

SMITH *v.* HAVEMEYER and others.<sup>1</sup>

(District Court, S. D. New York. November 18, 1887.)

## 1. WHARVES—UNUSUAL CONDITION—DAMAGE ARISING THEREFROM—LACK OF CARE AND EXAMINATION—LIABILITY OF OCCUPANT.

The lessee and occupant of a wharf is liable for damage arising from its unusual and dangerous condition, unless he can show reasonable care and examination in regard to the condition of the wharf and slip.

## 2. SAME—DAMAGE TO VESSEL—STATEMENT OF CASE.

Respondents' wharf, instead of being perpendicular below the water line, extended considerably into the slip. From one of the beams a spike projected, which injured the bottom of libellant's vessel when she went there to discharge. *Held*, in the absence of evidence of reasonable care and examination of the condition of the wharf by respondents, they were liable for the damage.

*Goodrich, Deady & Goodrich*, for libellants.

*John E. Parsons*, for claimants.

BROWN, J. While the bark *Formosa* was lying along-side the dock that for many years had been occupied by the defendants for discharging cargo, she got upon a projection from the pier below the water-line, and received some injury. Subsequently examination by a diver showed that the side of the pier where the *Formosa* lay, instead of being perpendicular below the water, projected considerably into the slip, the successive layers of crib work forming a kind of stairs. A spike projected from one of the beams about six feet above the bottom, and tore off some of the copper of the vessel.

There is no direct evidence to show whether the side of the wharf was originally built in the manner above stated, or whether it had subsequently got into this condition accidentally. There is but a single statement in evidence that has any bearing on the question, viz., that similar vessels had previously been accustomed to lie there without injury. The libellant, in the course of the trial, propounded a question to a witness which, if answered, might have thrown some light upon the cause of the condition of the pier; but, upon objection by the respondent, the question was withdrawn. It was proved, however, that such a shape of the side of the wharf was improper and unusual, and it was clearly dangerous. Such a wharf was plainly not a proper one, or in a proper condition below the water-line to receive vessels for the discharge of cargo. The defendant, as the lessee and occupant of the wharf, is, therefore, *prima facie* chargeable with negligence. To exonerate himself, it was incumbent upon him to show reasonable care and examination in regard to the condition of the wharf and the slip. No proof on this subject being adduced, the *prima facie* liability must stand, and the respondents held to answer for the damages. A reference may be taken to compute the amount.

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

THE AMERICA.<sup>1</sup>

## MILLS v. THE AMERICA.

(District Court, S. D. New York. November 12, 1887.)

## COLLISION—TUGS—RULE OF THE STARBOARD HAND—RIGHT OF WAY—RISK OF COLLISION.

The tug *Talisman*, on her way from Weehawken to pier 5, New York, saw on her starboard bow the red light of the tug *America*, bound from Jersey City to Thirty-fifth street, New York. The *Talisman* attempted to cross the bows of the *America*, but was struck on her starboard quarter. The *America* slowed as the vessels approached, giving one whistle twice, and when the tugs were 50 to 100 feet apart gave an alarm signal, and reversed. She did not alter her helm. Held, that the *Talisman* was in fault for not avoiding the *America*, having the latter on her starboard hand; that the *America* was in fault, though she had the right of way, for not taking more effectual measures to avoid a collision as soon as she saw by the movement of the *Talisman*'s lights that there was risk of collision; and that the damages should be divided.

*Goodrich, Deady & Goodrich*, for libellant.

*Biddle & Ward*, for claimant.

BROWN, J. The collision between the libellant's tug *Talisman* and the tug *America* occurred opposite Hoboken, between 11 and 12 o'clock at night, about one-third of the way across the river from the New Jersey shore. Considering that the *America* was on her way from Jersey City to the foot of Thirty-fifth street, New York, and the *Talisman* bound from Weehawken to pier 5, North river, I have no doubt that it was the *America*'s red light, and not the green light, that was first seen by the pilot of the *Talisman* on the latter's starboard bow. The *Talisman* was, therefore, the one that was bound to keep out of the way of the *America*, while the latter had the right of way. The *Talisman* must be held in fault, because there was plenty of room for her to have kept out of the way by porting; and because she undertook to cross the *America*'s bows to starboard, instead of passing port to port; and because the *America* did nothing to mislead the *Talisman*, or to thwart her in her duty of keeping out of the way.

As respects the *America*, the question of fault is less easy to determine. Some of the contradictions in the testimony cannot be reconciled. The greater fault is evidently on the part of the *Talisman*, for the reasons above stated. The *America*, according to the account of her captain, gave a signal of one whistle when the boats were, as he estimates, some 300 or 400 yards apart. Both of the *Talisman*'s colored lights were then seen one or two points off the *America*'s port bow. Getting no answer, the pilot ordered the engines slowed, and then repeated the same signal while seeing both of the *America*'s colored lights. Directly after the last signal, he observed the *Talisman*'s red light shut in, leaving her green light visible, which indicated that she was heading to-

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