

THE B. C. TERRY.
THE NOKOMIS.
CARROLL *v.* THE B. C. TERRY.
KENZEL AND OTHERS *v.* THE NOKOMIS.

District Court, S. D. New York.

April 26, 1887.

1. COLLISION—SAILING VESSELS—KEEPING OUT OF THE WAY.

It is a condition of the duty "to keep out of the way," that the other vessel shall act intelligibly, and afford reasonable evidence of her intentions. While that is doubtful, the former should keep her course.

2. SAME—TACKING—LOSING HEADWAY—EXTRAORDINARY SWINGING ABOUT.

The yacht N. and the schooner T. were beating up the bay in a north-west wind, on the port tack. The N., being a little to leeward of the T., tried to come about upon the starboard tack, when she was sufficiently in advance to do so safely and pass across the T.'s bows, under ordinary circumstances; but the wind being strong, and her foresail down, and her main-peak lowered, on coming about, she entirely lost headway, and swung around in all about 18 points, and collided with the T. on the leeward side. The master of the T., observing the continuous swing, inferred that the N. was intending to go to leeward, as similar vessels were in the habit of anchoring in that region, and he therefore starboarded to aid in avoiding the N. *Held*, that the N. was alone in fault, the collision being occasioned by the extraordinary behavior of the N. in coming about, and the persistence of the N. in endeavoring to cross the T.'s bows; and that the master of the T. did what was best under the circumstances.

In Admiralty.

On the afternoon of May 5, 1886, the schooner yacht Nokomis, 90 feet long, and of 51 tons burden, and the three-masted schooner B. C. Terry, loaded with timber, were coming in from sea,—the Nokomis bound for Stapleton, near the north end of Staten island; the Terry, for Hoboken.

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As they passed the Narrows, they met a violent squall. Both shortened sail. After the squall abated, the wind remained strong: from the northwest, and the vessels continued under short sail, as before, heading about N. N. E., on their port tacks. The Nokomis, having her foresail down and her main-peak lowered, ran a little more off the wind than the Terry, and passed across the Terry's bows. When she arrived nearly up to "Owl's Head," a little below buoy 18, and being only half to two-thirds the distance across from Staten island to the Long island shore, the Nokomis tacked, for the purpose of making her station at Stapleton, being then about two points on the Terry's starboard bow, and distant from her somewhere from a quarter to a half mile. She did not miss stays, but came about slowly; and, on getting into the wind, completely lost her headway; but, by hauling her head-sheets to windward, she gradually swung round to the southward, all the time drifting to leeward. Before coming up to her course, which should have been W. by S., or W. S. W., she had fallen off to S. or S. S. W., and the bluff of her starboard bow struck the Terry abreast of her mizzen rigging, on the starboard side, doing both some damage, for which the above cross-libels were filed. Just before the collision the Terry luffed from three to four points, so that she headed at the time of collision about N. N. W.

Olin, Rives & Montgomery, for the Nokomis.

Shipman, Barlow, Larocque & Choate, for the B. C. Terry.

BROWN, J. While there are wide discrepancies, in many of the details in regard to this collision, it is clear that the general cause of the collision was the fact that the Nokomis, in coming about, lost her headway; so that, in the strong breeze that prevailed, she drifted much to leeward, and, before gathering sufficient headway to come up to her expected course, swung off from six to eight points to the southward, changing her heading altogether from sixteen to eighteen points from her previous course of about N. N. E. This behavior of the Nokomis must be assumed to have been as unexpected to both vessels as it was remarkable. The distance of the two vessels apart when the Nokomis tacked was estimated by her own witnesses at from half to three-quarters of a mile; according to the Terry's witnesses, about a quarter of a mile. Assuming that the Nokomis was running under proper sails, so as to be managed with ordinary facility in coming about, the distance of a quarter of a mile only, would, I think, be a sufficient and safe distance for tacking, when she was but two points off the Terry's starboard bow. But the behavior of the Nokomis was so unusual as to baffle previous calculation. On coming about, had she kept her headway, and got on her proper course upon her starboard tack, and not exceeded any ordinary margin for falling off, she would have passed ahead of the Terry without difficulty. The Terry, on observing her tacking, had no reason to suppose she would not pursue the customary course. Had she missed stays, and remained in the wind unmanageable, the Terry would have had notice in time sufficient to have put her

upon her guard; and she would have been bound either to keep off, or to luff so as to avoid the

Nokomis. But the Nokomis did not miss stays; and, in swinging round into the wind, she did not exhibit to the Terry any indications of inability to pursue whatever course she desired. The Terry did not know where the Nokomis was bound.

Vessels Were accustomed to anchor in that vicinity. Her main-peak being down, as well as her foresail, the yacht's intentions were not known to the Terry, and could not be surmised; and, as she continued to swing around, paying off more and more from her proper course, if merely tacking, the Terry was led to suppose that she was designing to go to leeward of her. The master of the Nokomis insists that the Terry was a quarter of a mile distant when he had got around with his head-sails drawing on the starboard tack, and that the Terry then kept away a couple of points more to leeward. The officers of the Terry contradict the latter statement, and their testimony on this point, according to the ordinary rule in admiralty, is controlling. The Terry did not keep off to leeward at all, but kept her course until her luff, when her officers saw that the Nokomis was not likely to clear them to leeward. The witnesses on board the Nokomis, which was all the time swinging till near the moment of collision, were in no situation to judge correctly of any changes in the course of the Terry.

The extraordinary behavior of the Nokomis is not explained so as to free her from blame. The burden of doing this clearly rests upon her. It is unnecessary for me to find the specific causes,—whether inadequate, or ill-adjusted sails; or whether there was mistake in giving or in obeying orders. It is sufficient, so far as the question of fault goes, that the course of the Nokomis was so wholly unexpected that the Terry was in no fault for not anticipating it; nor for being in doubt whether the intention of the Nokomis Was to tack for Staten island, or to go to leeward. According to ordinary maneuvers in navigation, the Nokomis had time and space to do either. Even after she had payed off so much to the southward, and when the Terry was seen to be luffing, 200 to 300 yards distant, there would have been no difficulty, in my judgment, in the Nokomis going to leeward, had her master concluded to adopt that course; and that was, I think, obligatory upon him after he had swung round so much. Instead of that, he kept his main-sheet hauled in, and his helm to port, still aiming to cross ahead of the Terry until very shortly before the collision. Although his own estimate was that the Terry began to luff when she was a quarter of a mile distant, it was probably only from one-half to one-third of that distance. But this was ample space for the Nokomis to go to leeward, had she starboarded her helm, and let her main-sheet run.

As respects the Terry, the situation was one in which her master could not tell which way to turn. It was his duty, doubtless, to avoid collision with the Nokomis if he could. But it is a condition of the duty to keep out of the way that the other vessel shall, act intelligibly, and afford reasonable evidence of her intentions. Until that was done, it was the

duty of the Terry to keep her course. At first the Terry was not required to do anything, because there was plenty of room for the Nokomis

to tack in the visual way. Instead of tacking in the usual manner, the master of the Nokomis says that the yacht fell off so as to have the wind abeam, and that she was going astern at that time; that the Terry was then about ahead, and was heading fore and aft from him. Since, in that situation, the Nokomis was also still swinging to the southward, as well as drifting to the eastward and southward, the Terry could not then safely keep off, since, that would apparently be running right into the Nokomis; and, as, the Nokomis was also still swinging, the natural inference was that she was intending to go to leeward. To luff was therefore the Terry's best maneuver to aid the yacht's apparent design. The master of the Terry says that, when she was two or three hundred yards off, he went to his lee rail, and saw the Nokomis about one point on his starboard bow, heading for his midships. That was probably about the same time above referred to by the master of the Nokomis. As the Terry changed about three or four points, the distance at which she began to luff must have been from 400 to 600 feet. One of the officers of the Nokomis, it is said, waved his hand to the Terry to keep off to windward; but several of the witnesses of the Nokomis say that this was when the vessels were within one or two hundred feet of each other. Some estimate the distance still less. On either estimate, it was too late to be of any use. The Terry payed off slowly, and that maneuver, unless made much earlier, would apparently have resulted in a worse collision; and the Terry, as I have said, naturally inferred that the Nokomis, was going to leeward. Under the extraordinary circumstances of the case, I do not see that there is anything that the Terry had at the time reasonable grounds for doing that she did not do; and in the situation of the two vessels, when the Nokomis was found to be gaining headway so slowly, and to have swung so much to the southward, and to have drifted to leeward of the Terry, I think it, was the clear duty of the master to have gone to leeward, and not to have persevered in his attempt to cross the Terry's bows so long as he did; and that the fault of the collision was therefore wholly that of the Nokomis.

A decree may be entered accordingly.