

CLARE, Adm'x, etc., v. PROVIDENCE & S. S. Co.

(Circuit Court, S. D. New York. June, 1884.)

1. COLLIDING STEAMERS—LAW AS TO NAVIGATING IN A FOG.

The law requires that every steam-vessel shall, when in a fog, go at moderate speed, and the theory that full speed is the safest speed when offered as an excuse for infringing the law, cannot be accepted by the courts.

2. SAME—WILLFUL BREAKING THE LAW ENTAILS UPON THE LAW-BREAKER FULL CONSEQUENCES OF HIS ACT.

One who takes a course forbidden by law does so at his peril, and the excuse that the unlawful way is the best way will not save him.

In Admiralty.

Isaac N. Miller, for plaintiff.

Wheeler H. Peckham, for defendants.

COXE, J. This action is brought by Almira R. Clare, as administratrix of Charles C. Clare, her deceased husband, to recover damages of the defendants for having negligently caused his death. The defendants are common carriers, and on the eleventh of June, 1880, they were the owners of the two steamers, the Narragansett and the Stonington. On the evening of that day the former was proceeding from New York to Stonington, Connecticut, and the latter from Stonington to New York, via Long Island sound. At about 11:30 p. m., which was their usual hour for meeting, the two vessels collided, the Narragansett, upon which the plaintiff's intestate was a passenger, took fire and sank, and he was drowned. The sound at this point is about 12 miles wide. The night was still and dark and there was a dense fog. Both vessels were upon the same course, going at about 11 knots (between 12½ and 13 miles) per hour. This was their usual rate of speed. Though it was customary for the Stonington to make her trips with two pilots, on this occasion she had but one. When she first sighted the Narragansett the latter was about 150 feet distant, headed across the Stonington's bow. The Stonington then gave signals in quick succession to slow down, to stop, to back water, and to back strong. It was then too late. There was not time enough to stop. The Stonington was, prior to the collision, engaged in signaling approaching vessels to go to the right by short blasts upon her whistle. She was also blowing fog whistles about three times per minute. She heard the Narragansett's fog whistle when the latter was from three to five minutes off, apparently about a point and a half on her port bow. The wheel of the Stonington was then put hard a-port and her head turned about five points to the right, but her speed was not slackened. The captain of the Narragansett, on the contrary, testified that he made the Stonington a point or a point and a half on his starboard bow, and he gave orders to starboard his helm.

The defendants introduced testimony to prove that experience has demonstrated that in fogs on Long Island sound accidents are less

likely to occur if vessels run at full speed. The sound is navigated by taking a course from light to light. In thick weather it is customary, after leaving one light, to run the time nearly up which is required to make the next light, at the usual rate of speed. The boat is then stopped and feeling her way cautiously by sounding she makes the second light, and this is repeated through the sound.

It is urged that if the rate of speed is changed or the boat stopped, except in the vicinity of a light, the reckoning will be lost, or at least less accurately attained. That if the steamer is slowed down in the strong currents and crossed tides of the sound the danger of drifting or running onto the rocks, reefs, and points, which everywhere abound, is vastly increased. In short, it is maintained by those accustomed to the navigation of the sound that by keeping up the regular speed they are better able to make their courses, handle their boat, and tell their whereabouts than by adopting a different rule.

The defendants introduced the record of the proceedings in the district court in the matter of the *Narragansett*, taken under the act of March 3, 1851, entitled, "An act to limit the liability of ship-owners and for other purposes," and they insist that the decree there rendered constitutes a bar to this action. The court decided that this position was well taken as to the *Narragansett*, but that in so far as the plaintiff's right to recover depended upon the negligence of the *Stonington*, which was not surrendered, the proceedings in the district court were not a bar and that the question whether or not the *Stonington* was at fault should be submitted to the jury. The jury found for the defendants and the plaintiff now moves for a new trial on several grounds, only one of which will be considered.

It is urged that the verdict should be set aside as contrary to evidence and to law, for the reason that there was a clear and palpable violation of sailing rule No. 21. The rule is as follows:

"Every steam-vessel, when approaching another vessel, so as to involve risk of collision, shall slacken her speed, or, if necessary, stop and reverse; and every steam-vessel shall, when in a fog, go at moderate speed." Rev. St. § 4233, p. 818.

No case has been found, where this rule was under consideration, which holds that $12\frac{1}{2}$ or 13 miles an hour is moderate speed for a steam-vessel in a fog. On the contrary, the decisions are unanimously the other way. *The Pennsylvania*, 19 Wall. 125, (7 knots;) *The Colorado*, 91 U. S. 692, (5 or 6 miles;) *The Blackstone*, 1 Low. 485, (8 knots;) *The Rhode Island*, 17 Fed. Rep. 554, (15 miles;) *The State of Alabama*, Id. 847, (8 or $8\frac{1}{2}$ knots;) *The City of New York*, 15 Fed. Rep. 624, (10 knots;) *The Eleanora*, 17 Blatchf. C. C. 88, (between 5 and 6 miles;) *The Leland*, 19 Fed. Rep. 771, (8 miles;) *The Bristol*, 4 Ben. 397, (16 miles;) *The Hansa*, 5 Ben. 502, (7 knots;) *The Manistee*, 7 Biss. 35, (7 miles.)

It is true that the foregoing are causes in the admiralty, and the criticism is made that the question of speed was determined as a ques-

tion of fact. It is urged by the defendants that, because one court concludes upon the evidence before it in a particular case that eight knots per hour, for instance, is immoderate speed, no reason is therefore suggested why another tribunal, in different circumstances, should reach the same conclusion. That to argue to the contrary is tantamount to the absurdity of contending that because a jury determined that 25 miles an hour is too high a rate of speed for a railroad train at a particular crossing, every other jury in similar cases should be constrained to find the same way. This position would quite likely be well founded if the only questions decided were questions of fact, but it will be observed that in several of the cases referred to, some of which were not presented to the court upon the trial or argument, a construction is placed upon rule 21, that in all circumstances "moderate speed" means less than usual speed.

In *The Pennsylvania*, 19 Wall. 125, the court, at page 133, say:

"Our rules of navigation, as well as the British rules, require every steamship, when in a fog, 'to go at moderate speed.' What is such speed may not be precisely definable. It must depend upon the circumstances of each case. That may be moderate and reasonable in some circumstances which would be quite immoderate in others. But the purpose of the requirement being to guard against danger of collisions, very plainly the speed should be reduced as the risk of meeting vessels is increased. * * * And even if it were true that such a rate (7 knots) was necessary for safe steerage, it would not justify driving the steamer through so dense a fog along a route so much frequented, and when the probability of encountering other vessels was so great. It would rather have been her duty to lay to."

In *The Blackstone*, 1 Low. Dec. 485, the court, adopting the language of another case in the same circuit, says, at page 488:

"What would be moderate speed in the open sea, would not be allowable in a crowded thoroughfare or in a narrow channel. And under the same circumstances in other respects, the speed should be the more moderate according as the fog is more dense. The only rule to be extracted from the statute and a comparison of the decided cases is, that the duty of going at a moderate speed in a fog requires a speed sufficiently moderate to enable the steamer, under ordinary circumstances, seasonably, usefully, and effectually to do the three things required of her in the same clause of the statute, viz., to slacken her speed, or, if necessary, to stop and reverse."

In *The Colorado*, 91 U. S. 692, the court, at page 702, use this language:

"Different formulas have been suggested by different judges as criterions for determining whether the speed of a steamer in any given case was or was not greater than was consistent with the duty which the steamer owed to other vessels navigating the same waters; but perhaps no one yet suggested is more useful, or better suited to enable the inquirer to reach a correct conclusion, than the one adopted by the privy counsel. *The Batavier*, 40 Eng. Law & Eq. 25. In that case the court say, 'At whatever rate she [the steamer] was going, if going at such a rate as made it dangerous to any craft which she ought to have seen, and might have seen, she had no right to go at that rate.'"

In *The Rhode Island*, 17 Fed. Rep. 554, the court says, page 557:

"The rate of speed at which the Rhode Island was going in a dense fog, viz., 15 miles per hour, is far beyond that 'moderate speed' which the rules of navigation permit. This has been so often discussed, and the prior adjudications are so numerous and uniform, that it cannot be deemed longer an open question."

In *The State of Alabama*, Id. 847, the court says, page 852:

"The failure to slacken speed in this fog must be set down as one fault in the steamer. Although the fog was not dense, it was nevertheless evidently such a fog as materially to interfere with the timely observation of other vessels, and therefore increased materially the dangers of navigation. To go at full speed in such a fog is not a compliance with rule 21, which requires steamers in a fog to go at moderate speed. * * * No steamer's speed is moderate in the sense of rule 21 so long as she is going at her ordinary full speed. She is required to moderate and reduce her speed according to the density of the fog and the increased difficulty of discovering danger, and of adopting timely means to avoid it. * * * Without determining whether 8 or 8½ knots would or would not be a moderate rate for vessels of much higher ordinary speed in so light a fog as prevailed on the night of this collision, I must hold it not moderate for this steamer, because not moderated or reduced from her ordinary speed."

In *The City of New York*, 15 FED. REP. 624, the court, having under consideration rule 21, says, at page 627:

"This rule plainly imposes upon a steamer two duties: (1) To proceed in a fog at a *moderate speed*; (2) in approaching another vessel so as to involve danger of collision, to *slacken* her speed, and, if necessary, to stop and back. * * * Whatever 'moderate speed' may be, under given circumstances, * * * it is, at least, something materially less than that full speed which is customary and allowable when there are no obstructions in the way of safe navigation. To continue at full speed, therefore, as the steamer in this case substantially did, or until the bark was in sight, was a clear violation of the statutory obligation to go at moderate speed."

In *The Eleanor*, 17 Blatchf. C. C. 88, the court, at page 100, says:

"A simple slackening of speed by a steamer in a fog is not always enough. She must run at a moderate speed, and is never justified in coming in collision with another vessel, if it be possible to avoid it. This implies such a speed only as is consistent with the utmost caution. * * * Her rate of speed must be graduated according to the circumstances. The more dense the fog the greater the necessity for moderation."

In *The Leland*, 19 FED. REP. 771, the court, at page 773, says:

"It is an undoubted violation of the sailing rules for a steamer to run at a reckless or dangerous rate of speed in a fog. What is a moderate, and what is a dangerous, rate of speed, are, of course, to some extent, comparative terms, depending upon surrounding circumstances. * * * This rate of speed, (8 miles per hour.) I have no doubt, was too great in a dense fog, in the night-time, upon waters where the liability to collision was so imminent as on the waters of Lake Michigan, even at this early season of the year."

In *The Manistee*, 7 Biss. 35, the court says:

"I know what steam-boat men say, that they must make their time; that they must run in a fog. But they cannot be permitted to run with their usual speed in a fog, surrounded by sail-vessels, against which they are liable to collide at any moment."

The conclusion derived from these authorities is: That "moderate speed" means moderated speed; reduced speed; less than usual speed. It was not the intention of congress that steam-vessels should run as fast in a fog as in fair weather. Applying the rule so construed to the Stonington, there is no possible escape from the conviction that she was guilty of a grave maritime fault. The law said to her that she must not run at the rate of 11 knots an hour in a fog, and, yet, in total disregard of the statute, she was running at 11 knots an hour, at midnight, in a dense fog, and at a time when she knew that she was in close proximity to the colliding vessel. She was going so fast that all efforts to avoid or mitigate the collision were unavailing. It can hardly be contended that this high rate of speed did not produce or contribute to the accident. Had the steamer been going at a less rate not only would she in all probability have heard the signals sooner, but she could have stopped in less space, and, though the collision might have occurred, the blow would have been less severe. Within the cases cited, it must be said upon this evidence that the Stonington was at fault, and that the finding of the jury exculpating her was not in accordance with the evidence and the law.

It is thought that the sailing rule referred to, which has its counterpart in the English admiralty, contains provisions the wisdom of which can hardly be disputed. If in the opinion of others it states an erroneous principle of navigation, it behooves those interested to petition congress for its repeal, or modification so far as it relates to Long Island sound. While it remains the law it is incumbent upon the courts to see that it is properly enforced. Those who violate it do so at their peril. If the owners of vessels navigating the sound choose to take a course forbidden by law, they should clearly understand that when loss and injury happen they must take the consequences, and that the excuse that the unlawful way is the best way, will not be accepted by the courts.

A new trial is ordered.

THE UNION and others.

(*District Court, N. D. Illinois. 1884.*)

ADMIRALTY—JURISDICTION—ARBITRATION.

It is not the province of an admiralty court to investigate the conduct of arbitrators in a matter previously submitted to them, and to review their award.

In Admiralty.

W. M. Condon, for libellant.

Schuyler & Kremer, for the tug Union.

W. L. Mitchell, for the schooner R. B. King.

BLODGETT, J. The libelant in this case seeks, as owner of the schooner Floretta, to recover damages sustained by said schooner in a collision between said schooner, while in tow of the tug Union, and the schooner R. B. King. The collision occurred on the nineteenth of August, 1882, near the entrance to Chicago harbor. Among other defenses urged in the case is an award made by arbitrators, to whom the matters arising out of such collision was submitted by the parties interested. It appears, from the proofs and pleadings, that libelant was, at the time of the collision, owner of the Floretta. The Vessel-owners' Towing Company was owner of the tug Union, J. L. Higgie being president of the company and acting in its behalf, and J. C. Dunbar was master of the schooner R. B. King, and acted in the matter of the arbitration in behalf of her owner. The agreement for submission to arbitration was as follows:

"CHICAGO, August 24, 1882.

"Know all to whom these presents may concern, that we, the following parties, J. L. Higgie, of the Vessel-owners' Towing Company, representing the tug Union, and J. V. Taylor, representing the schooner Floretta, and Capt. J. C. Dunbar, owner of the schooner R. B. King, do hereby agree to leave to arbitrators the collision that happened between the three said vessels on the morning of the nineteenth of August, 1882, about one mile or thereabouts from Chicago harbor. We have also agreed to the following arbitrators: Capt. William Keith and Capt. William Cary, and, if they cannot agree, to be left to a third party to be appointed by them.

[Signed]

"J. L. HIGGIE,

"President of the Vessel-owners' Towing Company.

"J. C. DUNBAR.

"J. V. TAYLOR."

And, under this agreement, the arbitrators named made an award as follows:

"CHICAGO, September 5, 1882.

"*J. L. Higgie, J. V. Taylor, and J. C. Dunbar.*—GENTLEMEN: We, William Keith and William Cary, do herewith give you our decision in damage case of schooner Floretta and R. B. King and tug Union. We hold schooner Floretta responsible for her own damage through action of her master, Capt. S. Murphy, for giving four different orders, and thus free tug Union from all responsibility. We hold schooner R. B. King responsible for her own damage for not keeping proper lookout.

WILLIAM KEITH.

"WILLIAM CARY."

In the fifth article of the libel, the fact that the matter was submitted to arbitration and an award made in pursuance thereof is stated, but it is also alleged that libelant had no notice of the hearing before the arbitrators, and no opportunity to present proofs; and also that libelant was induced to sign the agreement to arbitrate by misrepresentation made by Higgie, the president of the towing company; and therefore libelant is not bound by the award, and is entitled to recover upon the original cause of action. The only question I deem it necessary to consider is the effect of this submission and award as a defense in this case. I think there can be no doubt

that the agreement for arbitration in this case is sufficiently full and explicit to define the controversy and subject-matter upon which the arbitrators were to act. It gives the date and place of the collision, the vessels concerned in it, and their owners, and provides for the selection of an umpire by the two persons named as arbitrators, if they cannot agree. The award, on its face, shows that the arbitrators acted upon the matter submitted to them, and made an award fully within the powers with which they were clothed.

The rule as to the effect of an award is stated by Judge STORY in his learned work on Equity Jurisprudence, § 1452:

"It is well known that when a suit is brought at common law upon an award, no extrinsic circumstances, or matters of fact *de hors* the award, can be pleaded or given in evidence to defeat it. Thus, for example, fraud, partiality, misconduct, or mistake of the arbitrators is not admissible to defeat it. But courts of equity will, in all such cases, grant relief, and upon due proof set aside the award."

This award, being within the powers of the arbitrators, must be held final, until set aside by a direct proceeding for that purpose in a court of equity; it cannot, as it seems to me, be attacked collaterally in a case like this. The award merges the original cause of action, and extinguishes the contract or tort on which the right of action was founded. This position is fully sustained by several cases in the supreme court of Illinois, and by a large number of text-writers, which I need not take time to quote. *Eisenmeyer v. Salter*, 77 Ill. 515; *Haddaway v. Kelly*, 78 Ill. 286; *Morse*, Arb. 490; *Story*, Eq. Jur. § 1458; *Varney v. Brewster*, 14 N. H. 49. It is no part of the functions of a court of admiralty to correct mistakes, reform contracts, or relieve persons from contracts obtained by fraud. It follows, therefore, as a necessary conclusion, that an admiralty court, which is not a court of equity within the meaning of the constitution of the United States, is not clothed with jurisdiction to inquire into the action of these arbitrators, and set aside their award on proof outside of the submission and award itself, for any irregular action on the part of the arbitrators, or for any fraud practiced on the libellant to induce him to submit the differences in question to arbitration. The only authority which seems to support the exercise of such a power by a court of admiralty is the case of *Taber v. Jenny*, 1 Spr. 315. But in that case the question of jurisdiction was not raised or considered by the court, and I do not, therefore, deem it controlling or binding on other courts. In cases where a submission to arbitrators and award are palpably void upon their face, they would furnish no bar to proceeding in admiralty on the original cause of action; but it is otherwise when the award is apparently valid upon its face, and extrinsic facts must be resorted to for the purpose of avoiding it.

It is true that courts of law have in many cases set aside awards when matters pending in a suit before such courts have been submitted to arbitration, and, either by statute or by agreement of par-

ties to such submission, the award was to be made a rule of court, or basis for some future action by the court. So, too, as in the case of *The Sparkle*, 7 Ben. 528, when a contract comes before a court of admiralty in a cause of which it has jurisdiction, it will look into the equities of such contract, and not execute it if inequitable. But there the court has jurisdiction of the subject-matter, and simply looks into the equities of the parties under the contract itself, and, finding it inequitable, refuses to enforce it. But in this case the parties made a submission of their differences to arbitrators voluntarily, so far as appears upon the face of the papers, when no suit was pending, and if by reason of any extrinsic facts the award of these arbitrators ought not to be binding, it does not come within the province of a court of admiralty to inquire into these facts and set aside the award, which it must do before it can proceed to the merits of the original controversy, the mere fact that the original cause of action was within the jurisdiction of admiralty does not clothe this court with power to act upon this contract of submission and declare it void, because its execution was obtained by the fraud of Higgle, nor to say that the award is inoperative by reason of irregularity or misconduct of the arbitrators, or by reason of their mistake or errors of judgment in the matter over which they had full jurisdiction. The controversy in this case at present is not whether the tug *Union* and schooner *King*, or either of them, are liable for the damages sustained by the *Floretta*, but whether the decision of these arbitrators, an independent tribunal to whom the parties submitted the controversy in regard to those damages, shall stand.

Entertaining these views, I have not examined carefully into the proof bearing on the conduct of the arbitrators in the matter of notice to the libellant, as to the time when they would hear proof and act in the case, nor as to the alleged misconduct of Mr. Higgle, by which the libellant was induced to sign the statement, nor have I examined the elaborate report of the commissioner and proofs as to who was blamable for the collision, because I consider those questions are at an end, if this court has no jurisdiction to inquire into the validity of this award and its binding effect.

The case will therefore be dismissed for want of jurisdiction, and without prejudice to the libellant's right to take such action, as he may be advised to set aside the award. In dismissing the case, however, I shall do it upon the terms that each party shall pay the costs of their own witnesses in the case, because I think this award should have been brought to the attention of the court, and the judgment of the court taken upon it, as to whether it was a bar to further proceedings upon the original cause of action, without the expense of taking the large amount of testimony which has been put into the record. Each party will be required to pay their own costs, and each pay one-third of the commissioner's costs, there being three parties to the contest.

THE MINNIE and another.

(District Court, D. Connecticut. May 20, 1884.)

1. LIBEL—NEGLIGENCE.

Where a tug, engaged in towing, carries a barge too near a shoal, and does not protect her from the foreseen danger from a passing vessel, although she has an opportunity to do so, she is liable, in an action for libel *in rem*, for damages occurring through her negligence.

2. STEAM-VESSEL—DUTY IN NARROW CHANNEL—LIABILITY FOR FAILURE OF DUTY.

Where a steam-vessel is about to pass through a narrow passage in which is a tug and its tow, it is her duty to go slowly and carefully, in order to avoid the danger resulting from rapidly passing very near another vessel; and when damage occurs through failure to do her duty in this respect, she is liable for it.

In Admiralty.

Wilhelmus Mynderse and Joseph F. Mosher, for libelants.

Samuel Park, for the Minnie.

Thomas M. Waller and Wm. P. Dixon, for the Doris.

SHIPMAN, J. This is a libel *in rem* by the owners of the barge H. S. Van Santvoord against the tug Minnie and steamer Doris, to recover the amount of the damages to the barge, her furniture, contents, and cargo, which were caused by the alleged negligence of the two other vessels. On March 9, 1883, the barge H. S. Van Santvoord, owned by the libelants, and laden with 605 tons of coal, was taken in tow at Communipaw, New Jersey, by the steam-tug Minnie, to be towed through the harbor of New York and Long Island sound to New London. The barge was made fast along-side the port side of the barge Wyoming, which was made fast along the port side of the tug. Two other barges were made fast along the starboard side of the tug in a similar manner. This is the usual and proper way of conveying a tow through Hell Gate. The four barges carried 1,800 tons of coal. The tug can easily tow 3,000 tons. With the barges so made fast the tug proceeded safely across the harbor of New York and up the East river until she had reached a point in Hell Gate between the Middle Ground and the Sunken Meadows. The Van Santvoord was close to the Sunken Meadows, the tide was flood, and the tug and tow were going at the rate of six miles per hour. At this time the freight steam-propeller Doris was about 500 feet behind the tug and tow, and was also bound up the East river on a course corresponding closely with that of the Minnie, and at a speed of 12 miles per hour. The Doris has a registered tonnage of 1,096 tons, and draws 12 to 14 feet of water when loaded. She gave a signal of one blast of her steam-whistle to signify to those in charge of the Minnie that she was intending to pass the Minnie on her starboard side. This signal was heard and understood by the officers of the Minnie, but was not replied to, and her course was not altered. Her captain testified: "I did not answer the Doris' signal, because I had no idea that the man