

ON APPEAL FROM THE TORONTO ADMIRALTY DISTRICT.

Between

JOHN M. TUCKER (PLAINTIFF).....APPELLANT;

AND

THE SHIP *TECUMSEH* (DEFENDANT).....RESPONDENT.

Shipping—Collision—Wrong manœuvre when collision imminent—Lack of signal—Liability.

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Jan. 9.

When the master of a ship, in danger of collision with another ship, instead of porting his helm puts it to starboard and so makes the collision inevitable, the absence of a signal required by a local regulation to be given by the other ship in such circumstances, does not relieve the ship primarily responsible for the collision from full liability if the omission to give such signal did not contribute in any way to the accident.

APPEAL from a judgment of the Local Judge in Admiralty for the Toronto Admiralty District in a case of collision in the Detroit River.

The facts of the case are stated in the reasons for judgment of the trial judge reported *ante* (1).

July 11th, 1905.

J. E. Hanna, for the appellant, contended that the court must be governed by the circumstances surrounding the collision in coming to a conclusion, because it has become the practice of the courts not to implicitly rely upon the oral testimony produced by either side in cases of collision. There is always contradiction between the story of one set of witnesses and that of the other, which of course is not always due to deliberate misstatements of fact.

The whole circumstances of the collision negative the finding that it was due to inevitable accident. If the

(1) See p. 44.

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Lilly had (1st) kept her course; or (2ndly) had signalled the course she intended to take to the *Tecumseh*; or (3rdly) had stopped and backed when the collision was imminent, the accident would have been averted. (*Marsden on Collisions* (1); the *Cuba v. McMillan* (2); the *Khedive* (3); Art. 18 of English Rules for Preventing Collisions (4); the *Marpesia* (5). Furthermore, there was no look-out on the *Lilly*. The worst that can befall the *Tecumseh* on this appeal is a division of damages.

J. H. Rodd, for the respondent, argued that no court of appeal would disturb the findings of the trial judge upon the facts in this case. *Collier v. Wright* (6): *Inchmaree Steamship Co. v. The Astrid* (7).

The respondent relies on the findings of fact of the learned trial judge, and the cases cited in his reasons.

Mr. *Hanna* replied.

THE JUDGE OF THE EXCHEQUER COURT now (January 9th 1906) delivered judgment.

This is an appeal by the owners of the *Tecumseh* against a judgment of the learned Judge of the Toronto Admiralty District, whereby in an action for damage by collision he pronounced in favour of the plaintiff's claim and condemned (with costs) the said ship and her bail in an amount to be found due on a reference thereby directed.

When the appeal came on for argument it turned out that the record was not complete. At the request of the parties however the argument was proceeded with and concluded, on the understanding that the missing papers would be furnished for the consideration of the court. These papers were filed on the 31st of October last, and I have now had an opportunity to examine carefully the record in the case.

(1) 3rd ed. pp. 144, 496, 499.

(2) 26 S. C. R. 651.

(3) 5 App. Cas. 876.

(4) In *Marsden on Collisions*, 3rd ed. p. 434.

(5) L. R. 4 P. C. 212.

(6) 24 S. C. R. 714.

(7) 6 Ex. C. R. 218.

The collision took place a little before midnight on the 3rd of November, 1903, near the Bar Point lightship in the Detroit River. Immediately before it occurred the *Lily*, a steamer belonging to the plaintiff, was on her way down the river, and the *Tecumseh* was on her way up. The former was light, the latter loaded. The lights of each vessel were seen from the other; but the evidence as to their relative positions is contradictory. The channel of the river generally used by ships was, at the place where the two vessels met, about eight hundred feet wide. The Bar Point lightship was on the western side or edge of the channel. The *Tecumseh* was near the fairway or middle of the channel. The *Lily* according to the evidence of her master, was on the western side of the channel. Just before sighting the *Tecumseh* she had passed on her port side an unknown steamer going up stream. Then the *Tecumseh* came in sight showing her red light, but not her green light. In that position there was no danger of collision. But a little later the *Tecumseh* took a sheer towards the west side of the channel, shutting out her red light and opening up her green. To avoid the collision the master of the *Lily* ported her helm and changed her course more to the west. But it was not averted. The *Tecumseh* struck the *Lily* on the port bow.

According to the master of the *Tecumseh* the *Lily* when he first sighted her was a little on his starboard bow and east of the centre of the channel, and he expected her to pass on the starboard side. He did not see the unknown steamer that preceded him up the river. All the *Lily's* lights were visible. But soon after she changed her course to the west and shut out her green light. Then he changed the course of the *Tecumseh* by starboarding his helm, with the result that has already been mentioned. The evidence discloses a good deal of confusion about the lights and some manifest errors.

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The master of the *Lily* is corroborated by the testimony of an independent witness, who from the lightship saw what took place; and it is probable that his story of what happened is true. But taking the evidence of the master of the *Tecumseh* to be correct there is no excuse for the course he adopted. Being in a position in which he should have ported his helm, he put it to starboard, and it was this wrong manœuvre that caused the collision. It is contended, however, that the master of the *Lily* was also to blame for not complying with a local regulation which requires the vessel descending the river to give a signal to show which side of the channel she elects to take. No such signal was given, but that did not it seems to me, contribute in any way to the accident. If the evidence of the master of the *Lily* is accepted he was on the west side of the channel all the time and out of any danger of a collision, except from some such mistake as that which the master of the *Tecumseh* made. But even if the *Lily* crossed towards the west from a point east of the centre line of the channel, as the master of the *Tecumseh* says she did, the latter could see what she was doing, and was as well aware of it as though the prescribed signal had been given. The absence of the signal affords no excuse for the manœuvre that caused the collision. For that the master of the *Tecumseh* was, it seems to me, alone to blame; and after the latter had committed this error the master of the *Lily* did all that he reasonably could to avert the consequences of it.

The appeal will be dismissed and with costs.

Judgment accordingly.

Solicitor for the appellant : *J. W. Hanna.*

Solicitor for the respondent : *J. H. Rodd.*
