TORONTO ADMIRALTY DISTRICT.

BETWEEN:

ONTARIO GRAVEL FREIGHTING COMPANY, LIMITED. ..... PLAINTIFF;

1914
March 2.

AND

THE SHIPS *A. L. SMITH* and *CHINOOK*

DEFENDANTS.

Shipping—Collision—Rules of the Road—Foreign Waters—Jurisdiction—Waiver.

1. Obedience to the rules of the road is not exacted as strictly in the case of a tug and tow as where a single vessel is concerned.

2. Where proceedings have been taken in a Canadian court in respect of a collision in foreign waters between two foreign ships, and a bond has been given and the *res* released, the question of jurisdiction cannot be raised by the defendant.

Semble:—A person or ship damaged in collision will not be restrained from proceeding in the domestic forum because the foreign vessel proceeded against has instituted an action in a foreign court to which the person or ship damaged is not a party.

ACTION in *rem* for damages for collision.

The case was tried at Windsor before the Honourable Mr. Justice Hodgins, Deputy Judge of the Toronto Admiralty District, on the 22nd day of December, 1913.

The facts of the case appear fully in the reasons for judgment.

J. H. Rodd, for plaintiff.

A. St. George Ellis for defendant.

HODGINS, D.Lo.J., now (March 2, 1914) delivered judgment.

The plaintiff's loaded scow *Hustler*, while being towed down stream by the tug *Moiles*, was struck and

1914

ONTARIO GRAVEL FREIGHTING CO. v. THE SHIPS A. L. SMITH AND CHINOOK.

Reasons for Judgment.

sunk by the tug *Smith*, heading up stream, towing the scow *Chinook* light. The collision occurred in the St. Clair River just below Russell Island, at a point a little beyond Gd. Pointe Dock in American waters at about one a.m. on a bright moonlight night—the 28th day of November, 1913.

Both tugs were hugging the American shore, and the *Moiles* had the right of way descending the stream. Ray, the mate of the *Smith*, says that he saw the *Moiles* hugging the American shore and admits that the rule of the road is that the vessel coming down should keep or direct its course to starboard in the St. Clair River; that if he had wanted her to take another course he should have given some other signal and that he did not do so; that the *Moiles* was in her usual course, and at the time of the collision she was as near to the American shore as she could safely go. This last admission accords with the statement of Hunter, the mate of the *Moiles*.

Ray accounts for the collision by stating that when he sighted the *Moiles* he saw her starboard-light and thought she was on the range course for large vessels, that his ship was inside that course and so he intended to pass starboard to starboard instead of, as usual, port to port. He says the *Moiles* changed her course during a time when, owing to smoke, he had lost sight of her and that when it cleared he saw her red light on a course at an angle of forty-five degrees, to that of the *Smith*, and right across her course. He says that the smoke was caused by his own fireman putting in fire, and that a following wind blowing at thirty-five miles (or twenty-five to thirty miles, according to Hunter) had carried the smoke forward, right down on his bow and obstructed his view. The weather reports put the velocity of the wind at sixteen to eighteen or twenty

miles. As to signals, he says he did not give any and did not hear the first signal given by the *Moiles* notifying him that she was directing her course to starboard. This signal was given, according to Hunter, mate of the *Moiles* and others, about half a mile away, and Ray admits seeing her on that course when sighted. Ray says the danger signal was given only five seconds before the collision, but admits this is a guess and it may have been fifteen seconds, in which time both vessels would go two hundred and eighty feet. Hunter deposes that it was given five hundred or six hundred feet away, and three or four minutes before the collision, when he noticed the *Smith* sheer, and that after the earlier single blast he had given way a little towards the American shore, but not much, as he had not much room. The sheer of the *Smith* was denied.

It is clear that the *Smith* was heading so as to pass inside the *Moiles*. Ray says he gave no passing signal, because the *Moiles* was so far to starboard; but I cannot accept this statement, as he admits that he knew the *Moiles* which he often met, was close to the American shore, and would have to edge in further towards the American shore, after passing Light Ten, because there is a bay just below that light and that she had always done so, and he had no reason to expect she would not do it that night. He says he gave no danger signal, although the rules require three blasts when the view is obstructed (1). Allen, master of the *Smith*, on cross-examination admits that an upgoing vessel should keep out of the way, and that that should have been done in this case, and if blinded by smoke he would have given a signal.

The *Moiles* when she realized that a collision was

(1) Canadian Rules, Art. 15 (a); American Rules No. XIII.

1914

ONTARIO GRAVEL FREIGHTING CO. v. THE SHIPS A. L. SMITH AND CHINOOK.

Reasons for Judgment.

imminent, turned in towards shore and cleared the *Smith*. The *Chinook* came up on the starboard of the *Smith*, which struck the *Hustler* on the port bow. The *Smith* put her helm to port and went to starboard, and was also hit by the *Chinook* before she struck the *Hustler*.

The collision ought to have been avoided if the *Moiles* had had longer warning of the sheer of the *Smith*, so Heddrick, Captain of the *Moiles*, deposes, provided the *Smith* had been in control; but both he and his mate think that the *Smith's* steering was affected by the *Chinook*, which had machinery for using crane and anchor in its forward end, and that being light, this affected her own steering, which Hunter says was not good.

The mate of the *Moiles* admits that she did not slow down or stop until his crossing signal was understood and answered; and this is relied on as a breach of the regulations contributing to the collision.

There are two answers to this. There was nothing to indicate that the *Smith* was not observing and would not observe the rule of the road, and the *Moiles* was justified in keeping on. *The Lebanon* v. *The Ceto*, (1) *China Navigation Co.* v. *Asiatic Petroleum Co.*(2) The other answer made is that the danger from the loaded scow going down stream made this impossible, and that if the *Moiles* had stopped the *Smith* would have struck her, or the *Hustler* fouled her screw with the tow-line, as the down current was one and a half miles and the speed of the *Moiles* four and a half miles. To stop would mean collision or disabling or beaching the tug, as there was no visible channel bank and the *Moiles* was in as far as was safe at night. I accept this explanation as reasonable; the rules not being applied

(1) 14 A.C. at p. 686.

(2) 11 Asp. M.C. 310.

as strictly in the case of a tug and tow as where a single vessel is concerned. (1).

I also think that the difficulties in the situation proved distinguish this case from that of the *Owen Wallis*, (2). There was plenty of water to allow the *Smith* to have gone to the eastward and avoided all trouble. Under the Canadian Rules Art. 18, it is provided that when two steam vessels are meeting end on, or nearly end on, so as to involve risk of collision, each shall alter her course to starboard, so that each may pass on the port side of the other. Rule V of the American rules is substantially the same. Hunter says when he sighted the *Smith* he saw all her lights and hence his course was properly altered to starboard, although only slightly, owing to the danger he apprehended in getting too close in. He gave the signal required by Art. 28 (a) (American Rules 1); and the fact that it was not heard does not put the vessel giving it in the wrong. If not heard, it was the duty of the *Moiles* or *Smith* to have sounded five short blasts (Art. 28, American Rules 2). Ray, on the other hand, says he saw the green lights of the *Moiles* and, under Art. 19, (American Rule X,) it was his duty to have kept out of her way, and the *Moiles* was right in keeping her course (Arts. 21, 25 a and b. American Rules V or X). The *Moiles* gave the five short blasts when no answer was given to the first signal, and so conformed to the rules.

On the evidence I find that the fault lay with the *Smith* and that she alone was to blame for the collision.

The defendants argue that as the *Smith* had taken proceedings in the District Court of the United States for the Eastern District of Michigan in Admiralty to limit her liability, that this court has no jurisdiction

(1) The *Lord Bangor*, 8 Asp. M.C. 217. *Canadian Pacific Ry. Co.* v. *Bermuda*, 13 Ex. C.R. 389.
(2) L.R. 4 A. & E. 175.

1914

ONTARIO GRAVEL FREIGHTING CO. v. SHIPS SHIPS A. L. SMITH AND CHINOOK.

Reasons for Judgment.

to proceed with this action. It is also put in the statement of defence on the ground that the defendant ships are both American ships and that the collision occurred in American waters, hence the proper forum is the United States Court.

It appears by the exemplification put in that those proceedings were begun in the United States Court on the 4th December, 1912, and that up to the 10th October, 1913, no judgment had been rendered. The proceedings were advertised in the Detroit newspapers, but no notice was given to the plaintiffs and their president denies any notice, and says he saw only a "squib" in the papers. This is not to be wondered at, as the order directing publication, authorizes service on the owners of the barge *Hunter* through the post office at Detroit, Michigan. The proceedings appear to be directed to limiting liability, and admit of proof being made by all claimants against the ship.

The *Smith* and *Chinook* were arrested on the 12th May, 1913, at the dock at Walkerville, in the Province of Ontario, this action having been begun on the 14th April, 1913, and a bond was given under which they were released on July 11th 1913. The question of jurisdiction, therefore, dealt with in *St. Clair* v. *Whitney* (1) does not arise here. I do not think the objection is open to the defendants. They have chosen to give a bond and to obtain an order releasing the *res* upon submitting to the jurisdiction of the Court, and securing to the plaintiffs payment of whatever amount is adjudged against them in this action.

The bond given is as follows:—

"Know all men by these presents that the United "States Fidelity & Guaranty Company hereby sub-

(1) 10 Ex. C.R. 1; 38 S.C.R. 303.

1914

ONTARIO GRAVEL FREIGHTING CO. v. THE SHIPS A. L. SMITH AND CHINOOK.

Reasons for Judgment.

" mits itself to the jurisdiction of the said Court and " consents that if E. Jacques & Sons, owners of the " vessels, *A. L. Smith* and *Chinook*, seized by the " Sheriff of the County of Essex in this action, and for " whom bail is to be given, shall not pay what may be " adjudged against them or said vessels or either of " said vessels in the above named action with costs, " execution may issue against us, the said United " States Fidelity & Guaranty Company, its goods and " chattels, for a sum not exceeding twelve thousand " Dollars ($12,000.00)."

The ships are therefore free, and the plaintiffs cannot follow them into the American court and claim against them. They are limited to their bond, with which they are well content.

I have found no case, and none was cited to me, where the person or ship damaged was restrained from proceeding in the domestic forum because the foreign vessel had instituted proceedings in a foreign court to which the person or ship damaged was not a party.

The rule invoked rests upon convenience and fair dealing, and the plaintiff must be in some way responsible for or a party to the foreign proceedings before it is applied. No claim is made to limit liability under the *Merchants Shipping Act*.

I give judgment for the plaintiffs, with costs, and with a reference to the Deputy-Registrar of this Court at Windsor to assess the damages.

Judgment accordingly.

(1) The *Mannheim* (1897) P. 13; the *Reinbeck*, (1889) 6 Asp. M.C. 366; 60 L.T. 209; the *Christiansborg* (1885) 10 P.D. 141.