THE FLORIDA.[1]

THE HOWARD DRAKE.[1]

(*Circuit Court, S. D. Georgia.* December, 1884.)

1. SALVAGE—SHIPS AT WHARF IN PERIL OF FIRE.
   Ships tied up to a wharf that can be aided when in peril of fire without great personal danger by volunteers from shore, ought not, when so rescued, to have added to their other misfortunes the expense of rewarding excessively all comers to whom the opportunity is given to render aid without showing much gallantry, heroism, or endurance, and without running risk of life or limb. At the same time persons rendering successful maritime services to ships in peril are entitled, under maritime laws, to reward as salvors.
2. WHO MAY BE SALVORS—DAY WATCHMAN RENDERING SALVAGE SERVICES AT NIGHT.
   Where salvage services were rendered to a vessel in peril of being destroyed by fire during the night-time, by a person who was employed upon her as a day watchman, *held*, that as it was wholly voluntary with him to render the services or not, that as it was no part of his employment or duty to render services at night, after he had been regularly relieved by the night watchman, he is entitled to his share of salvage.

Admiralty Appeal.

Richards & Heyward, for libelant.

Garrard & Meldrim, for claimants.

PARDEE, C. J. On the twelfth day of June, 1882, the steamer Florida and the steamer Howard Drake, both belonging to the same transportation company, were laid up in the port of Savannah, on the north side of the river, at a wharf, on which was a building used by the Savannah Oil Company, and with large quantities of oil stored therein; both ships being without crews, and under charge of one night watchman. About 2 o'clock in the morning a fire broke out in the oil building, which fire gained great headway, and resulted in burning the building and considerable of the wharf on which the building stood. This fire greatly endangered both steamers, and it seems now to be conceded that, but for the services of certain volunteers from the city of Savannah in putting out the fire, which actually caught on the Florida, and in moving both steamers up stream out of danger, both steamers would have been actually lost. The services rendered by these volunteers are conceded by the claimants to be low-grade salvage services; and in this I concur. Ships tied up to a wharf, that can be aided when in peril of fire, without great personal danger, by volunteers from shore, ought not, when so rescued, have added to their other misfortunes the expense of rewarding excessively all comers to whom opportunity is given to render aid without showing much gallantry, heroism, or endurance, and without running risk of life or limb. At the same time, persons rendering successful maritime services to ships in peril are entitled, under maritime laws, to rewards as

[1] Reported by Joseph P. Hornor, Esq., of the New Orleans bar.

salvors. In the case of the Florida and Howard Drake, it seems unlikely that any of the salvors could have risked much peril. Escape from the steamers was easy, and when any one found the fire too hot for him he could have retired. No one was injured, and the outside damage involved only some injury to wearing apparel. Some 13 persons, including the night watchman, were around and aboard the steamers, and each rendered more or less service in rescuing them. Three gentlemen from the city—Messrs. Branch, Rutzler, and Fernandez—took a leading part, and, from the intelligent manner in which their evidence is given, I cannot avoid the conclusion that their services were more valuable to the steamers than those of any or, perhaps, all of the other volunteers. It seems the claimant thought so, for, on their declining to join in the libel for salvage, the claimant presented them with a complimentary letter and $333.33⅓ each. The evidence discloses that Joseph Jeannet also rendered very valuable service to the Florida; for, procuring a small boat and an ax, he had the presence of mind to go around the stern of the Florida and sever her stern lines, which enabled the Florida to swing with the incoming tide, and thus to be removed further from the burning oil, and then used his boat to carry Branch, Rutzler, and Fernandez over the river to give their aid. He does not join in the libel for salvage, and states that he was settled with by claimant.

The night watchman, as his duty required, rendered very efficient aid, and he joined in the original libels for salvage, but afterwards, and before decree in the district court, he voluntarily dismissed his claim. The remaining eight joined in the libels against both the steamers, and all were allowed in the consolidated decree $50 each, except George L. Coggins, whose claim was rejected, apparently, on the ground that he was one of the crew of the Florida, and therefore could not be a salvor. All have appealed, and the questions argued and presented here are: (1) Was Coggins entitled to salvage for his services, admitted to have been valuable? (2) Did the judge of the district court sufficiently appreciate the services of the other libelants? Coggins had been in the employ of the Florida as steward before she was laid up, and says that he was expecting to go on her again when the season opened. In the mean time he was employed aboard the Florida as a day watchman, his duty requiring him to go on watch at 7 in the morning and remain until 6 in the evening. He was not required to and did not sleep on the steamer, but at night he came over the river to his home in Savannah. On the night of the fire he was at home, and on the alarm being given he hastened to the river and then got over as quickly as he could. The evidence shows that his first idea was that the steamer would burn, as it was already on fire and in a place of increasing danger, and his first efforts looked to the saving of his own effects (some clothes) and the ship's valuables; but almost immediately, on more help arriving, he turned to and rendered, as all concede, valuable assistance. "A salvor is one who, without

any particular relation to a vessel in distress, proffers useful service and gives it as a voluntary adventurer without any pre-existing covenant connecting him with the duty of preserving the vessel." Cohen, Adm. 54. So that the question is whether it was in the line of Coggins' duty, under his employment as a day watchman, to render aid and assistance to the Florida whenever she might need it in the night-time. The statement seems to answer itself. It was wholly voluntary to go or not. His contract covered no work at night, and it would seem that if he did render services at night at the request of the owners he would be entitled to compensation therefor on the principle of *quantum meruit*. It is difficult to see what his previous employment and expected future employment as steward has to do with the matter. It seems clear to me that it was no part of Coggins' employment or duty to render services to the Florida at night after he had been regularly relieved by the night watchman, and I therefore take it that he is entitled to his share of salvage in this case.

The remaining question is as to the amount of salvage proper to award among the libelants. The salved steamers are agreed to have been worth $15,000. The services rendered were very laborious, and covered in all about three hours' time. In awarding salvage the courts give either a lump sum, considering the value of the services as well as the proper reward, or a certain portion or per cent. of the property saved. The learned judge who heard this case in the district court did not record his method of reaching an amount, but awarded each libelant a fixed sum. My own view is that 6 per cent. of the salved property, or $900, would be a reasonable and proper amount of salvage in this case. The supreme court approved 10 per cent. when a ship anchored in the harbor was saved from fire. *The Blackwall*, 10 Wall. 1. Justice WOODS allowed 4½ per cent. in the case of the Louisiana, aground on shoals near the mouth of the Mississippi. But the fact is, hardly any salvage case can furnish a rule for amount of allowance in another. See rules and general principles and particular cases in Cohen, Adm. 87 *et seq.*

The amount of salvage being determined, there remains the apportionment. Twelve persons participated, more or less, in the services rendered, who can be classed as salvors. In the argument great stress was laid upon the evidence as showing that a few persons did all, and that the others of the twelve were of no use. Notwithstanding the miserable condition of the record, I have carefully read all the evidence, and have reached the conclusion that while some, from superior intelligence, accompanied with presence of mind, rendered more effective service than others, all the persons embraced in the libel rendered service as they were able, entitled to rank as salvage service, and entitling them to share the reward. At the same time, I think they are not entitled to share in equal amounts. An equitable award, and one in keeping with the object of salvage, will be to put down Branch, Rutzler, Fernandez, Jeannet, and Coggins at $100 each, and distrib-

ute the remainder among the libelants Austin, Peterson, two Dixons, Honig, Goette, and O'Neil, share and share alike. The shares awarded Branch, Rutzler, Fernandez, and Jeannet will inure to the benefit of claimant, as these parties do not appear as libelants, but admit having been satisfactorily compensated. A decree will be entered according to this distribution, and taxing costs to claimants.

THE ANNE E. VALENTINE.

(*District Court, E. D. Virginia.* December, 1884.)

1. COLLISION—VESSELS DESCENDING AND ASCENDING JAMES RIVER.
   Ascending vessels about to meet descending vessels in that part of James river above City Point, when the tide is in ebb, must steer close to one or the other edge of the channel, and leave as much room to the descending vessels meeting them as practicable.
2. SAME—FAULT—DAMAGES.
   When it is not clearly proved that an ascending vessel has thus given room to a vessel meeting her, and a collision occurs, damages will not be awarded to the ascending vessel.

In Admiralty.

Meredith & Cocke, for libelant.

W. W. & B. T. Crump, for respondents.

HUGHES, J. The collision under investigation happened in James river just below the mouth of Almond creek, which is a little below the wharves of the Chesapeake & Ohio Railway Company. Although the river there is wide, the channel is not more than 200 feet between the buoys. The collision under consideration occurred about 9 o'clock on the night of the thirtieth of April, 1884. It was a clear night. A new moon was shining. The tide was in ebb. There was a tow coming up the river, drawn by the tug Frank Sommers, with a small tug, the Petersburg, in front of her, helping. They had three vessels in tow, namely, the brig Bonito, of 223 registered tons, with 25 feet breadth of beam, drawing 9 feet 3 inches of water; the schooner Gaskill, about as large, but broader in beam; and a small schooner in the rear of the Gaskill. The tug Ajax was going down the river, having the schooner Anne E. Valentine in tow. The Valentine drew 10 feet 8 inches of water, and was loaded. Her breadth of beam was 32 feet. The two tugs duly signaled each other in approaching, to pass to the right. As the Valentine was passing down, and when between the Sommers and the Bonito, she took a sheer to port and soon came in collision with the Bonito. The hulls of the two vessels do not seem to have come in contact. Just before coming abreast the Valentine seems to have righted herself from the sheer she had taken sufficiently to have cleared the Bonito. She

would have cleared, but for the fact that her port anchor, which projected considerably beyond the bow, caught in the forward rigging of the Bonito, just above her port bulwarks. The result was that the bulwarks of the Bonito were torn away from the topmast backstays down to the poop, and that a good deal of damage was done, chiefly on deck and above decks. See Capt. Koch's answer to the twentieth question in chief. The damage claimed is about $1,300. I am to say, from the evidence, whether the Bonito or the Valentine was in fault on the occasion.

If the Sommers was steering close to the northern edge of the channel, and if each of the vessels which she had in tow was in line with her, and close on the same side of the channel, there was no fault on their part. The question in this case is whether or not the Bonito was reasonably close to the northern side of the channel at the time of the collision. The *law* of navigation, prescribed under the sanction of congressional statute, for the western rivers, is that when two boats meet in the narrow channel of a river it shall be the duty of the pilot of the ascending boat to make the proper signals, and, when answered by the descending boat, to lie as close as possible to the side of the channel; and that the descending pilot shall cause his boat to be worked slowly until he has passed the ascending boat. We have no positive *law* of similar purport prescribed for the navigation of our eastern rivers, but reason and prudence, equally on these as on western rivers, require the ascending boat to give the way in a narrow channel to the one descending, and courts of admiralty are obliged in their rulings to insist that this shall be done.

In the case at bar the tide was going out, and the natural downflow of the James river very materially increased the current. A vessel going down stream on a strong current is very little under the influence of her helm, and is liable to take "sheers," not only in shallow places, but under the action of cross or "switch" currents, which cannot be known or foreseen by the pilot. The ascending boat, on the other hand, is obedient to her helm, especially when under the tow of a tug, and she can choose her course with tolerable precision and certainty. It is consequently her duty to leave as much of the channel as practicable to the descending vessel. In the present case the Valentine was entitled to as wide a breadth of channel as could conveniently be allowed her by the up-coming vessels which she was to pass. The real question to be dealt with is, therefore, whether or not the Bonito gave to the descending vessels all the room which was not needed for her own safe and convenient navigation.

The tug Sommers is proved to have been as near to the buoys on the north of the channel as she could or ought to have been. The Gaskill is also proved to have been well up to the northern edge of the channel and steering after the Sommers. But the evidence in regard to the position of the Bonito, which came between the Sommers and the Gaskill in the tow, is conflicting. If there was none but the

testimony of the respective crews of the two colliding vessels in this case it would be impossible to arrive at the truth of the matter with any judicial certainty. The two sets of witnesses contradict each other at every point. We can get at the truth, if at all, only from other testimony, and from such circumstances as appear to bear upon the point at issue.

Of all the witnesses, of either colliding vessel, who testified, the one most competent to testify as to the position of the Bonito just before and at the time of the accident was Capt. Gaskill, of the schooner Gaskill, which was next in rear of the Bonito in the same tow. He testifies, with iteration and emphasis, that in steering his own vessel by the lights of the tug Sommers he could see these lights to the starboard (or the shore side) of the Bonito. This brig was but partially loaded, and stood high out of the water, and would have obscured the lights of the tug if she had been in line, with helm a-port, as close as the tug and the Gaskill were to the edge of the channel. Capt. Gaskill expressly says that, fearing his helmsman was steering by the brig and not by the tug, he took the wheel himself and put his vessel after the Sommers. He would not say how far off to port in the channel the Bonito was, but he was persistent in saying that she was off far enough to allow of his steering by the lights of the tug, seen to the starboard of the Bonito.

It is also proved that, after the collision, the Ajax immediately slipped her hawser, and that the Sommers did not do so, but continued to pull on hers. She thus prevented the Bonito from moving further towards the southern edge of the channel than when the accident occurred. The concussion of the Valentine against the Bonito would also tend to drive the latter further towards the northern edge. Therefore the Bonito could not, after the collision, have got nearer to the southern edge of the channel than she was at the time of it. Yet the evidence is positive that the Gaskill, a large schooner of broader beam than the Bonito, passed up in tow of the Petersburg on the starboard side of the Bonito, between her and the north edge of the channel, just after the accident. The Gaskill was of at least 30 feet beam, and the additional room which she must have had on that side of the channel on her passage up must have been as much more; and therefore it would seem that the Bonito must have been near the middle of the channel at the time she was raked by the Valentine's port anchor, the channel being only 200 feet in width of deep water. Moreover, it is proved in evidence, by Capt. Koch, of the Bonito, that he did not put his helm hard a-port until half a minute before the collision. His brig being, as I suppose, near the middle of the channel, it was his duty to hard-port his helm as soon as the two tugs blew to pass to port, and to hold it hard a-port until he had got near the northern edge. He did not do this at the time of the signal, nor even when the Ajax passed him, nor until half a minute before the Valentine came in contact with him. The two vessels

were approaching each other at the rate of nine to ten miles an hour, or 800 feet a minute, and the helm of the Bonito could not have thrown her from the middle to the edge of the channel in half a minute, or even far enough towards the edge to avoid the sheer of the Valentine.

On the whole evidence, I think the case made is that the Bonito was near the middle of the channel; that she was not reasonably near the starboard edge of it, as she ought to have been; and that she ported her helm to get there too late to be thereby out of the way of the Valentine, as she was bound to be.

Vessels coming up the portion of James river above City Point, on ebb-tide, are in better subjection to their helms than vessels going down; and I shall invariably rule that up-coming vessels, when about to meet descending ones in narrow places in this river, on ebb-tides, must keep as near that edge of the channel which has been indicated by signals and leave as much room to the descending vessels as practicable. This rule must, of course, be construed in connection with the correlative rule that the descending vessel must observe a proper caution and diligence in exercising its right of way. See, as to this latter point, the case of *The Katy Wise*, 3 Hughes, 589, decided by me at Alexandria in 1879.

The libelant in the case at bar has not established fault in the Valentine by affirmative proof reasonably conclusive of the fact. On the contrary, the weight of evidence seems to show that his own vessel, the Bonito, was in fault in being near the middle of a narrow channel, on an ebb-tide, and not having hard-ported her helm in time to get near its edge.

Decree must be for the respondents.

THE A. F. NICHOLS.

(*District Court, D. New Jersey.* December 12, 1884.)

MARITIME LIEN—REPAIRS ON VESSEL IN FOREIGN PORT—CONTRACT—LIBEL DISMISSED.

As there is no sufficient proof of the waiver of the terms of the contract under which libelant was to furnish the materials and do the work in repairing the vessel now libeled, the libel must be dismissed.

Libel *in rem*.

See Bros., for libelant.

J. A. Hyland, for respondent.

NIXON, J. This is a libel *in rem* for repairs, etc., to a vessel in her foreign port. The case turns upon the question whether the materials furnished and the work done, for the payment of which the libel-

ant sues, were performed under a contract or not. The payment is resisted by the claimant on the ground that there was a written agreement between the parties, and that the libelant has failed to comply with its terms. The libelant admits that, originally, there was a contract in writing, but claims that, when the boat was sent to his dock for repairs, he examined her and discovered that she was so old, and her timbers so rotten, that it was impossible to proceed under the contract; that he went to the office of Compton, the respondent's husband and agent, and so advised him; that Compton sent his clerk and agent, Turner, to examine the boat to ascertain whether she was worth repairing; that Turner came, and, after examination, said that the repairs could be made by using one-inch plank, doubling one on top of the other, and showed him where to cut and where to put in the pieces, and authorized the use of new timbers, for which the additional compensation of $10 was to be made. Both Compton and Turner admit the interview and visit, and deny the conversation, or any change of the original contract. But such denial is so guarded and qualified that I am greatly inclined to believe the libelant's statement, and the more especially as he is confirmed by the evidence of his wife and a Mrs. Wilson, who were present at the interview between Turner and the libelant, and testify as to the conversation which they heard between them. But this evidence does not help the libelant. The Schedule A annexed to and forming part of his libel asserts that the work was done under a contract; and while the foregoing testimony may be accepted as showing that it was changed by a verbal agreement in regard to the character of the plank to be put on, and the amount of compensation to be rendered, the contract remains operative as to its other provisions. It is clear that the libelant has not performed the remaining work in accordance with its terms, and no payment is due until such performance. I think the libelant is honest, and has done the best that he could under the circumstances. It is a hardship to him that he is not paid for his work; but the respondent insists upon her contract, and there is no sufficient proof that it has been waived, except as to the above particulars.

The libel must be dismissed.

CHANDLER v. TOWN OF ATTICA.

(*Circuit Court, N. D. New York.* January 7, 1885.)

1. REMOVAL OF CAUSE—COLLUSIVE TRANSFER—REMANDING CASE—ACT OF MARCH 3, 1875, § 5.
   A plaintiff who has been introduced into a controversy by an assignment or transfer merely that he may acquire a standing and relation to the controversy, to enable him to prosecute it for the beneficial interests of the original party, is collusively made a party to the suit, and when the fact appears it is the duty of the court to remand the suit, under section 5 of the act of congress of March 3, 1875.
2. SAME—CREDIBILITY OF WITNESS—DISCRETION OF COURT.
   Where an extraordinary transaction is disclosed, no satisfactory explanation of which is vouchsafed, and the evidence of the transaction, which it was in the power of the parties to produce, has been withheld, the court may disregard the testimony of the parties so far as it is improbable, and interpret the transaction in a way consistent with the ordinary conduct and motives of business men.
3. SAME—CAUSE REMANDED.
   On further examination of the evidence and circumstances of the case the former order remanding the cause is affirmed, and a new trial refused.

Motion for New Trial.

Redfield & Hill, for plaintiff.

Cogswell, Bentley & Cogswell, for defendant.

WALLACE, J. The question raised upon this motion for a new trial is whether the court erred upon the trial in ordering the action to be remanded to the state court, upon the ground that the plaintiff was collusively made a party to the suit, for the purpose of creating a case removable to this court. It appeared in evidence that prior to February 9, 1884, the plaintiff was the owner of 12 unpaid and overdue coupons, for interest on bonds issued by the defendant, the coupons being for the sum of $25 each. The plaintiff was a citizen of the state of Connecticut. He had owned similar coupons previously, upon which he had brought suit in this court and recovered judgment. The defendant contested the coupons in that suit upon the ground that the bonds were issued without its authority.

On the ninth day of February, 1884, he purchased 79 other coupons, of the same issue of bonds, being also for $25 each, of Sistaire & Sons, bankers, of New York city. He paid for these coupons $79, or one dollar for each coupon of $25. Sistaire immediately delivered these coupons to the plaintiff's attorneys, who brought a suit upon them and the 12 previously belonging to the plaintiff. The suit was brought in the state court, and was immediately removed by the plaintiff to this court, and, as was conceded by his counsel, the suit was intended to be so removed at the time it was commenced. The negotiations between plaintiff and Sistaire & Sons for the purchase took place by correspondence. None of the letters were produced upon the trial, and it was not shown that they were lost, but both the plaintiff and Mr. Sistaire were permitted to testify, without objection, that there