FITZPATRICK ET AL. V. EIGHT HUNDRED BALES OF COTTON.

Case No. 4,843.

{3 Ben. 42.}[1]

District Court, S. D. New York. Dec., 1868.[2]

VOLUNTARY STRANDING—SEAWORTHINESS—MASTER.

1. Where a three-masted schooner encountered a severe storm from the eastward, off Fire Island, in the course of which the mizzen sail was so torn as to make it useless, and it was found impossible to repair it, and the effect of its loss was that the vessel could not be kept up to the wind, but fell off into the trough of the sea, and, about ten o'clock at night, the master ordered the mainsail to be taken in to check her speed, and kept her off before the wind towards the New Jersey shore, hoping that, before he reached it, some change might take place, but the wind and sea increased, and, about one o'clock the next morning, on consultation, it was determined that, inasmuch as an attempt to bring the vessel's head to the wind would cause her to fall into the trough of the sea, and be thrown on her beam ends, when her decks would be swept, and all on board be lost, it was safer to run the risk of beaching her, and accordingly, she was kept on, and ran ashore about an hour after, and proved a total loss, her cargo being almost all saved: *Held,* that this was a case of voluntary stranding, and that the owners of the vessel were entitled to contribution from the cargo.
2. A vessel equipped in a manner which renders her competent to encounter the ordinary perils of a voyage is seaworthy.
3. The fact that the mizzen sail of the vessel gave out in the extraordinary storm, and that she had no spare mizzen sail, does not show that she was unseaworthy when she sailed.
4. The master of the vessel acted with due deliberation and discretion, with no unreasonable timidity, with an honest intent to do his duty, and with a fair exercise of skill.

This was a libel {by Philip Fitzpatrick and others against eight hundred bales of cotton and two hundred and eighty eight barrels of molasses} to recover contribution, in general average, for the damage sustained by the libellants by the loss of the schooner George W. Hynson, owned by them, and of the freight on her cargo. Such loss was claimed to have occurred by the voluntary stranding of the vessel by her master. The libel was filed against the cargo, which was saved, and was being transported on the vessel as freight. The vessel was a three-masted schooner. She took on her cargo at New Orleans, and left there for Providence, Rhode Island, on the 28th of December, 1866. On the 21st of January, 1867, at about live o'clock P. M., when she was about fifteen miles south from Fire Island, on the shore of Long Island, she encountered a severe storm from the eastward and was headed off on a south southwest course. As the wind and the sea increased, an attempt was made to take in sail, and, in taking in the mizzen sail, it was so torn by the wind as to require to be repaired before it could be further used. The other sails were taken in, so that the vessel ran under a two-reefed mainsail, and a jib with the bonnet off. The night was so dark, the weather so cold, the wind so violent, and the sea so high, that, after an attempt by all disposable hands to mend the sail, the effort had to be abandoned

about nine o'clock P. M. The effect of the loss of the use of the mizzen sail was, that the head of the vessel could not be kept to the wind and she fell off into the trough of the sea, and was in danger of being thrown on her beam ends. The wind and the sea continued to increase, and life lines were stretched for the safety of the crew, as the sea frequently broke over the deck. About ten o'clock P. M., the master, after consultation with the mate, ordered the mainsail to be lowered, to thus check the speed of the vessel, and kept her off before the wind and the sea to the westward, towards the New Jersey shore. At that time he supposed himself to be from twenty-five to thirty miles distant from that shore, and he had no then present intention of running the vessel on shore there, but hoped that before reaching there, the wind would either go down or shift from the eastward, and allow him to change his course from one towards the shore. Directed by her rudder, proper hands being kept at her wheel, she was kept away from the wind, and out of the trough of the sea, and on a westward course. The wind did not abate or shift, and the sea increased. It was storming, with rain, snow, and hail, and

very dark, and, about one o'clock A. M., the master had another consultation with the mate. The occasion of that consultation was, that the vessel had been running before the wind for three hours, and was approaching the New Jersey coast. The result of the consultation was, that, in the then state of the wind and the sea, it was thought to be impossible to do anything else but keep the vessel running to the westward, before the wind and the sea, until she should run upon the beach, for the reason that any attempt to bring her head to the wind would cause her to fall into the trough of the sea and be thrown on her beam ends, when her decks would be swept, and all on board would be lost. It was known to the master that the shore was a sandy beach. Two men were kept at the wheel, and guided the course of the vessel directly before the wind, and towards the beach, until the last moment, so as to prevent her falling into the trough of the sea before reaching the shore, so as to ensure her reaching the shore, and so as to ensure her reaching it bow on, and not broadside on, in which latter event the breakers might have swamped her. The rest of the crew were sent into the rigging. About two o'clock A. M., the vessel neared the breakers, bow on. The men at the wheel left it and jumped into the rigging just as a heavy swell came which lifted the vessel over the outer bar and carried her high up upon the beach, which, when daylight came, was found to be Squam beach. The vessel was secured by an anchor from listing to starboard towards the sea. She ran up so high that, at low water, it was bare ground in shore of the vessel. An arrangement was soon made with the Coast Wrecking Company to save the vessel and cargo for seven per cent of their value, they to be delivered to the master in New York. After work was commenced under this arrangement, an agent, sent by the owners of and underwriters on the cargo, arrived at the wreck, and sanctioned the arrangement, and concurred in the discharging of the whole of the cargo, and remained there until nearly all of it was discharged. The cargo was all saved, mostly in good order, except thirteen barrels of molasses. The vessel broke up and was lost, despite all proper efforts to save her. After being stripped she was sold, as she lay, for $316. Her value before was about $20,000. The freight and primage on the cargo, if delivered in Providence, would have been $3,902. The agent of the owners and underwriters of the cargo told the master of the vessel, at the wreck, that he was prepared and authorized to sign average bonds for the owners and underwriters of the cargo, and that the freight would be payable, less the cost of transportation from New York to Providence. Without the knowledge of the master or of the agents of the vessel, the agent in New York of the consignees of the cargo received there and forwarded to Providence all of the cargo except 276 bales of cotton, which were seized under the process in this suit. The consignees of the cargo paid the salvage expenses and charges on it. The answer set up, in defence, that the vessel was not seaworthy, or competently manned or commanded for her voyage; that no proper effort was made to pursue her voyage, or to prevent her and her cargo from being wrecked, or to take her into a place of safety; and that the

disaster was due to the fault or neglect of the master or the poor condition of the vessel and her equipment. The liability of the cargo to contribute in general average for the loss of the vessel, or of her freight, was denied. The libellants insisted that the case was one of voluntary stranding, constituting a general average loss of the vessel and freight, and entitling the libellants to recover contribution therefor from the cargo saved; and that the vessel was seaworthy, and was properly navigated. On the part of the claimants it was insisted, that the stranding, if excusable, was not voluntary but compulsory, and that the vessel was not properly equipped or competently navigated.

E. H. Owen, for libellants.

C. A. Hand, for claimants.

BLATCHFORD, District Judge. It is the law of this court, as settled by the supreme court of the United States (Columbian Ins. Co. v. Ashby, 13 Pet. [38 U. S.] 331), that the voluntary running on shore of a vessel in a case of such imminent peril that there is no other possible means of preserving the crew, the vessel and the cargo, the stranding being done to preserve the crew, the vessel, and the cargo, followed by a total loss of the vessel and the saving of the cargo, constitutes, on behalf of the vessel, a general average loss, to which the cargo saved is bound to contribute. In the case of Barnard v. Adams, 10 How. [51 U. S.] 270, 303, the same court state the rule to be, that, where there is a danger in which vessel, cargo, and crew participate, and such danger is imminent and apparently inevitable, except by voluntarily incurring the loss of a portion of the whole to save the remainder, and there is a voluntary jettison of some portion of the whole, for the purpose of avoiding such imminent peril, and the attempt to avoid such imminent common peril is successful, the case is one for a general average contribution. It was urged, in the present case, on the part of the claimants, that, to constitute a voluntary stranding, the vessel must be subjected intentionally to an increased peril, and that, where she flees from instant and sure destruction, the election to strand her is a secondary result forced by unavoidable compulsion,

and is not voluntary. This is a mistaken view of the law of the federal courts on the subject. In Columbian Ins. Co. v. Ashby [supra], it is held, that where, in the stranding, there is an intention to place the vessel and cargo, if practicable, in less peril, by an act which, though hazardous, is done to escape from a more pressing danger, and for the common safety, and the salvation of the cargo is accomplished thereby, while the vessel is lost, the case is one of voluntary stranding, in which the cargo must contribute, in general average, for the loss of the vessel. So, too, in Barnard v. Adams [supra], it is held, that where there is imminent peril that the vessel will be driven on shore under such circumstances as to be inevitably wrecked, with loss of vessel, cargo, and crew, and such immediate peril is avoided by voluntarily stranding the vessel at a less dangerous place, and cargo and crew are saved uninjured, but the vessel is lost, the case is one of voluntary stranding, and one for contribution, in general average, by the cargo saved, to the loss of the vessel. In that case, it was urged, that if the common peril was of such a nature that the thing cast away to save the rest would have perished inevitably, even if it had not been selected to suffer in place of the whole, there could be no contribution. But the court overruled this view, and held that there could be no foundation for a voluntary stranding, except the compulsion of necessity to save vessel and cargo or one of them from an imminent peril which threatened their common destruction; that the compulsory choice between the loss of the whole and the loss of a part must exist, to justify the sacrifice of a part for the whole; and that, if the jactus were not indispensable in order to escape the common peril, the master would himself be liable for the consequent loss. In the case of Rea v. Cutler [Case No. 11,599], the doctrine of the case of Columbian Ins. Co. v. Ashby was applied, and it was held that, where the master adopted a course which seemed to him least perilous, and most conducive to the common benefit, the loss by shipwreck being inevitable, but being capable of being met in more than one way, and with different degrees of peril to life or property, and in so acting the vessel was wrecked, the loss was a ground for general average.

Applying these principles to the facts of the present case, the stranding of the vessel was less perilous than an effort to keep her head to the wind, and to keep her away from the shore. Such an effort, on the evidence, would have caused her to go around no farther than into the trough of the sea, and there was in such a position imminent and apparently inevitable danger that her crew would have been swept away and lost, entailing a loss of vessel and cargo. Under these circumstances, the master adopted the course which was least perilous. He knew that the New Jersey shore was sandy, and afforded a probability of safety, and, after due and proper consultation, he directed the course of his vessel so as to give her and her cargo the benefit of the lesser peril and the chance of avoiding the greater one. There was, of course, a chance that, in not running before the wind, and in keeping off shore, the vessel might in some way have escaped the apparent danger from

lying in the trough of the sea, but that chance the master threw away and elected not to take; and in doing so he exercised volition. There was a manifest intention on the part of the master, especially after the second consultation, to place the vessel and cargo in less peril by running the vessel on shore. That act, though hazardous, was done to escape from the more pressing danger, and was for the common safety. It is true that, when the master first began to run before the wind, the New Jersey shore was so far distant that his hope that the wind would die away or change before he should reach the shore was greater than his fear of being east upon the shore. But, at the time of the second consultation, there was an honest belief that the vessel and cargo and crew would be lost in the trough of the sea, if the vessel were not run on shore, and that there was less peril in running her on shore. Under this state of facts, the will of the master was exercised in avoiding the greater peril of lying in the trough of the sea, and in discarding whatever chance of safety existed in doing so, and in carefully guiding the course of the vessel so as to accomplish the result attained. The case, therefore, was one of voluntary stranding, calling for contribution, in general average, on the part of the cargo saved.

The defence that the vessel was not seaworthy when she left New Orleans is not made out. She was equipped in a manner which rendered her competent to encounter the ordinary perils of the voyage. Dupont v. Vance, 19 How. [60 U. S.] 162, 167; 2 Pars. Mar. Law, bk. 2, c. 3. § 2, p. 132. The fact that the mizzen sail gave out in the extraordinary storm the vessel encountered, and that she had no spare mizzen sail, is not enough to make out unseaworthiness at the commencement of the voyage. I see no evidence of any deficiency in her equipment in other respects, or of any want of care or skill in her navigation. The master appears to have been a competent man, and to have acted in the emergency with due deliberation and discretion, with no unreasonable timidity, with an honest intent to do his duty, and with a fair exercise of skill. Lawrence v. Minturn, 17 How. [58 U. S.] 100, 110. The freight, if lost, is to be regarded as a part of the loss to be contributed for, Columbian Ins. Co. v. Ashby, 13 Pet. [38 U. S.] 331, 344.

There must be a decree for the libellants

in accordance with this decision, with a reference to a commissioner, as an auditor, to adjust, and state, and report the average contribution due from the cargo saved. All other questions are reserved until the coming in of the report.

{NOTE. An appeal was taken to the circuit court (Case No. 4,319), where the decree of the district court was affirmed.}

[1] {Reported by Robert D. Benedict, Esq., and here reprinted by permission.}

[2] {Affirmed in Case No. 4,319.}