TORONTO ADMIRALTY DISTRICT.

1905
May 17.

BETWEEN

JOHN N. TUCKER..........................PLAINTIFF;

AND

THE SHIP *TECUMSEH*..........DEFENDANT.

Admiralty law—Narrow channel—Risks—Collision—Rule of the Road—Right of way—Blast signals.

The Rule of the Road on our rivers and lakes applicable to "Narrow Channels" is set out in Art. 21, R. S. C., c. 79, which applies to foreign as well as to British and Canadian ships and is as follows: "In narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or midchannel which lies on the starboard side of such ship."

Held, 1. That a channel 800 feet wide comes within the designation of "Narrow Channels" as mentioned above, and that a ship violated said rule when she steered towards the westward and crossed towards the channel on her port side instead of keeping in the channel on her starboard side.

2. When two steamers are meeting on the Detroit River the descending steamer shall have the right of way; and it is no defence to an action for collision to prove that at the moment of collision it was too late to take a precaution which ought to have been taken earlier to avoid the risk of a collision, the rule being that every steamship, when approaching another ship, so as to avoid the risk of collision, shall slacken her speed, or stop and reverse if necessary. The more imminent the risk of collision, the more imperative is the necessity for implicit obedience to the rule.

3. Where a steamer some distance from another has indicated by the course she is steering that she cannot be considered as a steamer "meeting another end on," the state of things does not arise which renders it incumbent on her to give blast whistles indicating which side she proposes to take on passing.

THIS is an action brought by the plaintiff against the steamer *Tecumseh* to recover damages for injuries to his steamer the *Lilly* as the result of a collision

which took place on the night of the third day of November, 1903.

The trial of the case took place at Windsor before the Local Judge for the Toronto Admiralty district on the 31st of January and the 1st of February, 1905. A written argument subsequently was put in on which judgment was reserved.

The facts of the case are set out in the reasons for judgment.

J. H. Rodd for the plaintiff:

The first question to be determined in this action as it appears to me, is as to the position of the ship *Lilly* with respect to the channel of the Detroit River just prior to the accident, and upon this point there is a direct conflict of evidence, although the greater weight of the evidence is in favour of the plaintiff's contention.

It was as a matter of fact the usual custom of the *Lilly*, as she plied between Mount Clemens and Toledo, to go on the west side of the Bar Point Lightship; and one would naturally expect to find her from the southerly end of Bois Blanc Island to the lightship, steering in a direction which would take her in her usual course and the nearer she approached the lightship the further westward from the centre of the channel she would be.

Apart, however, from the probabilities of the case, we first have the evidence of Captain Dubay who with the wheelsman was standing in the pilot house commanding the course of the ship, and he states in the most positive terms that from the island down he was well to the westerly side of the channel and at the time of the accident he was in fact west of the channel bank. The unknown steamer at any rate, threading almost the centre of the channel, passed the *Lilly* two or three hundred feet to the eastward, and

1905
TUCKER
v.
THE SHIP
TECUMSEH.
Argument of Counsel.

this of itself is the strongest evidence that the plaintiff's ship was well out of the way of all passing steamers.

Then it is further to be observed, as the evidence establishes, that at the moment of passing the unknown steamer the *Lilly* was heading almost directly for the lightship and the captain then changed his course half a point to the westward so as to keep the vessel clear of the lightship, and as it approached nearer and nearer must have gone farther and farther from the centre of the channel.

The wheelsman of the ship *Lilly* is equally positive as to the position of the ship and the course which it was pursuing. The mate, engineer and fireman were not in a position to know what took place before the accident, but the moment of the collision they rushed up on deck before either vessel had an opportunity to move any appreciable distance, and their evidence is that they found the plaintiff vessel westward of the channel bank and three or four hundred feet from the centre of the channel.

As opposed to this evidence we have the evidence of the captain of the *Tecumseh*, Mr. Anderson and the sailor boy George Decaire, whose evidence, even if it were of any importance, could not, it is submitted, be relied upon as trustworthy, and the evidence of William Spencer, the engineer, who was looking out the side window of the vessel, and is now attempting to swear as to the direction of a ship a mile away.

The very fact that these men swear positively that they guaged the position of the *Lilly* by two range lights, which they claim to have seen upon her, and by these to have determined the position of the approaching vessel in relation to their own, is sufficient of itself to prove that they were absolutely mistaken or were wilfully stating what was untrue, when it is remembered that the evidence of the plaintiff and

1905

TUCKER
v.
THE SHIP
TECUMSEH.

Argument of Counsel.

a disinterested witness, Captain Stevenson, proves beyond a doubt that not only did the steamer *Lilly* not have an aft mast light but in fact did not even have an aft mast. It was, therefore, impossible for these persons to tell the position and course of the plaintiff's ship, and the evidence upon this point, it is submitted, must be thrown aside.

But we are not obliged to depend upon the testimony of the interested persons in either boat. John Smith, a watchman on Bar Point lightship, who was on watch that night, observed all three of the boats in question, and, having no interest whatever in this matter, we submit with confidence that his statement of the affair should be taken as the correct one. He states in the most positive terms that the steamer *Lilly* was proceeding downward well to the westerly side of the channel of the river, that it passed the unknown steamer to the westward at a safe distance of two or three hundred feet, and that the *Tecumseh* was following in the wake of the unknown steamer and but a short distance behind, and if it had continued in the course which it was pursuing would have passed the *Lilly* at an equally safe if not greater distance.

Can there be any doubt upon this testimony alone that the steamer *Tecumseh* just after passing the lightship for some reason or other not disclosed took a sudden sheer to the westward and before it could be in any way avoided by those in charge of the *Lilly*, caused the collision resulting in the damage complained of.

The very fact that not a single person on the steamer *Tecumseh* observed the unknown vessel which was about two or three lengths ahead, is of itself the strongest evidence that they were keeping a very indifferent watch, and points strongly to negligence in the navigation of the ship.

1905
TUCKER
v.
THE SHIP
TECUMSEH.
Argument of Counsel.

It is submitted, therefore, with confidence that the evidence given on behalf of the plaintiff in this case establishes beyond a doubt that the steamer *Lilly* was well out out of the channel and out of the course of the up bound vessels.

But even if, as the defendants themselves allege, the steamer *Lilly* was coming down the river on the starboard bow of the *Tecumseh* at a distance of a mile away, and did proceed along in that course until within five or six hundred feet of the steamer *Tecumseh*, and then took a very sharp and sudden turn to the westward across the bow of the *Tecumseh*, it seems to me that the captain and others in charge of the *Tecumseh* were guilty of very gross negligence in directing the course of the *Tecumseh* as sharply to the westward in the same direction as the *Lilly*, as it must have been apparent to any reasonable person that a collision in such a case could hardly be avoided.

The evidence of Captain Anderson is that the *Lilly* started to turn when four or five hundred feet away, while that of Decaire and Spencer puts the distance at six hundred feet. Putting the distance between these estimates, say five hundred feet, it seems to me that if instead of turning to the west the captain of the *Tecumseh* had put his wheel hard aport, and sent his ship sharply to starboard, the accident would have been entirely avoided. At any rate the common sense of the matter would justify one saying that such a proceeding was the only one that gave any opportunity of avoiding the collision.

Even though one person is negligent, yet if the other can by the exercise of reasonable care, avoid the accident, then the person so failing to exercise such reasonable care is guilty of negligence and liable for the damages caused (1).

(1) Marsden on Collisions, 4th ed. p. 25.

1905

TUCKER v. THE SHIP TECUMSEH.

Argument of Counsel

It is submitted, therefore, upon the evidence, first, that the steamer *Lilly* was proceeding along the extreme westerly side of the channel of the Detroit River and quite clear of all up bound vessels, and that she was struck by reason of the sudden sheering of the ship *Tecumseh*, or secondly, even if the story of the defendants can be accepted, and it cannot be, we argue, the ship *Tecumseh* could have avoided the accident by the exercise of ordinary common sense.

Then as to the damages. In *Marsden on Collisions* (1), it is clearly set forth that the owner of a damaged ship is entitled to have his ship properly repaired, and to be paid the cost of making such repairs, and if in making such repairs her value is in fact increased, he is entitled to the advantage thereof, and no deduction therefor is to be allowed in estimating the damages to be given.

It is pointed out on this page that a deduction of one-third new for old is not allowed in this kind of action, and in that respect differs from an adjustment under a maritime policy. This being so, the plaintiff is entitled to the amount which he proved at the trial to have spent upon making repairs; and this should be ordered to be paid by the owners of the ship, together with the costs of this action.

J. W. Hanna for defendant:

In this action the court can find, first of all, that the ship *Lilly*, owned by the plaintiff, was wholly to blame.

Secondly: That the ship *Tecumseh* was wholly to blame.

Thirdly: That both ships were negligent, and divide the damages.

Of course if I am able to convince the court that the first finding is the correct one, that ends the case;

(1) 4th ed. pp. 121, 122.

1905
TUCKER v. THE SHIP TECUMSEH.
Argument of Counsel.

and I purpose only contending that the first one is the correct one, and failing in that I purpose contending that the final finding would be correct.

The evidence depends entirely upon the sworn statement of the crew of the *Tecumseh* and *Lilly* that were on duty that night with the exception of some evidence given by John M Smith, who claims to have been on the lightship on the night when the accident occurred, which is put in to support the crew of the *Lilly*. The theory of the plaintiff is that the *Lilly* was proceeding in a southerly direction hugging the western channel bank of the Detroit river, and when close to the Bar Point Lightship the *Tecumseh*, which was going up the river, suddenly veered and ran into the *Lilly*. The evidence in support of that contention rests entirely upon that of Clem Dubay, the captain, Frank Thomas, the wheelsman, and John Smith, aboard the lightship. Their evidence is contradicted by Captain Anderson of the *Tecumseh*, his wheelsman, engineer and fireman. It is not pretended that the engineer and fireman of the *Lilly* saw anything of the accident; but the engineer of the *Tecumseh*, as well as the fireman were in a position on the starboard side of their ship, and looking out of a window observed the *Lilly* going down, at first evidently intending to pass between the *Tecumseh* and the Canadian shore. Suddenly she veered, crossing starboard to her right. The captain of the *Tecumseh* in order to keep out of her way put his wheel to starboard going further to port. The *Lilly* still persisted and when too late, the captain of the *Tecumseh* found that the *Lilly* was persisting in crossing upon the American side at a time when it would have been dangerous for him to change his course, as a good seaman he kept on the course he was going with the result that the two boats came together in a slanting position near the western bank

of the channel and some three or four hundred feet north of the lightship. Captain Anderson and the officer in charge of the wheel support that contention. Let us for a moment look at the evidence of Thomas, who was in charge of the *Lilly* up to a few moments before the collision, and it bears out the contention of the *Tecumseh.*

"99. Q. You got more benefit in the centre of the channel than at the sides?—A. Yes.

100. Q. On this occasion you were taking advantage of that?—A. Certainly.

101. Q. Any good sailor coming down the river would take advantage of the current?—A. Certainly.

102. Q. He would be a land-lubber if he crept along the side when he could have the benefit of the current?—A. Yes.

103. Q. When you got down near the lightship you concluded to take a cut across towards Toledo?—A. Yes.

104. Q. When you got in the middle of the course where the big fellows are you concluded you would go over towards Toledo, and the Captain told you to steer across that way?—A. Sure, yes.

105. Q. You didn't notice the *Tecumseh* at all?—A. No."

This is the man that was steering the boat, and this is his evidence. It is exactly in accord with the evidence of the *Tecumseh*.—As against this there is the evidence of Captain Dubay, and this young man Smith, who only saw what occurred immediately before the collision; and who had no reason to expect anything was going to happen until it actually happened, as hundreds of boats pass that point in the evening and it would be unreasonable to expect the mere whistling of two boats passing or approaching one another would have attracted his attention.

1905
TUCKER
v.
THE SHIP
TECUMSEH.
Argument of Counsel.

Let us have regard to the kind of navigators that were in charge of the *Lilly*. Take it from their own evidence; hear what Captain Dubay says:

"29. Q. Where did the accident occur — the collision?—A. I should judge about four or five hundred feet from the lightship.

"30. Q. What lightship is that. What is the name of that ship?—A. I don't know the name of it.

"31. Q. The lightship where?—A. In Lake Erie.

"32. Q. What locality do you call it?—A. I don't know the name of it."

Showing that he did not even know the name of the lightship.

"37. Q. Do you know this part? (Indicates on chart.) —A. I don't read."

Showing that he cannot read and is therefore unable to study up the chart or read the rules and regulations for the governing of pilots. He swore that some unknown vessel first signalled him.

"67. Q. She gave you a signal?—A. Yes."

Thomas, on the other hand:

"22. Q. Who gave the first whistle?—A. The Captain of the *Lilly*."

I have already indicated where Thomas swore the *Lilly* was sailing.

As to Captain Dubay's theory. The lightship marks the west channel bank. Captain Dubay's evidence says:—

"156. Q. How wide is the channel there?—A. Eight hundred feet We were sailing away outside of the lightship.

157. Q. You were sailing away outside of the lightship?—A. On the west side."

If Captain Dubay is right how does he reconcile that with his answer given in the following question:

"325. Q. A boat drawing as much water as the *Tecumseh* did would have to keep to the channel at this point?—A. Yes."

A reference to the chart would show, having regard to the collision occurring three or four hundred feet to the north of the lightship and west of the channel, that it would have been impossible for the *Tecumseh* to have gotten in there, she would have gone around first. Another point, as regards the *Tecumseh's* course Captain Dubay says:

"245. Q. She was on the same tack or line as the unknown?—A. Yes, just about.

246. Q. How far was the unknown boat from the *Tecumseh*, about?—A. About half a mile.

247. Q. You were able to see one boat following the other. They were coming in the same course, is that what you want us to understand?—A. That is when I seen her light.

248. Q. She was going in the same direction northerly?—A. Yes.

250. Q. Then answer the question. You say she was on the same line, and I am asking you how far behind the unknown she was. Was she east or west of the line the unknown had taken?—A. On the same course.

251. Q. Directly in the wake of the unknown?—A. Yes.

253. Q. Half a mile apart?—A. Yes."

The captain further says he passed the unknown three or four hundred feet apart, and further says, that had the *Tecumseh* proceeded on her course she would have passed up about the same distance. Passing signals were exchanged between the *Lilly* and the unknown. The *Tecumseh* was seen one-half mile off in a narrow channel in the same course as the unknown, why was not there a passing signal given by Cap-

1905

TUCKER v. THE SHIP TECUMSEH.

Argument of Counsel.

tain Dubay in accordance with Rule 24 of the White Law adopted for the Pilot Rules, and which has been considered a rule of the road by Captain Anderson and Captain Dubay. The Rule is as follows: "That in all narrow channels where there is a current, and in Rivers Saint Mary, Saint Clair, Detroit, Niagara and Saint Lawrence where two steamers are meeting, the descending steamer shall have the right of way, and shall before the vessels shall have arrived within one half-mile of each other, give the signal necessary to indicate which side she elects to take," and which was recognized as good navigation long before the White Law was enacted.

If it were necessary to signal to the unknown, was it not equally necessary to signal to the *Tecumseh*, both proceeding in the same course? The *Tecumseh* was one-half mile behind the unknown when the steamer first passed the *Lilly*, and was first seen by the Master of the *Lilly* (Dubay).

"84. Q. How far was the *Tecumseh* behind the steamer that passed you when you first saw her?—A. About half a mile, may be closer than that.

193. Q. In what direction were you in reference to the lightship when you first saw the *Tecumseh*?—A. Did'nt I say three hundred feet

194. Q. You said five hundred feet a little while ago. Tell us something that you will stick to. How many feet were you from the lightship, and in what direction were you going?—A. The lightship was about opposite our port rigging.

195. Q. Can you tell the direction?—A. I was heading about south of south-west.

196. Q. On to the lightship?—A. Outside of the lightship, south by south west—on the west side.

197. Q When you first saw the *Tecumseh*?—A. Yes."

If when Captain Dubay first saw the *Tecumseh* and the *Lilly* had the lightship opposite her rigging what explanation does he give of his contention that the *Tecumseh* came up the river the distance near one-half mile while he ran down the river and still the collision took place northwest of the lightship. Some minutes afterwards Dubay, the captain, and Thomas, both say there was about one-half mile difference between the unknown and the *Tecumseh.* Smith says two or three hundred feet. Which is correct?

Smith says: "168. Q. There would be about two or three hundred feet between the *Tecumseh* and the unknown?—A. Yes"

Again Smith's evidence, Smith did not see the actual collision.

"194. Q Then after the *Tecumseh* sheered she came between you and the *Lilly*?—A. She went past her bow.

195. Q. She would shut off your view if she did that?—A. Yes.

196. Q. You can't say anything about the actual collision, you couldn't see it because that was on the other side of the *Tecumseh*?—A. Yes."

The collision occurred on November 3rd, 1903, and young Smith claims he has been able to give an account of the collision from the time of the collision up to the present time, and says he made a statement after the collision, but has not seen it since. His evidence:

"208. Q. What you say is that you have not seen the statement you made to that lawyer from the time it was made to this time?—A. No.

209. Q. You never had it read for you?—A. No, sir."

It is passing strange that the statement was not produced.

1905
TUCKER v. THE SHIP TECUMSEH.
Argument of Counsel.

"The testimony of officers and witnesses as to what was actually done on board their own vessel is entitled to a greater weight than that of witnesses on other boats, who judge, or from opinions merely from observation." The *Havana* (1).

The officers of the *Tecumseh* contend that the accident could not have occurred, as claimed by the plaintiff, unless the *Tecumseh* was wilfully steered out of the channel into the *Lilly*. The accident could not have occurred if the *Lilly* was where her witnesses claim she was, as it would be impossible, or extremely unreasonable, for a ship drawing the amount of water the *Tecumseh* draws to have gone there; she would first have gone aground.

It is therefore contended that the judgment should hold the *Lilly* wholly to blame; but should the court not be willing to adopt that view, it is submitted with great respect, that the only other course that could be adopted is that both ships were negligently navigated. As has been pointed out the rule of the road which requires the signal when within one-half mile to an up coming ship, was not observed by the *Lilly*. It was the duty of the *Lilly* to have stopped and backed when she saw a collision was probable. It was the duty of the *Lilly* to have given the warning signal, all of which rules and regulations, which good seamanship demand should be observed, were disregarded.

Reads from the evidence of Captain Dubay:

"223. Q. Do you know of any rules to stop and back when you see a chance of collision?—A. Yes."

Two minutes elapsed between the time the *Lilly* saw the collision was likely to and it did take place.

Thomas' evidence:

"162. Q. You don't seem to understand my question. I didn't ask you the distance. You say you saw that

(1) 54 Fed. Rep. 413.

the collision was likely to occur. How many minutes elapsed between your seeing the collision was about to take place and the collision actually occurring?—A. About two or three minutes, I guess."

The *Tecumseh* was seen to sheer, and a collision was to be expected, when she was four hundred feet from the *Lilly*. I am accepting now the plaintiff's contention. Had the *Lilly* at that moment stopped and backed, would any sane person say that the accident could have occurred? As it was she was struck twenty feet back of the bow. Instead of backing, however, she increased her speed.

"102. Q. (Dubay) What did you do? You didn't give a signal, and she didn't?—A. I thought by increasing my speed and putting the wheel more to port I could get away from her. I did that and he struck me about like that." (Indicates.)

Reads what Thomas, the man at first in charge of the wheel on the *Lilly*, says as to Captain Dubay's conduct:—

"148. Q. If you had stopped your boat and backed up when you first saw the collision was going to occur, you wouldn't have been run into?—A. Probably not.

149. Q. Don't you think that would have been a good precaution to take?—A. Probably.

150. Q. Wouldn't you have taken that precaution if you had been the captain?—A. Sure.

158. Q. Don't you think he lost his head?—A. He was kind of excited. There was something wrong."

Even suppose the contention of the plaintiff is true, was it not the duty of the *Lilly* to stop and back? The rules of division of loss applies where one of the ships is guilty of negligence in fact and the other is deemed to be in fault for the infringement of the regulations, *Voorwaarts and the Khedive* (1).

(1) 7 App. Cas. 795.

1905

TUCKER v. THE SHIP TECUMSEH.

Argument of Counsel.

As to both vessels being at fault see *McCallum* v. *Odette* (*the M. C. Upper*) (1). Captain Dubay did not observe any regulations.

"294. Q. Did you blow any whistle?—A. No sir.

295. Q. Do you know what is the duty of the captain in a case of that kind? Do you know what an alarm signal is?—A. Yes.

298. Q. Will you tell me what an alarm signal is? —A. Three or four whistles.

302. Q. Isn't the alarm signal to be used in cases of emergency like this, to warn other boats to keep off? —A. Yes.

303. Q. Three or four loud blasts?—A. Yes.

304. Q. You are supposed to stop and back up in order to get out of the danger?—A. Well.

305. Q. Didn't you know it was your duty to do one or all of those things?—A. I know those things."

Accepting the worst position that the plaintiff can ask us to be placed in, can there be any doubt that the accident could have been avoided by the observance of the regulations which good navigation calls for the observance of?

The worst that could befall the *Tecumseh* would be a division of the damages. The doctrine of inevitable accident cannot apply where either of the ships had violated the regulations for good navigation.

HODGINS, L. J., now (17th May, 1905), delivered judgment.

This is an action against the defendant steamer by the owner of the steamer *Lilly* for a collision near Bar Pointe light-ship in the Detroit river on the night of the 3rd November, 1903. The pleadings and evidence upon both sides, as not unfrequently happens in

(1) 7 S. C. R. 36.

Admiralty cases, are so conflicting on some material points as to be almost irreconcilable.

The steamer *Lilly* was bound for Toledo, and the *Tecumseh* for Owen Sound. The evidence on the part of the plaintiff is that the *Lilly* had her green, red and head and stern lights all right; and that before the *Tecumseh* came in sight she passed an unknown steamer bound up the river about half a mile on the east side of the light ship, and that the unknown gave one blast of her whistle to which the *Lilly* replied.

This unknown steamer was not seen by any on board the *Tecumseh* nor were the whistles heard by any of the witnesses, although all the plaintiffs' witnesses substantiate the fact of her being about half a mile ahead of the *Tecumseh*. This evidence, therefor, warrants the finding that no proper or efficient look-out had been maintained on the *Tecumseh*.

The evidence of the captain of the *Lilly*—though confused in parts—is that as he steered to pass on the west side of the light-ship he saw the red light of the *Tecumseh* about half a mile behind the unknown steamer, which indicated that the *Tecumseh* was then out of the *Lilly's* way; that when about 400 to 500 feet from the light-ship, the *Tecumseh* suddenly turned in and showed her green light; and that after she thus turned in, the *Lilly* could not see her red light, and the *Tecumseh* then struck the *Lilly* at an angle of 45 degrees. In answer to questions put by me he stated that when about 800 feet from where the collision took place he shifted his course half a point to starboard, and that when about 500 feet from the light-ship and probably about 400 feet from the *Tecumseh*, he put his helm hard aport, which changed his course two points further to the starboard side.

The defendant's evidence as to seeing the lights on the *Lilly* is in part unsatisfactory and in part contra-

dictory. The captain of the *Tecumseh* says that he first sighted and could make out both red and green lights of the *Lilly* about half or three eighths of a mile away, up to the time she turned; and that for five minutes he had both in view. That he lost the *Lilly's* green light more than a quarter of a mile away. After that he only saw her red light and the range lights; and he was then abreast of the light-ship. After giving this explanation of his seeing the lights he added: "I made a mistake in lights. I lost the red light a quarter of a mile away." In another part of his evidence he stated that the *Lilly* was about 400 or 500 feet away when she commenced to change her course, which distance he had previously stated (when he lost her green light) to be more than a quarter of a mile, or over 1,320 feet away. In answer to my question he stated that the *Tecumseh* was about 500 or 600 feet beyond the light-ship when he commenced to sheer to the west.

The evidence of George Decaire, a young deck hand, whose first season was in 1903, is as follows:

"Q. You say you could see the *Lilly* when she was 600 feet away?—A. I am just guessing 600 feet or something like that. She was on our starboard side.

Q. What lights did you see?—A. Every one, the green, the red, and the two mast lights." (The evidence in rebuttal proves that one of these (the stern light), could not be seen by any boat approaching the *Lilly*, it being hung under the deck aft).

Q. Did you stand on the starboard side of the boat until they came together?—A. No.

Q. Did you see all the lights up to the colllsion?—A. No, sir.

Q. What lights did you lose?—A. I lost sight of the red light; no, the green light.

Q. When did you lose sight of the green light?—A. When she changed her course."

But I prefer the evidence of Smith, an independent witness, who was on the light-ship, as to the actual facts of this collision. He said that he saw the *Tecumseh* behind the unknown steamer, and that as she came on he lost her green light, and could only see her red light; that the *Tecumseh* took a sudden sheer and came right across the channel, and that she then ran into the *Lilly* on the west side of the channel. He heard two crashes. The *Lilly* was 500 feet north by west of the light-ship, and on the western side of the channel bank going in a westerly direction heading so as to pass downwards on the west side of the light-ship. And he further said that the *Tecumseh* was abreast of the light-ship when she began to sheer to the westward. This light-ship's position was on the western side of the recognized channel. This evidence proves that the *Tecumseh* was crossing to the channel on her port side and that the *Lilly* was heading to pass on the west side of the light-ship and to the westward of the light-ship in the channel on her starboard side.

The channel being about 800 feet wide, must, I think, be held to come within the designation of "narrow channels" mentioned in Art. 21 in R. S. C. c. 79, which Article by s. 9 of that Act applies to foreign as well as British and Canadian ships—especially in view of the length and tonnage of the steamers sailing on our inland waters. This view as to narrow channels is sustained by *The Scotts Greys* v. *The Santiago de Cuba* (1), where the channel was 375 yards wide; and *The City of Springfield* (2), where the channel was 750 feet wide. The rule of the road provides that, "In narrow channels every steamship shall,

(1) 5 Fed. R. 369; 19 Fed R. 213. (2) 26 Fed. R. 158.

1905
TUCKER
v.
THE SHIP
TECUMSEH.

Reasons for Judgment.

when it is safe and practicable, keep to that side of the fairway, or mid-channel, which lies on the starboard side of such ship." This rule of the road was violated by the *Tecumseh*, when she sheered towards the westward, and crossed towards the channel on her port side instead of keeping in the channel on her starboard side.

In *The Clydach* (1), the court held that the larger vessel was in fault for the collision for insisting on keeping on the side of the channel which lay on her port side, instead of keeping on that side which lay on her starboard hand, knowing that another steamer was coming through the channel which lay on the starboard side; that having seen the lights of the smaller steamer more than a point on his starboard bow, and about a mile distant, "his imperative duty was to keep to the starboard side of the channel." In the *Leverington* (2), this rule of the road was similarly recognized, and the ship which disregarded the rule of the road was held to be blameable for the collision.

And the next rule provides that when by the above rules, one of two ships is to keep out of the way, which was the duty of the *Tecumseh*, the other, which was the right of the *Lilly*, shall keep her course.

There is in the United States Pilot Rules of 1904 the following:

"That in all narrow channels where there is a current, and in the rivers St. Mary, St. Clair, Detroit, Niagara and St. Lawrence, where two steamers are meeting, the descending steamer shall have the right of way, and shall before the vessels shall have arrived within the distance of one-half mile of each other, give the signal necessary to indicate which side she elects to take.'

In *Canfield* v. *F. and P. M.* (3), it was held that the ascending vessel was bound, if necessary, to stop and avoid the descending vessel, as her movements could

(1) 5 Asp. M. C. N. S. 336. (2) 11 P. Div. 117.
(3) 44 Fed. R. 698.

1905
TUCKER
v.
THE SHIP
TECUMSEH.

Reasons for Judgment.

be controlled with less difficulty than those of the descending vessel. See also the *Galatea* (1), and the *Gustafsberg* (2).

Another fact I must hold to have been established by the following evidence of the captain of the *Tecumseh*. In answer to some questions put by me he said:

"Q. You say you put your wheel hard a starboard? —A. Yes.

Q. What was the effect of putting your wheel hard a starboard?—A. It threw us in that position (indicates on exhibit).

Q. Across the bow of the *Lilly*?—A. Yes.

Q. When you saw her heading that way, and you were here (indicated) why didn't you pass her on the port side, because you saw she was turning that way? —A. I didn't think. I thought if we tried to pass her on that side we would run into her. He was too close to us and I was afraid we would run into him.

Q. Surely when he changed his course that way (indicated) why did you not change yours to go the other way?—A. If he had whistled.

Q. When you saw him change his course wouldn't it have been common sense to have changed yours to have avoided him?—A. I didn't consider I could have avoided him that way.

Q.—I want your reason. You say you saw him change his course to come across here (indicating) and you continued as you say. You put your helm hard a starboard and that put you across his bow. When you saw him coming why didn't you put your helm the other way, and you would then have avoided the collision?—A. He was so close that I didn't think we could clear him by putting our helm a port."

(1) 92 U. S. 439. (2) [1905] P. 10.

1905
TUCKER
v.
THE SHIP
TECUMSEH.
Reasons for Judgment.

Considering the distance between the two vessels—about 400 feet – when the *Lilly's* helm was put hard aport, which placed her two points off, and when the *Tecumseh's* helm was put hard a starboard in her attempt to cross the bow of the *Lilly*—and also the fact that the *Tecumseh* struck the *Lilly* at an angle of 45 degrees, I think that had the *Tecumseh* put her helm hard aport, the collision would not have taken place.

The observations of King, J. in the ship *Cuba* v. *McMillan* (1) a case of some resemblance to this, may be cited: "The course of those in charge of the "*Cuba* in starboarding her helm at this juncture was "wholly wrong, and shows a want of reasonable care "and skill to prevent the ship from doing injury. "And that it was an efficient cause of the collision "that followed cannot be doubted."

And the captain further remarked: Q. "You say "you saw her red and green lights up to half a mile "away, and then you lost the green light more than "a quarter of a mile away?—A. The ship would be "more than a quarter of a mile away when we lost "sight of the green light."

This evidence on the part of the *Tecumseh*, that her captain saw the *Lilly's* red and green lights up to a half a mile away, and her red and not her green light "more than a quarter of a mile away," was sufficient notice to him that the *Lilly* was keeping to the channel on her starboard side and heading south-west to pass on the west side of the lightship; and it was not necessary for the *Lilly* to give a blast signal as to the course she was taking—having indicated it long before there was a possibility of a collision. This view is sustained by the case of *The Mourne*, (2), in which Sir F. H. Jeune, after indicating cases of vessels "meeting

(1) 26 S. C. R., p. 660.
(2) (1901) P. 68.

1905
TUCKER
v.
THE SHIP
TECUMSEH.
Reasons for Judgment.

end on;" or of a steamer meeting another under circumstances requiring her to "keep out of the way;" or of a steamer having to "give way to a sailing vessel," said: "These are illustrations of the working of "the rule (as to blast signals); and it would seem to "follow that the rule does not apply to a case where "as here she is on a (circular) course which she had "adopted before in order to reach the place she desires "to reach and is keeping on that course. Under such "circumstances the state of things does not arise in "which she should give notice to other vessels by "signals." And he therefore held that it did not appear to him that there was any obligation upon the complaining ship to give the blast signal so as to render her liable for not giving it. This is I think in harmony with clause (a) to Art. 16 of the Canadian rules respecting ships "meeting end on," which provides that "the Article does not apply to two ships "which must, if both keep on their respective courses, "pass clear of each other."

There is another rule (Canadian Art. 18) applicable to this case which provides: "Every steamship when approaching another ship so as to involve risk of collision, shall slacken her speed, or stop and reverse if necessary." The captain of the *Tecumseh* while acknowledging such to be the rule, and that it was the duty of the *Tecumseh* to stop and reverse, said that the time was short and that he did not think of it. The phrasing of the rule is not a direction to prevent a collision, but to prevent the risk of a collision. And it has been well said that it is no defence to prove that at the moment of the collision it was too late to adopt a precaution, which ought to have been taken earlier, to be of any service to avoid the collision. (The *Johnson* (1), and the *Dexter* (2). The more imminent the risk

(1) 9 Wall. at p. 153. (2) 23 Wall. 69.

1905
TUCKER
v.
THE SHIP
TECUMSEH.

Reasons for Judgment.

the more imperative is the necessity for implicit obedience to the rule. (The *Vanderbilt* (1). See also the observations of Lord Bramwell in *Lebanon* v. *The Ceto* (2). Also *Marsden's Law of Collisions at Sea* (3).

On a review of the facts in this case, and especially of the *Tecumseh* not observing the rule of the road, and also manœuvring to cross the bow of the *Lilly* when the collision was imminent, I find that the *Tecumseh* was to blame for the collision, and is therefore liable for the damages claimed by the *Lilly*.

Reference to the Deputy Registrar at Windsor to assess the damages. Costs of the action and reference to be paid by the *Tecumseh*.

*Judgment accordingly.**

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(1) 6 Wall. 225. (2) 14 App. Cas. 670.
(3) 5th ed. p. 416.

* REPORTER'S NOTE.—On appeal to the Exchequer Court of Canada, this judgment was affirmed. See *post*.