

the use of water sufficient for such maneuver. The space in which she was compelled to navigate was greatly reduced by the presence in the slip of more boats than the regulations of the dock-master permitted, but the space was still sufficient to warrant a reasonable expectation that she could draw out without doing any greater damage than would result from the ordinary contact of boats when moving in crowded slips. She exercised due care in leaving, did not move rashly, notified the intruding boats to withdraw, and provided a steam-tug, by whose assistance she might counteract the danger to be apprehended from the tide pressing her against the pier, and thus swinging her stern out against them. So far as the evidence shows, she moved out carefully, and nearly in a straight line, although, as her greatest breadth of beam drew towards the outer end of the pier, she did come in contact with the outermost boat, pressing it with considerable force against its neighbor. Even then it is not likely that the libelant's boat would have been damaged had it not been that she was berthed against a boat so much shorter than herself that the pressure she received from the other boats was not evenly distributed. Were this a controversy between the Express and the intruding boats, the latter would be held solely in fault; their wrongful act, which unnecessarily and unlawfully embarrassed the Express when leaving her slip, being the immediate and proximate cause of the collision. The mere fact that the libelant's boat was not herself in fault does not change the situation; her remedy for the injuries from collision with the other canal-boats is against them, not against the Express.

Decree appealed from is affirmed, with disbursements of the circuit court and the costs of this court.

THE CLARA.

THE RELIANCE.

McCAFFREY *et al.* v. THE CLARA AND THE RELIANCE.

(District Court, S. D. New York. February 14, 1892.)

1. COLLISION—EAST RIVER—CORLEAR'S HOOK—STATUTE AS TO MID-RIVER—HUGGING SHORE—SIGNALS OMITTED.

The tug C., with a tow, was going up the East river with the strong flood-tide, within 400 feet of the New York shore, and was nearing Corlear's Hook. The steam-berge R., coming down stream nearer the New York shore, on passing from the slack-water into the strong flood-tide off the Hook, setting a little across the river, swung her head to port, and collided with the tow of the C., though both vessels reversed. *Held*, that the C. was in fault (1) for disobeying the statute which required her to take the middle of the river; also (2) for not signaling; and (3) for not giving more room for the swing of the R. in the cross-tide. The R.,

coming down on her own side of the river in slack-water, and not expecting to meet any vessel coming up in the C.'s situation, was held in fault for not keeping a proper lookout, and consequently not doing all she might have done to counteract the tide.

3. SAME—STATUTES—WHEN MATERIAL—CUMULATIVE—PRECAUTIONS AGAINST COLLISIONS.

The non-observance of the statute requiring vessels to navigate in the middle of the East river is material when it causes embarrassment to the other vessel. To prevent collisions, the rules impose cumulative duties, designed in part to avert the consequences of mistake or negligence. Hence the non-observance of a rule, such as to give signals, does not become immaterial, merely because observance of the rule would not have been necessary if the other vessel had done her duty, or had not been negligent.

In Admiralty. Libel by owner of canal-boat George Adams to recover damages for collision.

Carpenter & Mosher, for libelants.

Goodrich, Deady & Goodrich, for the Clara.

Wing, Shoudy & Putnam, for the Reliance.

BROWN, District Judge. At about 8:30 A.M. on October 20, 1891, as the steam-tug Clara, with the canal-boat George Adams lashed to her port side, was proceeding up the East river in the strength of the flood-tide, the canal-boat, when off Corlear's Hook, came in collision with the steam-barge Reliance, loaded with coal, which was coming down the river and rounding Corlear's Hook near the shore. The Reliance was loaded deeply by the head, and on passing from the slack-water near the shore into the strong flood-tide, which sets from Jackson-Street pier towards Williamsburgh, she was swung round to port; and though both reversed full speed, they could not avoid collision.

This collision, like so many others that occur at Corlear's Hook, is directly traceable to the persistent refusal of those navigating round the Hook to observe the statutory requirement to go as "near mid-river as may be." For the purpose of taking advantage of the slacker water at one place or another above or below the Hook, tugs continually take the additional risks that a violation of the statute involves. In the present case, so far as I can see, the Clara was without excuse. Although the evidence is contradictory as to her precise position in the river, I am satisfied that she was not over 400 feet from the New York shore, if so much, or one-quarter of the width of the river there. A number of witnesses testify she was only half that distance out. Of the disinterested witnesses, those who were in the best position to observe make the distance from the New York shore the smallest. The only excuse offered by the Clara for not keeping the middle or right-hand side of the river is the set of the tide towards the Williamsburgh shore. But that suggestion is without force; there was nothing in the tide that presented the slightest difficulty in going in mid-river, or on the right-hand side of the river, had the Clara been so inclined. The river was clear of other vessels. The Clara was further in fault for not signaling as required by the rules of the supervising inspectors. No signals were given

by either tug. The excuse given by the Clara for not signaling is that she was so much further out in the river than the Reliance that there was no need of signals; but the result proves the contrary. It is further urged that both her place in the river and the absence of a signal were immaterial, because there was time enough and space enough for the vessels to avoid each other as they were going, and without the giving of signals. If this argument were sound, no signal would ever be material, since there is always time enough and space enough if each boat does her duty otherwise, except in cases of inevitable accident. The same reasoning would make the want of a proper lookout on the Reliance immaterial, since the absence of a lookout would have done no harm had the Clara been near mid-river, where the statute required her to be. The argument wholly overlooks the object of the various rules for the avoidance of collisions, which is to provide cumulative guaranties for the preservation of life and property, rather than to allow the safety of all to be imperiled upon the chance of a single neglect. To prevent lamentable accidents, often involving the loss of life, these cumulative duties are imposed by the rules and regulations upon both vessels. Timely signals are required, because such signals tend to avert the natural consequences of carelessness, and the lack of previous timely observation on one side or the other, as well as to enable the boats to come to a common understanding as to the mode of passing. Navigation in mid-river is required in order to give larger opportunities for maneuvering, and to avoid the special dangers arising near the shore, and any interference with other vessels there.

Next to Hell Gate, Corlear's Hook and the Battery present the greatest dangers in East river navigation, and the observance of all the rules to avoid collision is in those places most imperative. I think it probable, as is urged by the counsel for the Clara, that if a good lookout had been kept on the Reliance, and if her wheel had been put hard a-port at the moment when it was put slightly to starboard, and thus no delay in porting had happened, the collision might possibly have been avoided, although this is not positively certain. But the Reliance did not keep a proper lookout. She was pursuing the usual course, coming down on the right-hand side of the river in slack-water, and apparently did not expect to meet a vessel coming up in the Clara's position. She was inattentive and negligent, and is, therefore, chargeable with her own fault, and is liable therefor. But that does not remove the fault of the Clara in coming up the river in the strength of the flood-tide near the New York shore without good reason, and where her course was a serious threat and embarrassment to the Reliance, coming down on her own side of the river near the New York shore in the customary manner; because it would require, I think, the utmost care and effort by the Reliance, from the time the Clara's position and course became first visible, to avoid on the one hand the long Jackson-Street wharf, and to avoid on the other hand being set across against the Clara by the strong cross-current the moment the Reliance struck it.

The rule constantly applied is that, if the navigation of the one vessel contrary to the statute produces difficulty and embarrassment to the other vessel, the violation of the statute shall be held to be a contributing fault, since one of the objects of the statute is to prevent such embarrassments, (*The Columbia*, 29 Fed. Rep. 716, 719; *The Rockaway*, 38 Fed. Rep. 856, affirmed 43 Fed. Rep. 544; *The Garden City*, 38 Fed. Rep. 860, and cases there cited;) but if it causes no embarrassment, it is not deemed a proximate cause of the collision, and will be disregarded, (*The Columbia*, *supra*; *The Titan*, 44 Fed. Rep. 510, affirmed 1 U. S. App. 123, 49 Fed. Rep. 479; *The Emperor*, 46 Fed. Rep. 143.)

So also, had a signal been given by the Clara as required by the inspector's rules, there is no reason to suppose the attention of the Reliance would not have been attracted by it. The Clara has not shown, and cannot show, that such a signal would have been of no use. *The Pennsylvania*, 19 Wall. 125, 136; *The Dentz*, 29 Fed. Rep. 528. If the presence of the Clara had been thus made known, earlier efforts would naturally have been made by the Reliance to withstand the strong set of the tide which swung her against the Clara's tow. The lack of a signal thus presumptively contributed directly to the collision.

When the Reliance was seen by the Clara at some distance, it was, moreover, the Clara's duty to go to the right a sufficient distance to allow for any swing of the Reliance that the tide might cause without her fault. *The Fred Jansen*, 49 Fed. Rep. 254, 1 U. S. App. 92. There was nothing to prevent the Clara from doing so.

The evidence does not warrant the finding that the Reliance was in fault for being loaded by the head, nor because the tide got the best of her for a few moments. Nor was such a swing to be wholly unexpected; it happens occasionally, and the Clara took the risk of it in going so near the shore. I have no doubt the Reliance took the ordinary precautions, and, after the Clara was seen, did as well as she could. Her fault was in not seeing the Clara sooner; but for this the Clara was also partly responsible, because she did not give the signal which the law required of her. The fault of the Reliance being obvious from want of a proper lookout, the damages must be divided, and a reference ordered to compute the amount, if not agreed upon.

NORTON *et al.* v. WALSH.

(Circuit Court, E. D. Wisconsin. April 8, 1892.)

REHEARING—NEWLY-DISCOVERED EVIDENCE—LACHES.

Where parties, having in their possession evidence deemed material, appeal without moving for a rehearing, and after six months dismiss the appeal and ask for a rehearing on the ground of newly-discovered evidence, their laches is inexcusable, and the motion should be denied.

In Equity. Suit by Edwin Norton and others against Francis A. Walsh for infringement of patent. Motion for rehearing upon newly-discovered evidence. Overruled.

N. C. Gridley, for the motion.

Munday, Everts & Adcock, opposed.

Before GRESHAM, Circuit Judge, and JENKINS, District Judge.

JENKINS, District Judge. The bill was filed for an alleged infringement of certain letters patent of the United States. Upon final hearing before the district judge, an interlocutory decree passed for the complainant on the 5th day of January, 1891. A motion for rehearing was presented to the circuit and district judges on the 25th day of June, and overruled on the 13th day of July, 1891. Thereupon an appeal was prayed and allowed to the circuit court of appeals, which on the 12th day of January, 1892, was dismissed upon motion of the appellant. The mandate of the appellate court was filed here on the 16th day of January, and the present motion filed on the 18th day of January, 1892. The motion proceeds upon the ground that the inventions claimed under the complainants' patents were anticipated by certain newly-discovered patents disclosed in the moving papers. So far as respects all the patents now sought to be introduced as newly-discovered evidence, except No. 79,890, mentioned below, no excuse is stated for failure to plead them or to make timely profert of them in evidence. The answer asserts, in anticipation of the inventions claimed by the complainants, 20 American, 5 English, and 3 French patents. The search in the patent-office, preliminary to pleading, is stated to have been thorough and exhaustive. These patents now offered as newly-discovered were, so far as disclosed, accessible to the searcher, the then counsel of the defendant. No failure to discover them is asserted. It must be presumed, therefore, that they were known to him, but deemed immaterial to the controversy.

The failure to find letters patent No. 79,890, issued to Becker, Ross, and Sturnagal, is excused upon the facts stated in the moving papers. But regarding this evidence as newly-discovered, not cumulative, and that due diligence has been used prior to its discovery, we are yet of opinion that this motion must be overruled for failure to make timely presentation of the matter to the court. The patent was discovered by counsel prior to the argument of the original motion for rehearing in June, 1891. As stated in the moving papers, it was referred to upon that argument, and the court declined to consider it because it was not