8FED.CAS.—47

Case No. 4,500.

THE ENTERPRISE.
THE NAPOLEON.

{3 Wall. Jr. 58.}[1]

Circuit Court, E. D. Pennsylvania. April Term, 1855.

PRACTICE IN ADMIRALTY—POWER OF CIRCUIT COURT TO ISSUE MANDAMUS TO DISTRICT COURT—OR TO GRANT REHEARING OR ALLOW APPEAL—COLLISION—LIABILITY OF TWO VESSELS TO A THIRD—SUIT AGAINST BOTH—DAMAGES—TUGS AS CARRIERS.

1. The circuit court has no power to issue a mandamus to the district court, to compel it to set aside its decree in admiralty, or to grant a rehearing, or to allow an appeal after the time has elapsed in which it might have been taken; not even in cases where this court thinks that the district court should have reheard the case, or allowed an appeal under the circumstances.

{Cited in Snow v. Edwards, Case No. 13,145.}

2. In a question of collision between a "tow" on the one side, and a steam tug and a steamboat on the other, where it is difficult for the owner of the tug to ascertain who has been in fault, the owner of the tow may "implicate both vessels, demanding a decree against one or both, and thus compel them to interplead and settle the question of their respective liabilities;" and he need not run the risk of losing his suit first against the tug, because her owner can show that the steamer was in fault, and then against the steamer, because her owners

can show, upon new evidence in their power, that the tug was in fault.

[Quoted in The Hudson, 15 Fed. 167.]

3. Where a boat in charge of a tug, whose owners have contracted to tow her, is lost by a collision between the tug and a steamer—the boat towed being clearly in no fault—the court will not, on a libel against the tug, be astute to inquire whether as between the tug and the steamer, the one or the other of these last was to blame for the collision. In a case of doubt—and especially if by an error of the court below, not remediable here, it has lost its remedy against the steamer—it will rather give the boat towed reparation against the tug which has contracted to carry it, leaving this last to recover the whole or a quantum of damages from the steamer.

4. Steam tugs are not liable as common carriers for the safety of vessels which they are towing, or of their cargo.

Mandamus to district court. Appeal in admiralty and rehearing. These two cases, though the points adjudged in each are different, grew originally out of the same transaction, and were decided in this court, as they are here reported, together. The cases arose on libels in admiralty, filed by one Hitner. The transaction was thus: The libellant Hitner, contracted with the steam tug Enterprise, to tow his canal boat, loaded with iron, along the Delaware. While going up the river with her tow, the tug met the steamer Napoleon. A collision took place, by which the iron became a total loss. The collision was not an inevitable accident, but arose from the fault of either the tug or the steamer, or of both. But whether it was the fault of one, or of the other, or of both, Hitner did not himself, know; and instead of "implicating both vessels by demanding a decree against one or both, and thus compelling them to interplead and settle the question of their respective liabilities" (which this court said expressly, he should have done), he suffered himself to be persuaded by the owners of the tug, that the fault was all the steamer's, and so filed his libel in the court below against it alone; the owners of the tug conducting the suit in fact, but not being in any way parties to it on the record. The district court had thought that the fault was exclusively the tug's, and so dismissed the libel. Without taking an appeal from this decree within the time prescribed by the rules of the district court, but relying on the decree as showing conclusively that the steamer was not in fault, and therefore that the tug must be, Hitner then filed his libel below against the tug; and the owners of the tug, producing better evidence when their own interests were involved, than they had done when the steamer's were, the district court now decided that the fault was exclusively the steamer's, and dismissed the libel against the tug. Finding himself in this dilemma, the libellant next petitioned the district court to rehear his suit against the steamer, or to allow an appeal on it nunc pro tunc. This was refused by the court, and the question in the second of the cases in this court, st. the case of the steamer Napoleon, was, therefore, not upon the action of the district court upon the original libel against the steamer, but upon the action of that court in refusing to grant an appeal, or to rehear. It involved the question of the right of this court, the circuit court, to entertain an appeal from the district court in admiralty on a petition to grant an appeal or to rehear, when such petition was refused.

The question in the other, the first case, st. that of the steam tug, was an ordinary appeal. The evidence was conflicting. The tug, it was certain, had fewer lights than she ought to have had, but that omission, in the opinion of the court below, did not contribute to the collision. The collision was off the larboard side of the tug, against the starboard quarter of the wheel-house, and as the steamer had shut off her steam, and endeavored to sheer to the larboard, when the two vessels were some hundred yards apart, the district court had thought it "almost certain that the steamer, if she had ported her helm, would have passed clear of the tug; and that she would also have gone clear even after starboarding her helm, if she had kept up her headway." And there having been, as that court thought, "time enough, seemingly, for either resort, she did neither; but, on the contrary, violated the cardinal rule, which required her to port her helm, and then by slacking her speed, increased the probability of her being run into by the tug." When the proceeding against the steamer had been before him, the district judge, on the evidence in that case, had been of a different opinion. The tug, his honor thought, had been "clearly in delict," and it was "clear that her irregularly placed light misled the Napoleon." Where there was "no want of a look-out, no recklessness, no purpose of wrong manifested by a plainly wrong manoeuvre," he would "not hold that a manoeuvre, because it turned out to be unfortunate, should divert the responsibility from a party that had clearly been in the wrong." His honor was himself "inclined to think that the steamer would have done more judiciously if she had ported instead of starboarding her helm;" but he would "not question too zealously the nautical propriety of a manoeuvre made in good faith and upon an emergency induced by the misconduct of the other party." The libel against the tug was drawn rather loosely, and with a good deal of verbiage; and it was, perhaps, not quite clear whether tort or contract was the basis of the allegation. It set forth that libellants were owners of fifty tons of pig iron, in a canal boat called the General Marion. That on the 29th of July, 1851, the master of the Enterprise "undertook to tow said canal boat," &c. That by gross negligence

in the management of the Enterprise, the Marion was sunk and the iron lost, in consequence of being brought into collision with the steamboat Napoleon, and because the Enterprise "made no effort to avoid the collision."

St. George T. Campbell, for libellant.

Mallery & Gowan, contra.

GRIER, Circuit Justice. The libellant, who has lost his iron without any fault of his own, and who should have had nothing to stake in the game, has been compelled to play the cards of both parties in succession, and has lost the second game with what was the winning hand in the first. The case is obviously peculiar.

The only appeals known to courts of admiralty are in open court, sedente curia. In England the application must be made within fifteen days after the decree. Godolphin in Sea Laws, 208. By the act of congress of 3d March, 1803 [2 Stat. 244], it must be "allowed to the ciruit court next to be holden in the district." Within this limit the district court may prescribe the times and modes of making them. Norton v. Rich [Case No. 10,352]. The 45th rule of the supreme court requires the appeal to be made while the court is sitting, or within such other period as shall be designated by the rules of the court, or by an order specially made in the particular suit.

Whether a court of admiralty can entertain a bill or libel in the nature of a bill of review, according to the principles and practice of a court of equity, where there is newly discovered evidence or other matter touching the conscience of the court, is a question not raised by the case; nor do I know of any precedent for such a practice. But the same purpose may be effected by a motion or petition for a rehearing. By the 68th rule of the district court, such a petition may be exhibited any time before execution executed. But such an application being to the conscience and discretion of the court who made the decree, it is not the legitimate subject of appeal. And the same may be said of any application to allow an appeal nunc pro tunc. If this court were of opinion that in a proper use of its discretion, the district court should have reheard this case, or should have allowed an appeal under the circumstances, they have no power to give a remedy to the appellant. We have no power to issue a mandamus to the district court, or compel the judge to set aside his decree, or grant a rehearing, or allow an appeal after the time has elapsed in which it might have legally been taken. When a ease is before us on appeal, we must hear and decide it, but we have no mode of compelling the district court to allow an appeal or send up the record where it is not allowed. If the party has neglected to appeal in proper time, it is his own fault, and if he suffers in consequence, it is as much a "gravamen irreparabile" as where he suffers his goods to be adjudged to another. This appeal must therefore, be dismissed.

We come now to the case of the tug, the Enterprise. The libel in this case neglects to set forth in its caption whether it is a suit for a tort or on contract as required by the

23d rule. But as by the 24th rule, amendments in the matter of form may be made at any time, we shall consider the libel as amended in that behalf to suit the cause of action actually set forth in it. The complaint is clearly not for a maritime tort or collision, but for a breach of the contract to tow or carry the boat of libellants safely. Its averments, if established by the testimony, are sufficient to support the action. It is true, the libel contains much other useless and superfluous matter, which has justly subjected it to the imputation of appearing to be a suit for collision between the Napoleon and Enterprise. But in order to support his case against the tug, the libellant is not bound to justify the steamer, or show that, as between that boat and the tug, the latter was wholly in the fault. If the steamer was recklessly dashing along at full speed, after night in the harbor of Philadelphia, or near to it, seeing and hearing the tug more than a mile off, crossed her bows unnecessarily, and stopped her headway when right in front of the tug, she may not be in a situation to impute fault to the tug in a suit between them. And as such a controversy may possibly arise hereafter, it is not the intention of this court to intimate any opinion on this question till both parties have been heard. It is enough for the purposes of this case, that the steamer was found in front of the tug; that the tug did not back her engine or make any effort to avoid the collision, and that in consequence thereof, the libellants' boat was sunk and their property lost. It is true, a tug is not liable as insurer, as carriers for hire are, but it is bound to use all the care and diligence which prudence and caution require, to avoid bringing the tow in collision with objects which may cause its injury or destruction. The answer charges no fault to the tow or those who managed it. It was not lost by inevitable accident; but by being brought by the power of the steam tug into collision with the steamboat. And although the decree in the case of the Napoleon is no estoppel to the Enterprise, who was no party to it on the record, yet as between her and the libellants, under the circumstances I have detailed, it should have the force of an acknowledgment or confession in deciding doubtful questions of fact. If, as between the tug and the steamboat, the latter has been partially or entirely in the fault, the owners of the Enterprise may have their remedy for the half or the whole of the damages recovered by the libellants, and the judgment in this case cannot affect, by way of estoppel, either party in such a contest, as to any matter of fact herein decided, except

that the tug has been compelled to pay the damages caused by the collision.

Let a decree be entered for libellants for the value of the iron lost, to be calculated by the clerk. As other evidence was given in this court, materially affecting the cause, the appellants will not be allowed costs in this court.

ENTERPRISE, The. See Case No. 247.

[1] {Reported by John William Wallace, Esq., and here reprinted by permission.}