

After giving the most careful consideration to the testimony the court has been compelled to reach the conclusion that the collision was due solely to the negligence of the Moran. The libel is dismissed.

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## THE LOTTIE K. FRIEND v. THE ALBERT N. HUGHES.

(District Court, E. D. Pennsylvania. March 29, 1897.)

## COLLISION—VESSEL AT ANCHOR—TUG AND TOW.

A tug without a proper lookout (having no one exclusively devoted to that duty), and with a heavy schooner in tow on a long hawser, held in fault for a collision, while going down Delaware Bay with the tide, of her tow with an anchored vessel, in that she came quite close, nearly head on, a little to the eastward of the anchored vessel, before discovering the situation, and then turned sharply westward, signaling her tow to follow, which the latter could not do soon enough, because of her weight and the influence of the tide.

This was a libel in rem against the tug Albert N. Hughes to recover damages caused by a collision of her tow with the schooner Lottie K. Friend.

Henry R. Edmunds, for libelant.

John F. Lewis and Horace L. Cheyney, for respondent.

BUTLER, District Judge. The suit is for damages from a collision in the Delaware Bay, September 21, 1895. The libelant was at anchor, and is admitted to have been free of fault. The respondent was passing down, towing the schooner "Lawrence" astern, by a long hawser. The latter was heavy, and going with the tide responded tardily to her helm,—requiring two men at the wheel. A short distance above the libelant, and a little eastward, a small vessel was lying at anchor; and another a little further eastward was getting under way. These small vessels the tug and her tow passed safely. The tug also passed the libelant, a short distance to the westward, while the tow swung down and struck her well forward, on the starboard side. The answer, admitting the libelant to have been faultless, charges the tow with responsibility for the collision, alleging that she failed to follow the tug as closely as she should; and this raises the only material question in the case.

The record contains much conflicting testimony, as is usual in such cases. After a careful examination of it I have reached a conclusion adverse to the respondent. To analyze and discuss this testimony would be a useless labor; and I will therefore simply state my conclusions. In addition to the above undisputed facts, I find that the tow followed the course of the tug as closely as she could under the circumstances. Being large and heavy, and going with the tide, she responded slowly to her helm. The small vessel at anchor above the libelant was a little further eastward than she is shown on the draft at page 9 of respondent's brief, and the libelant a little further west-

ward than she is shown. The respondent passed the small vessel with little, if any, change of course, (the tow following pretty directly behind at this time,) and approached the libelant nearly head on, but a little to the eastward, getting quite close before discovering the situation. She then turned sharply westward and signaled the tow to follow. The latter endeavored to do so, but necessarily swung down under the influence of her momentum and the tide, and struck the libelant as above described. She may have been a bad steerer as the tug charges. But if she was, the tug, having towed her before, should have known it and taken precautions accordingly. The respondent was without a proper lookout, having no one exclusively devoted to that duty; and this, doubtless, was the cause of her running so near the libelant before changing her course. The collision was then inevitable, unless, possibly, by turning in the opposite direction. With the change westward the tow would necessarily be brought into collision; there was no chance of escape in attempting to follow. The distance between her and the libelant was too short for any available effort to keep off, especially in view of her speed and the force of the tide. She would necessarily swing down and turn lower than the tug, and thus be drawn into contact with the libelant just as she was.

The allegation that she took a sheer eastward, (on which the defense rests,) as some of the respondent's witnesses assert, cannot be accepted against the evidence to the contrary. Besides, there is nothing to account for such a sheer. If it occurred after the tug turned westward and signaled her to follow, it is wholly unaccountable that she should have turned in the opposite direction. If it occurred before the tug turned westward, then the tug should have gone eastward, as it would have been safe to do. It was perilous to turn westward under such circumstances, and attempt to haul the tow across the libelant's bows; and of itself would render the tug responsible for the collision.

The libel is sustained, and a decree may be prepared accordingly.

## DONALLAN v. TANNAGE PATENT CO.

(Circuit Court of Appeals, First Circuit. March 13, 1897.)

No. 189.

**APPEAL—DISMISSAL ON APPELLANT'S MOTION.**

An appellant cannot of right dismiss his own appeal; and, when an appeal is dismissed on his motion, he is not entitled, in the absence of special equitable considerations, to have the order expressed to be without prejudice; but where an appeal from an interlocutory order granting a preliminary injunction was so dismissed, the order may state the fact that the dismissal was before any hearing on the merits.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by the Tannage Patent Company against John E. Donallan for infringement of letters patent No. 291,784 and 291,785, for a process of tanning leather. The circuit court made an order granting a preliminary injunction (75 Fed. 287), and the defendant appealed. The cause was heard on appellant's motion to dismiss its appeal without prejudice.

Geo. L. Roberts, James H. Lange, and W. Orison Underwood, for appellant.

Frederick P. Fish and Wm. K. Richardson, for appellee.

Before PUTNAM, Circuit Judge, and ALDRICH and BROWN, District Judges.

PUTNAM, Circuit Judge. This is an appeal from an interlocutory order or decree granting a preliminary injunction. The appellant files the following motion:

"Now comes the original defendant in the above cause, the appellant before this court, and moves that the appeal taken by him from the interlocutory order or decree of the circuit court, granting a preliminary injunction, be dismissed, without prejudice to any proceedings in the circuit court, or to the right of the defendant to take any subsequent appeal, and without prejudice to the questions which may be raised by such subsequent appeal if lawfully taken, but with costs of the appeal to the appellee."

The appellee does not object to the dismissal of the appeal, but it does object to the qualifying expressions asked for.

An appellant cannot as of right dismiss his own appeal. U. S. v. Minnesota & N. W. R. Co., 18 How. 241, 242. That ordinarily, on a dismissal on his own motion, the appellant is not entitled to an order expressed without prejudice, follows from what is said in the case cited, at page 242, that usually the court will not allow such a dismissal if the appellant intends at some future time to bring another appeal. How very cautious the supreme court usually is to shut out presumptions of any qualification in connection with such orders appears from U. S. v. Griffith, 141 U. S. 212, 11 Sup. Ct. 1005.

Where, after a hearing, a cause is disposed of by the court on appeal, for some reason not touching the merits, it is now well settled that the judgment should usually show that it is without prejudice. So, on his own motion to dismiss, an appellant may