

THE PHOENIX.

{3 Blatchf. 273.}¹

Circuit Court, S. D. New York.

May 21, 1855.

COLLISION—BACKING INTO BERTH—STEADYING
LINE—MAIN YARD SQUARED.

1. It is the duty of vessels lying in slips, in the port of New York to brace up their yards, or top-lift them, during the night, and not leave them squared.

{Cited in *The Avid*, Case No. 678.}

2. Where a steamboat, in backing into her berth, in a slip in New York, in the night, became so wedged in as to make it necessary, to enable her to enter, to remove a lighter, which was fastened to a ship on the opposite side of the slip, and which lay between the steamboat and the ship: *Held*, that the hands on the steamboat, after the hands on the ship had failed, on being called on to remove the lighter, had a right to remove her themselves, and that there was no fault in their so doing, even though the removal of the lighter caused the main yard of the ship, which was squared, to come in contact with the smoke-pipes of the steamboat, as she backed, and broke them down.
3. The ship was in fault in leaving her main yard squared.
4. As the steamboat attempted to back in among a crowd of vessels, without having out a line by which to steady her, she was also in fault.
5. Under these circumstances, the loss was divided.

{Appeal from the district court of the United States for the Southern district of New York.}

This was a libel in rem, filed in the district court by Joseph W. Hancox, master of the steamboat *Hero*, against the ship *Phoenix*, to recover damages for an injury that occurred to the former in a slip on the North river, in the city of New York. The district court made a decree dividing the loss, on the ground that both vessels were in fault {Case unreported.} The claimant appealed to this court.

Dennis McMahan, for libellant.

Charles Donohue, for claimant.

NELSON, Circuit Justice. The Hero was in the act of backing into the slip, to reach her berth on the south side of it, and which was the north side of pier No. 43, and next the foot of Spring street. There were two vessels lying at the entrance of the slip, on the same side of the pier. The Phoenix lay opposite, on the south side of pier No. 44, heading into the slip. There was also a lighter lying along side of the Phoenix, under her starboard bow. The entrance into the slip was thus contracted, making the manœuvres of the Hero somewhat difficult, in backing into her berth between the vessels, especially as the night was very dark. She became wedged in between the lighter and the vessels below; and, after the fastenings of the lighter had been slackened, and she had been moved further into the slip, so that the Hero could move, the main yard of the Phoenix came in contact with the smoke-pipes of the Hero, breaking them down, and smashing her wheel-house, besides doing other damage.

The ground of the complaint in the libel is, that the hands on board of the Phoenix improperly neglected to brace her yards, especially the main yard, which extended some ten or twelve feet over the side of the vessel, and occasioned the damage that occurred. The claimant denies that there was any negligence in not bracing the yards of the Phoenix, and also charges that the damage was occasioned by the mismanagement of the steamboat in backing into the slip.

There is some small contrariety in the evidence as to whether or not the main yard of the Phoenix was squared at the time the Hero attempted to back into the slip; and also, as to whether or not the hands on board of the Hero, who were engaged in slackening the fastenings of the lighter and moving her, had not braced the yards of the Phoenix themselves, before the accident occurred. But the decided preponderance is in favor of the allegation that the yards were not braced

but squared, and had been left in that situation by the hands on board of the Phoenix.

It is insisted on the part of the claimant, that it is customary for vessels lying in slips around this port to leave their yards squared during the night as well as during the day, and hence, that no negligence is properly chargeable for the omission to brace them up, or top-lift them. I think the weight of the evidence in the case is the other way. It is true that Schultz, one of the harbor-masters, says, that it is common for vessels to lie with their yards squared—more common than to lie with them braced or top-lifted. Whether he means while lying in slips in the night time, is not stated. And yet he admits that it is not a prudent thing for vessels to lie with their yards squared. Admitting this to be so, his duty as harbor-master should lead him to correct this practice of vessels, if, as he supposes, it prevails. Story, one of the port-wardens, says, that when vessels lie in slips where boats are continually coming in and going out, the custom is for them to brace their yards up, and that, when yards are squared, is where vessels lie at the wharves. Mount, a dock-master, on complaint being made to him against the Phoenix, gave orders to the mate on board, the day before the accident, that he must keep his yards braced sharp up 532 during the night time, while lying in the slip, because, when squared, they interfered with the steamboats that were continually passing in and out of it, by unnecessarily obstructing the passage. There can be no doubt about the duty of the Phoenix; after this direction by the dock-master, however it may have been before. In my judgment, the duty was equally obligatory without the direction, and should be generally observed by vessels lying in slips around the harbor, and should be enforced by the officers appointed to superintend and regulate the shipping lying within it.

It is said that the hands on board of the Hero had no right to interfere with the lighter, and that,

if she had not been removed, the collision would not have happened, as the steamboat could not have backed far enough into the slip to have brought her smoke-pipes in contact with the main yard. I do not think so. After having called upon the hands of the Phoenix to change the position of the lighter, and they had refused to do so, those on board of the Hero were justified, under the circumstances, in making the change themselves. The crowded condition of the shipping at the docks and wharves around the harbor, must, of necessity, justify slight interferences of this description, for the convenience and accommodation of the business and commerce of the city. Undoubtedly, where it is practicable, a dock-master or harbor-master should be called in to enforce a proper spirit of accommodation. This could not be reasonably required under the circumstances of the present case; and no harm was done to the lighter.

I am satisfied, therefore, that the Phoenix was in fault, and would be responsible for the damage sustained, were it not that the hands on board of the steamboat were also in fault, for attempting to back into the slip among the crowd of vessels, without getting a line out to steady her. The want of this may have contributed to the accident, and, for this reason, the court below, adopting the rule where both vessels are in fault, divided the loss. I concur in this view, and shall therefore affirm the decree, with costs in this court.

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