application was made to amend the preliminary act or the pleadings.

In fact, the statement of claim was not amended until after the judgment and then on the invitation of the judge.

The rule requires that a preliminary act should be filed so that particulars of the rival cases set up on behalf of the two ships which are alleged to have been in collision should be given when the facts are supposed to be fresh in the memory of both parties and the rule as to amendments is stated in Halsbury's Laws of England, vol. 1, page 94:

Alterations or amendments will not be allowed in the preliminary act at the instance of the parties who have filed them, but, where a question in a preliminary act is insufficiently answered, the court, on the application of the opposite party, may direct the question to be properly answered and the preliminary act to be amended accordingly.

The plaintiffs should have been held to be bound by their preliminary act and such an amendment as was made here, if permitted, would defeat completely the object of the rule requiring the preliminary act.

Further, on the facts, the log is, of course, no evidence for the ship; but the legitimate inference is, where there is no entry or mention in the log, that the

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circumstances of the collision were such that if the true facts were entered they would be unfavourable to the vessel and weight must be given to this fact when the testimony is conflicting. Further, it is to be borne in mind that it is upon the libellant to shew by a fair preponderance of evidence that the collision happened and that it was the cause of the injury.

Of the witnesses examined by the plaintiffs, Lagault, the second mate of the "Neepawah," is the only one who says that he saw the collision, and he indicates a contact between a point on the "Westmount" between her aftermast and boiler-house and a point on the "Neepawah" about five feet forward of the stern, back of the deck-house altogether. The plaintiffs' other witnesses came to the conclusion that there was a collision as a matter of inference. The engineer of the "Neepawah," who was on deck, was not examined, although available.

On the other hand, for the defendants, seven members of the crew observed the passage of the vessels; they were necessarily only a few feet apart and they swear positively that the "Westmount" did not touch the "Neepawah." The engineer who was on board, sent out under the builders' guarantee, was not examined because, at the time of the trial, he had returned to England.

On the facts, I am of opinion that it is abundantly proved that the vessels did not collide. I do not see how the breach of the rule as to crossing ships, referred to by the judge, can be applicable to the facts of this case; and if applicable, it is certainly not proved that a non-observance of the rule in any way contributed to the damage. The vessels were here not crossing ships; they were what is known as passing

ships, in which case there is no statutory rule; it is merely a question of good seamanship.

On the whole, I would allow the appeal with costs.

DAVIES J.—This is an appeal from the judgment of the local judge in admiralty of the Toronto Admiralty District, holding the SS. "Westmount," owned by the appellants, liable for damages to the SS. "Neepawah," owned by the respondents, arising out of an alleged collision between the two while passing each other in the Welland Canal, on the 20th of October, 1904, about 11.30 p.m.

The damage sustained by the "Neepawah" consisted in the breaking of two of her propeller blades by reason of the same coming in contact with a floating boom of timber about two feet wide at water's edge along the stone wall of the level of the canal between locks 23 and 24.

The "Neepawah" was going up the canal loaded with merchandise, drawing eight feet forward and twelve and a half feet aft. The "Westmount" loaded with grain to canal draft bound down. The steamers met and passed each other port to port in the level of the canal between the two locks, which level is about 800 feet long and 110 or 112 feet broad.

The steamers were each about 250 feet long, the "Westmount" 42 or 43 feet broad, and the "Neepawah" 41 feet. The night was dark and rainy, and there was much conflict as to the "Westmount's" contention that there was a strong breeze blowing at the time.

The plaintiffs' preliminary act was filed on the 22nd of March, 1906, some eighteen months after the

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damage occurred, and their statement of claim, on the 2nd of April, of the same year.

In such preliminary act it is stated that the parts of each ship which first came into collision were

the port bow of the "Westmount" and the port quarter of the "Neepawah," abreast of the kitchen.

The statement of claim substantially repeated the preliminary act on this point though in somewhat different language, but without any correction of the statement in the preliminary act as to the parts of the two vessels which first came into collision and alleged that by reason of the "Neepawah" being so struck her screws came in contact with the boom and her propeller blades were broken. The captain of the "Neepawah" when afterwards giving his evidence on discovery stated that it was the bluff of the bow of the "Westmount" which struck him and drove his starboard quarter over the boom. In giving his evidence at the trial, he said that he did not know what part of the "Westmount" struck his boat, saying: "It was the stern or midships or something." As he said he did not see any collision and was only giving an impression.

The "Westmount" in her statement of defence denied that there had been any collision between the steamers as charged and claimed that the damage to the "Neepawah's propeller occurred by its coming in contact with the boom, without any contributory fault of the "Westmount."

The parties went down to trial in April, 1907, on the issues thus raised by the preliminary act and the pleadings. There was, as is often the case, much conflicting evidence and, in the result, the learned judge found that there was an actual collision between the

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two steamers which caused the damage to the "Neepawah's" propeller, not, as charged in the preliminary act and the pleadings, from the *bow* of the "Westmount" striking the stern or quarter of the "Neepawah," but from the *stern* of the "Westmount" striking the stern or quarter of the "Neepawah" as the former passed the latter and was straightening in order to enter the lock 24.

This was an entirely new and different case and opened up entirely new and different grounds of negligence, but the learned trial judge held that the plaintiffs' pleading

had not apparently misled the defendants and that the point as to the preliminary act and pleadings were not taken at the opening or early in the case and the plaintiffs might amend their pleadings as it seemed the defendants had not been prejudiced.

We are, however, clearly of the opinion that the learned judge was in error in holding that the plaintiffs' pleadings and preliminary act had not misled the defendants as to the case to be tried, and that he also fell into an error in thinking that the point had not been taken by the defendants at the opening or early in the case, and that the defendants had not been prejudiced.

The record shews clearly that the objection was taken as soon as the evidence of the first witness, Captain Patenaude, shewed that the plaintiffs were not going to stand by the statements in the preliminary act and the pleadings, but were about to put forward a new and different case. No application was made to amend the pleadings at the trial so as to enable the evidence to be given on the new and altered case. The captain of the "Neepawah" had been examined on discovery and had given his evidence confirming the case

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as put forward in the preliminary act and the pleadings. The defendants did not, therefore, have any notice of the contemplated change of front or of the new case they were called upon to meet.

That original case substantially charged the officers of the "Westmount" with so badly navigating their steamer that before her bow had passed the port quarter of the "Neepawah" it had negligently been run into or against such port quarter and inflicted the damage to the propeller by forcing it against the boom along the canal. The new case found by the learned judge and to meet which the pleadings were directed to be amended was that the "Westmount's" stern had been swung against the "Neepawah's" stern or quarter. It was an entirely new case, involving questions of negligence on the "Westmount's" part different from those involved in the case as originally stated in the preliminary act and pleadings and calculated greatly to prejudice the defendants. It was not one which, in our opinion, should, under the circumstances, and at the time, have been allowed. It is not necessary for us, in the view we take of this case, to determine whether in any case the court would allow a party at the hearing to contradict his own preliminary act. The authorities collected in Williams & Bruce's Admiralty Practice (3 ed.), at pages 368-9, seem clear that, at any rate, applications to amend mistakes in the preliminary act will not be entertained by the court. The object of the rule requiring these preliminary acts is to obtain a statement *recenti facto* of the leading circumstances of the case so as to prevent either party varying his version of the facts to meet the allegations of his opponent. The preliminary act must, therefore, remain as it was prepared

and filed and will not itself be allowed to be amended. But the same rule does not necessarily follow with respect to the pleadings.

In the case of *"The Frankland"*(1), in 1872, Sir Robert Phillimore allowed an amendment to be made in the defendants' answer, but refused to allow any in the preliminary act, saying the objection to the latter did not apply to an amendment to the answer *as the application was made before any evidence had been taken.* Afterwards, in 1881, in the case of *"The Miranda"*(2), the same learned judge in refusing an application to allow a mistake in a preliminary act to be amended, even though the application was made before the hearing of the suit, observed that he adhered to the practice he had always followed of refusing to allow amendments to the preliminary acts. But he went on to say, at page 186:

> The parties in an action of damages are not bound, in their pleadings, to repeat any error or omissions which may exist in the preliminary acts, and it is open to them in their statement of claim or statement of defence to state correctly any facts which may have been omitted or erroneously stated in their preliminary acts.

From these authorities it would appear that the statement in the preliminary acts are not absolutely binding on the parties making them if they have been corrected in the pleadings before evidence has been taken.

In the following year (1883), in the case of *"The Eugènie"*, Mr. Justice Butt is said, in a note to Williams & Bruce, Admiralty Practice (3 ed.), at page 368,

> to have intimated that if the parties in damage suits chose to avail themselves of pleadings framed in accordance with the forms ap-

(1) L.R. 3 A. & E. 511. (2) 7 P.D. 185.

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pended to the new rules so that the pleadings afforded the court no sufficient information, the parties would be held by him most strongly to the statements contained in their preliminary acts; and that any mistake or incorrect statement in the preliminary act of either party would be visited most strongly against the party on whose behalf it was filed.

It would, therefore, appear that an error or misstatement of a material fact in the preliminary act is not absolutely fatal or binding on the party making it. Such a mistake may be rectified in the pleadings afterwards, and, if so rectified, will be a subject for comment at the hearing. But, if the parties go to trial without pleadings, or prepare pleadings which do not correct the errors or mis-statements of the preliminary act, and do not afford the court sufficient information, in those cases, the parties will be held most strongly to their preliminary acts.

Now, in the case before us, there does not appear to have been any application to amend the pleadings before trial or any chance given to the defendants to shew prejudice. The parties had gone down to trial on a clear and distinct issue respecting the navigation of their ships. The pleadings did not correct the grave and important error of the preliminary act of the plaintiffs. The evidence shewed and it is admitted that the plaintiffs' claim as formulated in the preliminary act and pleadings could not be sustained. In addition to that it appeared in the evidence that, on the occasion of the alleged collision, the captain of the "Neepawah" did not make any complaint against those aboard of the "Westmount," either to them or to the lock-master or any one else; that, in the discharge of his duty, he had shortly afterwards entered the fact of his loss and damage in his log-book, as follows:

Broke my wheel between lock 23 and 24 at 11 p.m., weather very dark, no wind; start to blow S.S. West at 1.30 a.m., Friday.

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Not a word or hint of their having been any collision between the steamers or that the "Westmount" was in any way responsible for the breakage. Then, although the captain stated he had made a protest at Fort William and notice to produce it had been given, no protest was produced. In matters of this kind where serious loss and damage have been caused by collision and consequent demurrage, it is common knowledge that protests are made as soon after the accident or injury as reasonably possible, so as to record the facts officially and to enable the owners to recover their insurance.

All these circumstances combined to require a very strong and plain case to be made out before an amendment, practically substituting, at the conclusion of the trial, a new case for the one originally formulated, should have been made, and, in my judgment, no such case was made out.

But, taking the judgment as it stands, I am not able to concur in the finding of fact. One witness, and one only (Legault), pretends to speak from sight or knowledge of the actual collision having taken place as found by the learned trial judge. His evidence, however, on the point, is directly opposed to a large mass of testimony of the officers and men of the "Westmount," confirmed by that of the lock-master, Hillman and to some extent by that of the lock-master, Jordan, that the propeller was broken before the vessels could assume the relative positions in which the judgment finds they touched each other. At the moment when the propeller was heard to break, these witnesses concur in stating that the "Westmount" was one-half way or, at the most, two-thirds way past the "Neepawah," according to some of them, the bow

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of the latter had swung out, whether caused by the wind or by some other cause, and the reversing of her screw had caused it to break against the boom. The position of the bow of the "Westmount" at the time the propeller broke was, according to these witnesses, about abreast of the port quarter or stern of the "Neepawah," while the stern of the "Westmount" would necessarily not then have passed the "Neepawah's" bow. But the case, as originally framed, that the bow of the "Westmount" then collided with the stern quarter of the "Neepawah" has been abandoned as untenable and the new case attempted to be set up is absolutely inconsistent with the mass of testimony shewing that the propeller was broken before the bow of the "Westmount" passed the stern of the "Neepawah." This most important fact seems to be corroborated by the evidence of the captain of the "Neepawah" himself.

No good purpose can be gained by a critical analysis of each witness's evidence. The contradictions are impossible of reconcilement. The only witness, McLeavy, who above all others had the best chance to see whether the stern of the vessels collided at the place and moment found, distinctly and emphatically denied it and said that their sterns passed each other at least three feet apart.

The learned judge has, I venture to think, misunderstood this witness's testimony.

The effect, it seems from the judgment to have produced on his mind, was that the witness swore "he saw the sterns come together"; which, I think, from the way he quotes the statement, the learned judge understood as actually colliding. Now, a reference to this witness's evidence shews that, being a fire-

man, he ran up to see the boats passing and stood on the port quarter, opposite the towing machine, aft of all the deck-houses, leaning over the side with his arms on the rail, and did not see the "Neepawah" until they were, at least, half-way past each other. The bluff of the "Neepawah's" bow was about ten feet away from the "Westmount's" amidships, when he first noticed the other vessel. The sterns of the vessels were about three feet apart at the time they passed each other. The "Neepawah's" engines were stopped when he got abreast of her stern and he heard nothing and did not know the wheel had broken before he reached the lock. In response to the judge's question:

> Can you say definitely, now, whether the boats touched?

he answered,

> Yes. I am sure the boats didn't touch.

Now, the position this witness stood in enabled him to see and judge on this crucial point better than any one else. His evidence confirms that of the witnesses who proved that the propeller broke before the sterns came near each other at all. In point of fact, it had broken before he came on deck, as the engines had then stopped. So far from the judge discrediting this witness, he appears to have accepted him as a truthful witness, though at the same time misunderstanding what he said.

On the whole and recognizing the full difficulty of reconciling the conflicting testimony of the witnesses, I have concluded that it clearly appears the plaintiffs failed to make out the new case of negligence he was permitted to set up.

I do not desire to be understood as assenting to the assumption of the trial judge that the rules with

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respect to crossing steam vessels applied under the circumstances to these steamers, nor is it necessary for me to express any opinion whether the canal level was a narrow channel within the meaning of the rules or not.

My decision is based, first, upon the ground that there was no evidence at all to sustain a finding for the plaintiff, on the case as set out in the preliminary act and the pleadings; that, under the facts as proved, it was not proper to have made the amendments allowed after the trial and so set up an entirely new and different case from that stated in the preliminary act and pleadings, and that the preponderance of the evidence is clearly against the plaintiffs even on the new case set up.

The appeal should be allowed with costs in this court and in the court below, and judgment given for the defendants, dismissing the action.

IDINGTON J. agreed that the appeal should be allowed with costs and the action dismissed with costs.

MACLENNAN and DUFF JJ. concurred with Davies J.

Appeal allowed with costs.

Solicitors for the appellants: *Smythe, King & Smythe.*

Solicitors for the respondents: *Chisholm & Logie.*