

The claim of the King is that she had passed the Lymburner from a quarter to half a mile before she began to make her tack. But all the circumstances of the case point the other way. The evidence on the part of the Lymburner is that the coming in stays by the King was immediately seen by those in charge of the Lymburner, and her helm was instantly put hard up, and her mainsheet let go, in the hope of causing her to fall off and go under the stern of the King, which was the only possible way of avoiding or lessening the force of the impending blow, and though the Lymburner fell off somewhat, yet there was not time or room to go clear. I am satisfied that this is a correct statement of what occurred, and that the claim of the King that there was sufficient room is wrong. The King further claims that she was then getting into shoal water, and was obliged to go about for her own safety. This belief of her master was undoubtedly the reason of his going about when he did, but he was mistaken. There was ample room for her to proceed much further towards the shore without danger. Her master lacked in experience and was unacquainted with the navigation at this point, and this accounts for the disaster. The men on the Lymburner were familiar with the locality, and had the right to assume that the King would run out her course. The change by the latter was sudden and unexpected, and was without excuse. The libel against the Lymburner is dismissed with costs, and in the libel against the King there is to be a decree for the libelants. Ordered accordingly.

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THE GENERAL G. MOTT.

THE LAURA B.

THE LENA.

THE HOWARD SMITH.

DEMARIS *v.* THE GENERAL G. MOTT *et al.*

(Circuit Court of Appeals, Third Circuit. May 24, 1892.)

**COLLISION—RIVER NAVIGATION—PROPER SIDE OF CHANNEL.**

Two steam tugs, the L. and the M., each with a tow, approached each other nearly head on, by night, in the Delaware river, and each discovered the approach of the other when about a mile apart. Signals of one whistle were exchanged when the vessels were about one-half a mile apart, and both ported their helms. The court found, on conflicting evidence, that the M. was on the proper side of the channel, and could not have gone further inshore, owing to the presence of anchored vessels; that the L. either had gone too far towards the wrong shore before porting her helm, or that she did not port it sufficiently,—and hence held that for the collision between the two tows the L. was solely in fault.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

In Admiralty. Libel by Charles Demaris, master of the tug Laura B., and bailee of the barge Lena and her cargo, against the tug General G.

Mott and the schooner Howard Smith, for collision. Decree below dismissing the libel. Affirmed.

*Edward F. Pugh* and *Henry Flanders*, for appellant.

*John F. Lewis*, for the General G. Mott.

*Alfred Driver*, for the Howard Smith.

Before ACHESON, Circuit Judge, and WALES and GREEN, District Judges.

WALES, District Judge. At about 2 o'clock on the morning of July 27, 1889, the tug *Laura B.* with the barge *Lena*, lashed to her port side, and the barge *May*, lashed to her starboard side, both barges being heavily loaded, was going down the Delaware river, and when abreast of the Greenwich piers, on the western side of the river, the lights of a tug with a tow astern were seen nearly ahead, at the distance of about a mile, which lights proved to be upon the tug General G. Mott, having in tow the schooner *Howard Smith* astern by a hawser. The night was cloudy, with occasional rain, but lights were easily seen. The tide was high water slack, turning to ebb. The channel at this point is from 300 to 500 yards wide. The tugs discovered each other at the same time, each having the other on its port bow; the *Laura B.* running nearly south by west, and converging on the Mott's course, which was northeast by north. The Mott was nearly opposite the Gloucester ferry, and on the starboard or eastern side of the channel. A little astern, and on the port quarter of the *Laura B.*, the ferryboat *Peerless* was coming down the river; and a short distance ahead of, and on the starboard bow of, the Mott, the ferryboat *Law* was going up the river. On the eastern side of the channel, a little above the ferry, were the regulation anchorage grounds, where two steamers were lying at anchor, and beginning to swing around with the tide. The specific allegations of the libel are that the *Laura B.* was heading directly down the river, and that the Mott, with her tow, was heading up the river, a little to the eastward; that when the tugs were about a half a mile apart the red light alone of the Mott was visible from the *Laura B.*, about two or three points off the port bow of the latter; that at this time the Mott blew one whistle to indicate that she intended to go to the eastward, and that the *Laura B.* replied, with a like signal, that she would direct her course to the westward, at the same time porting her wheel; that both vessels kept on, and that the *Laura B.* had changed her course about two points to the westward, when the Mott blew two whistles, indicating that she was going to the westward, and immediately changed her course in that direction; that the vessels were then quite near to each other; that, as soon as the libelant saw this movement of the Mott, he blew three short blasts, and rang the bell for the engineer to go full speed astern; that by this time the person in charge of the Mott saw his error, ported his wheel, and endeavored to go to the eastward again; that this movement was unsuccessful, for, although the Mott herself escaped striking the *Laura B.* or her tow by steering suddenly to the starboard, the schooner *Smith*, coming on at full speed, struck the barge *Lena* on the starboard side, near the bow, tearing her loose from the *Laura B.*, breaking in her side, and sinking her.

The testimony is conflicting, but the weight of the evidence contradicts the allegations of the libel. There may have been, and doubtless was, some confusion of signals, arising from the fact that the Mott had signaled to each of the ferryboats before signaling to the Laura B., but it does not appear that the Laura B. was misled by them, because, after porting her wheel in response to the one whistle from the Mott, she made no further change in her course. According to the libelant's statement the tugs were not more than half a mile apart when the Mott signaled that she was going to the eastward. The vessels were then approaching each other at the rate of 15 miles an hour, and it is difficult to conceive what motive the master of the Mott could have had in attempting to make the erratic movements described in the libel, to say nothing of the improbability of such movements having been actually made within the time and the distance that intervened between the signal and the moment of the collision. The impracticability of a tug with a loaded schooner in tow, at the end of a hawser 60 fathoms in length, making the zigzag movements attributed to the Mott in such a short period of time renders this charge more difficult of belief. Even if the Mott could have turned her own bow so quickly and often, it does not follow that she could have pulled her tow about with equal facility. The Mott was on that side of the channel where she had the right to be, and the effort made on behalf of the Laura B. to show that the latter was on the western side of the channel is an admission that it was her duty to have kept her course on that side, whereas the fact that the Lena sank on the east side of the mid-channel demonstrates that, if the Laura B. had ported her helm sufficiently and promptly, she would have gone further to the westward, and have avoided the collision. Witnesses on board of the Mott, and others who were on the Peerless or on the Law, testified that the Mott continued her course as far to the eastward as was practically safe, under the circumstances, and that she did not make the tortuous movements charged by the libelant. The libelant admits that, if the Mott had kept her original course, there would have been no collision; and the failure to prove that she deviated from it leaves the cause of the collision unexplained, except on the theory that the Laura B. had gone too far to the eastward before porting her helm, or that she did not port it sufficiently. The Mott could not have gone further to the eastward without crowding against the anchored steamers, nor could she have gone around them without endangering her tow. There was ample room for the Laura B. to have gone to the westward, and there was no necessity for or obligation on the part of the Mott to go in that direction. The case against the schooner was not insisted on, as she followed in the wake of her tug. The decree of the district court, dismissing the libel, is therefore affirmed.

DUDLEY E. JONES Co. et al. v. MUNGER IMPROVED COTTON MACH.  
MANUF'G Co.

(Circuit Court of Appeals, Fifth Circuit. May 30, 1892.)

No. 6.

**APPEALABLE ORDERS—INTERLOCUTORY DECREE—INJUNCTION IN PATENT CASES.**

A decree sustaining the validity of a patent, directing a perpetual injunction against its infringement, and referring the cause to a master to take an account, is an appealable interlocutory decree, within section 7 of the act of March 3, 1891; and where, on appeal therefrom, the cause is submitted on the merits without objection, and a decree is rendered, it is too late for the appellee to question the court's jurisdiction by a motion for rehearing.

On rehearing. For former report, see 49 Fed. Rep. 61.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

PARDEE, Circuit Judge. This cause is again brought before the court on an application for a rehearing and upon a motion to vacate all proceedings had in this cause in this court, and dismiss the appeal herein for want of jurisdiction, on the ground that the decree of the court below sought to be reviewed in this case was neither a final decree, from which an appeal would lie to this court under the sixth section of the judiciary act of 1891, nor yet such an interlocutory order or decree that an appeal would lie under the seventh section of the said act. The case was heard in this court upon the merits without objection on the part of the appellee, and without a critical examination on the part of the court as to the character of the decree appealed from. In fact, appellee in his brief expressly states:

"It is the desire of the appellee that this cause be heard upon its merits, and we do not, therefore, wish to take advantage of any irregularities which may have occurred in bringing the case up, or of any omission to assign errors. \* \* \* As the case stands, it must be substantially treated as a rehearing at the circuit, and for this reason the argument is more diffusive than it otherwise would be, as it involves a re-presentation of the entire case, without any direction as to special points or findings by the court below."

An examination of the decree rendered by the court below shows that, while it adjudges the validity of the patent sued on and directs an injunction termed "perpetual" against the defendants as infringers, it refers the matter to a master for taking an account. It is well settled that such a decree is not a final decree from which an appeal could be taken, or of which this court would have jurisdiction, under the sixth section of the judiciary act of 1891. *Iron Co. v. Martin*, 132 U. S. 91, 10 Sup. Ct. Rep. 32, and cases there cited. We are, however, of the opinion that it is an interlocutory decree granting an injunction, from which an appeal would lie under the seventh section of the said judiciary act.

An interlocutory decree is:

"When the consideration of the particular question to be determined, or the further consideration of the cause generally, is reserved till a future hearing." Daniell, Ch. Pr. (5th Ed.) 986.