APPEAL FROM THE QUEBEC ADMIRALTY DISTRICT.

BETWEEN

THE SHIP *NORWALK* (DEFENDANT).... APPELLANT; 1909 Nov. 23.

AND

THE MONTREAL TRANSPORTATION COMPANY (PLAINTIFFS)..... } RESPONDENTS.

ALEXANDER D. THOMSON..INTERVENING PLAINTIFF.

Costs of interlocutory motion—Doubt as to disposal of same in judgment below on the whole case—Any necessary amendment of judgment in that behalf left to trial judge.

In this case it was not quite clear as to what disposition the learned trial judge had made of the costs of an interlocutory motion for an intervention order, and the court was asked to vary the judgment, *pro tanto*, ordering the defendant to pay such costs. The court intimated that upon a fair construction of the judgment below such costs were to be paid by defendant, but left it to the trial judge to amend the judgment if it was not intended to order the defendant to pay the costs in question.

APPEAL from a judgment of the Deputy Local Judge of the Quebec Admiralty District

The facts are stated in the reasons of the trial Judge.*

A. H. Clarke, K.C., for the appellant;

E. E. Howard for the respondent.

CASSELS J., now (November 23rd, 1909,) delivered judgment.

The appeal in this case is on behalf of the ship *Norwalk* from a judgment of Mr. Justice Dunlop, Deputy Local Judge in Admiralty for the Admiralty District of Quebec, delivered on the 12th May, 1909.

* Reported *ante* p. 434.

1909

THE SHIP NORWALK v. THE MONTREAL TRANSPORTATION CO.

Reasons for Judgment.

The appeal was argued before me on the 14th of September last.

Counsel for both the appellant and respondents, after shortly stating their points, requested that I should read the arguments of counsel before the local Judge and consider them as addressed to me.

These arguments had been taken by the stenographer and extended. Mr. Holden, K.C., and Mr. Howard had argued the case for the plaintiffs, and Mr. Clarke, K.C., and Mr. Angers, K.C., for the defendant.

Since the argument I have read and re-read these arguments.

Each of the counsel presented the case for his respective client in a very able way, sifting the conflicting testimony and urging the respective views, and also dealing with the legal questions.

If the learned trial Judge has erred in his conclusion it is not because of want of assistance of counsel.

I have carefully read the evidence given at the trial, and I am of opinion that the learned Judge has arrived at a correct conclusion.

The question at issue in the main turns upon disputed questions of fact, and I would be loth to overrule the trial Judge who had the benefit of seeing and hearing the witnesses, and was in a much better position to judge of their credibility than I can be sitting in appeal.

I wish to state, however, that after a minute perusal of the evidence with the contentions of counsel before me, I am of opinion that the learned Judge arrived at a proper conclusion, and I agree with him in all his findings.

The learned trial Judge has dealt with the evidence and law in a very exhaustive opinion, and it would be mere repetition on my part to add anything to his opinion.

It was proved conclusively at the trial that the tug *Glide* on two occasions blew three short blasts, the customary signal in those waters, to notify up-coming vessels to

check down. It is said that these blasts were not heard by those on board the *Norwalk*. Mr. Angers, K.C., during his argument stated that it was fortunate they were not heard, as since 1905 three short blasts mean : "My engines are going full speed astern". This, however, is only east of the Victoria bridge, and is not a rule applicable to the waters in question.

The *Norwalk* was aware that the tug *Glide* had a tow. It is proved that the beam of the *Winnipeg* is 37½ feet and the beam of the *Jet* 30 feet. The beam of the tug *Glide* is 16 feet.

The *Winnipeg* was on the starboard side and carried the regulation green light. The *Jet* was on the port side, carrying the regulation red light. It is said that those on board the *Norwalk* did not see these lights, giving as a reason that they were apparently obscured by the Lightship No. 2. This lightship is about 35 feet long and 10 to 12 feet beam.

Had the *Norwalk* been in that part of the channel northerly of the lightship, with the lightship on her port bow and the tow in the channel northerly of the lightship, it is difficult to understand how the lights, or one of them, would be obscured. It is quite evident to my mind that the pilot of the *Norwalk* deliberately intended to pass the lightship on the southerly side.

I think, as the learned Judge finds, the *Norwalk* is solely to blame.

A minor point was raised by Mr. Clarke as to that part of the judgment ordering the defendants to pay the costs of the intervenant up to the time of the allowance of the intervention. It was stated that no opposition was made to the intervention, and that in the previous part of the learned Judge's reasons it was stated that it has been admitted by the parties that the intervenant was the owner of the cargo, and "the foregoing motion is consequently granted but without costs". The learned

1909

THE SHIP NORWALK v. THE MONTREAL TRANSPORTATION CO.

Reasons for Judgment.

Judge, however, when using this language, was dealing with an application on behalf of the plaintiffs for leave to amend the statement of claim. The motion on behalf of the intervenant had been previously dealt with, and an order made on October 21st, 1908, and the costs were reserved. No doubt the learned Judge would amend the judgment if it was not intended to order the defendant to pay these costs.

The appeal is dismissed with costs. I think there should be no costs of the appeal to or against the intervenant.

Judgment accordingly.

Solicitors for the appellant: *Clarke, Bartlett & Bartlett.*

Sollicitors for the respondent: *McLennan, Howard & Aylmer.*