LEONARD v. DECKER and others.

SCHUYLER v. SAME.

(*District Court, S. D. New York.* December 20, 1884.)

1. WHARVES AND SLIPS—NEGLIGENCE.
   Persons in possession of a wharf and collecting wharfage are answerable to vessels, coming there in the usual course of traffic, for damages arising from obstructions or defects in the wharf that are known or ought to be known to the lessees.
2. SAME—DAMAGE—JURISDICTION.
   Where bolts projected from the wharf, in consequence of the timbers which they had held in place getting torn away, and the wharf was left without proper repair, and injuries to the libelants' boats were caused by the projecting bolts, *held*, that the damage arose from negligence that constituted a maritime tort, of which the admiralty has jurisdiction, and for which the respondents, as lessees, were liable.
3. SAME—TORT, WHEN MARITIME.
   A tort is maritime where the injury is received upon a vessel afloat, though the negligence originated on land.
4. SAME—DUTY TO REPAIR WHARF—LESSOR AND LESSEE.
   Though the lessor be bound to repair, the lessee in possession is answerable to the vessel from which he collects wharfage for injury caused by the wharf's being negligently left out of repair.

In Admiralty.

Beebe & Wilcox, for libelants.

W. Howard Wait, for respondents.

BROWN, J. The libels in the above cases were filed to recover for damages sustained under similar circumstances, in March, 1882, by the canal-boats Vision and Mimose, while moored along the southerly side of the pier at the foot of Bethune street. The pier was somewhat out of repair. Some piles or fenders had been torn away, and the bolts which had secured them were left exposed and projecting outward beyond the side of the pier. The bolts were under water, except when the tide was low. The evidence satisfies me that both the canal-boats were injured by mooring along-side these concealed bolts without notice of the obstructions, or of the danger from them. The wharf was owned by the city of New York. The lease of it for three years had been put up at auction the year previous, and had been bid off by the respondents. The terms of the proposed lease gave the respondents the right to collect all wharfage that might be obtained from the pier, in consideration of a certain annual sum to be paid to the city as rent for the use of the dock; and the city was bound to keep it in repair. No formal lease was executed, but the respondents went into possession, collected the wharfage, and paid to the city the rent agreed upon in the terms of sale. Under these circumstances I must hold the respondents answerable for any damages sustained by vessels coming to the wharf in the usual course of traffic, arising from obstructions or defects in or about the wharf or slip,

that were known, or ought to have been known, to the respondents, upon the grounds stated in the recent case in this court of *Onderdonk* v. *Smith*, 21 FED. REP. 588.

The respondents were virtually lessees; they were in possession; and this dangerous projection was of a kind that they were bound to take notice of and to remedy at once, without waiting for the city to do the repairs, as it was doubtless bound to do. Had the obstruction been a concealed one, not previously known, the question would have arisen how far reasonable prior notice of it would have been a condition of the respondents' liability. That question does not arise here. The projecting bolts arose from the want of ordinary care and necessary repair of the pier; defects that were obvious to inspection and were known, or ought to have been known, to the respondents, or to their agents in charge of the dock. To suffer the wharf to remain in this dangerous condition without notice to vessels resorting to it in the ordinary course of business, and in effect upon the respondents' invitation, is negligence, and a breach of duty owed to such vessels. For the damages caused by such obstructions the respondents, as between them and vessels thus coming to the wharf, are bound to pay, unless reasonable warning and notice of the danger be given. The duty of the city to repair did not absolve the respondents from their duty to the vessels either to repair or to give notice of danger.

Counsel for the respondents has submitted an elaborate argument against the jurisdiction of the district court in this case, on the ground that the tort is not a maritime one, since the bolts that did the injury were attached to the pier, and belonged to the land and not to the water. Among the cases cited are the well-known cases supporting the counter-proposition that injuries done by vessels to wharves, or objects upon wharves, bridges, etc., are not maritime torts, and hence not within the jurisdiction of the district court. *The Plymouth*, 3 Wall. 20; *The Neil Cochran*, 1 Brown, Adm. 162; *The Ottawa*, Id. 356; *The Maud Webster*, 8 Ben. 547. Without entering at length into a discussion of these and other cases cited, which I have carefully examined, I need only say that they do not seem to me to sustain the contention of the respondents; but, on the other hand, to be entirely consistent with and to recognize the jurisdiction of this court over torts like the present, and that upon two distinct grounds: *First*, that the bolts which caused the injuries were an obstruction to navigation; and, *second*, because the damage done was inflicted upon a vessel afloat, and because the place where the injury is consummated and the damage actually received is regarded as the *locus* of the *tort*. In the case of the *Maud Webster*, *supra*, BLATCHFORD, J., says, (p. 551:)

"If Howell had been held to be in fault for negligently causing an obstruction to navigation, this court could have made a decree against him in the suit brought by the owner of the schooner. It could have exercised jurisdiction over a case of such negligence, because the damage sustained by the

schooner would have been sustained on the water, in the course of her navigation, through an obstruction to navigation, although the thing which formed the obstruction which injured the schooner was affixed to a part of the earth, and was not afloat. *Philadelphia, W. & B. R. Co.* v. *Philadelphia & Havre de Grace Steam Tow-boat Co.* 23 How. 209; *Packet Co.* v. *Atlee*, 2 Dill. 479; *Atlee* v. *Packet Co.* 21 Wall. 389. But where, although the origin of the wrong is on the water, the consummation and substance of the injury are on the land, the admiralty has no jurisdiction. In this case, the schooner which did the injury to Howell's property was on the water,—was afloat and engaged in navigation; but Howell's property was a part of the soil of the earth, or was affixed to it, and was wholly on land. In a case of tort there can be no jurisdiction in the admiralty unless the substantial cause of action arising out of the wrong was complete upon navigable waters."

In all the above cases the decision is made to turn, not upon the place where the negligence as the cause of the damage originates, but upon the place where the *injury* is received and consummated. It must appear that the *damage*, as the substantial cause of action arising out of the negligence, "is complete within the locality upon which the jurisdiction depends, namely, upon the high seas or navigable waters." *The Plymouth*, 3 Wall. 36. The canal-boats, in this case, were moored along-side the wharf for the purpose of discharging their cargoes, a work which is maritime and one of the necessary incidents of navigation, and the vessels were afloat upon navigable waters. The whole damage and injury were *received* by them in this situation; the *locus* of the *damage* was upon navigable waters. That was, therefore, the *locus* of the *tort;* and as that tort was upon the water, it was within the admiralty jurisdiction, and the libelants are, accordingly, entitled to decrees, with costs.

MARKHAM and another *v.* SIMPSON, Jr., and another.

(*District Court, S. D. New York.* December 11, 1884.)

1. SALVAGE—DISTRIBUTION—RELEASE.
   Where a claim of salvage has been settled amicably, and the moneys distributed among the owners, captain, and crew, and a release under seal executed by the seamen for their various shares, a libel filed four years afterwards by some of the crew to obtain a larger sum will not be sustained, in the absence of any actual or constructive fraud, or of any grossly wrong or unfair distribution.
2. SAME—DEVIATION OF SALVING VESSEL—INCREASE OF RISK.
   The increase of the owners' risk through the deviation of the vessel, having a large and valuable cargo, in order to effect a salvage service, is an important element in the apportionment. In this case, that risk being large, and the salvage service being of a very low order of merit, the allowance of two-thirds to the vessel *held* not unreasonable.
3. SAME—DISTRIBUTION SUSTAINED IN PART.
   The libelants being at the time of settlement fully informed of the mode of distribution of $5,000 among the master and crew, and not in the libel complaining in respect to that part of the salvage distribution, *held*, that that part of the distribution would not be considered or disturbed.

In Admiralty.

Geo. W. Carr, for libelants.

James K. Hill, Wing & Shoudy, and *H. Putnam*, for respondents.

BROWN, J. This action was brought by two of the crew of the brig Redowa to recover an additional sum for their share of salvage moneys that had been previously received and distributed by the defendants, for the rescue of the bark John E. Chase. About 4 P. M. of June 13, 1878, the Redowa, being on a voyage from New Orleans to Fall River, when off Fernandina, fell in with the bark John E. Chase, which was derelict and abandoned. The first mate and two seamen, including one of the libelants, was sent off by the captain of the Redowa, in a small boat, to examine the derelict vessel. Before dusk they returned, and reported her salvable. The Redowa lay by until the next morning, when the mate and two others of the crew were sent aboard, and she was navigated under sail into Tybee roads, which she reached on the seventeenth of June. The Redowa kept her company, sending her provisions by a small boat daily. At Tybee roads the captain remained to take charge of the Chase, and to enforce the claims for salvage; while the Redowa, in charge of the mate, completed her voyage to Fall River, which she reached in safety on June 26th. On the following day powers of attorney were given to the defendants, by all the members of the crew, to settle the claims for salvage. By the second of July following an amicable settlement was effected in New York with the owners of the vessel, and with the underwriters of the cargo, by an allowance of 30 per cent. of their value for the salvage services. The Chase was valued at $12,500, and her cargo at $45,000. The gross amount of salvage thus received was somewhat above $18,000, and, deducting actual expenses, netted about $15,000. Two-thirds of this was paid to the owners of the Redowa, and one-third to the captain and crew. The two libelants received $100 each, and gave a receipt in settlement, and a release in full. They were informed of the amount distributed among the crew, and do not seek now to disturb the distribution among them. They allege in their libel that they were not informed of the whole amount of the salvage recovered, nor of the amount paid, or proposed to be paid, to the owners of the vessel; and they so testify. No fraud is alleged in the libel, or sustained by the proof. The respondents testify, in general, that the whole matter was explained to all the members of the crew, but can give no particulars. The libelants do not testify that any inaccurate statement was made to them, or that any inquiries made on their part were not properly answered. The libel was not filed until July 27, 1882, some four years after the distribution and releases. After this lapse of time little reliance can be placed on the testimony as to the particular details of conversations so long ago. It is sufficient to say that nothing approaching actual or constructive fraud is either proved or suggested. Upon such facts, and after so long delay, the court, even in the case of seamen, would

not disregard such a settlement and general release, unless it clearly appeared that the distribution made was so grossly wrong and unfair as to amount, of itself, to a presumptive fraud upon the seamen. *The Afrika*, L. R. 5 Prob. Div. 192; *The James Armstrong*, 33 Law T. 390. If there be any prevailing rule in cases subject to so great differences as cases of salvage, it is to allow to the salving vessel one-half, in the absence of special circumstances. Cohen, Adm. 152; *Sonderburg* v. *Ocean Tow-boat Co.* 3 Woods, 146. The German Code, art. 751, prescribes absolutely one-half to the salving vessel, in the absence of any contrary stipulation.

The circumstances of this case are almost wholly devoid of those elements which go to make up a highly meritorious service in the salvors. The weather was calm and mild, except some roughness on the first day. There was no danger; no special skill; no occasion for the display of personal enterprise, bravery, or daring. The duties of the crew that remained on the Redowa were unchanged, and not sensibly affected, except taking provisions daily, for three days, in a small boat from one vessel to the other, a short distance in a calm sea. The sum of $5,000 distributed to the master and crew for these services would seem to be an ample compensation. The only material danger and risk which the salvage, in fact, involved, was in making the owners of the Redowa liable as insurers of their own vessel and of her cargo by reason of the deviation to effect the salvage service. *The Henry Ewbank*, 1 Sum. 425; *The Nath. Hooper*, 3 Sum. 544, 578. The amount thus put at the risk of the owners was large, viz., some $18,000 for the value of the Redowa, and $85,000 for the value of her cargo. That such a deviation is a proper and important element in the distribution of a salvage award is now well settled. This rule was adopted in this country as early as 1792, in the case of *The La Belle Creole*, 1 Pet. Adm. 31, 39, 45, where three-fourths of the award were given to the ship. In the case of *The Waterloo*, elaborately considered by BETTS, J., in this court, (Blatchf. & H. 114,) the same rule was applied by him, giving two-thirds to the owner of the vessel, though the labors of the crew were very much greater than in the present case. The same proportion was allowed by Dr. Lushington in *The Scindia* and *The True Blue*, L. R. 1 P. C. 241, 250. See, also, *The Farnley Hall*, 46 Law T. (N. S.) 216; *Scaramanga* v. *Stamp*, L. R. 5 C. P. Div. 295; *The Waterloo*, 2 Dod. 443.

The services of the mariners being of a very inferior order of merit in this case, and there being no material risk on their part, while they employed the owners' property in saving the derelict vessel, and in so doing imposed a heavy risk upon the owners by the deviation, I think the allowance of two-thirds is such as the court itself would have made; and the libel is therefore dismissed.

Fox and others *v.* Patton and others.

(*District Court, S. D. New York.* December 31, 1884.)

1. Maritime Contract—Jurisdiction—Exceptions.
Where a libel was filed *in personam* against the agents of a foreign ship in New York, who had personally promised the libelants to pay for a previous loss through the breach of a charter-party, the agents not being owners nor personally liable for the damage aside from the new promise, *held*, upon exceptions to the libel, that the agents' personal contract was not a maritime contract of which the admiralty had jurisdiction.

2. Same—Consideration—Novation.
In a case of novation it is not sufficient, to make the new promise a maritime contract, that the consideration of the former contract or liability was maritime.

In Admiralty. Exceptions to libel.

Beebe & Wilcox, for libelants.

Butler, Stillman & Hubbard, for respondents.

Brown, J. The libel alleges that in the month of February, 1881, the libelants chartered the British bark Ashur for a voyage from Saint Mary's, Georgia, to Honfleur, France; that said vessel was to make a voyage to Brazil, and thence to proceed in ballast to Saint Mary's, instead of which she took a cargo of merchandise in Brazil and proceeded to New York; that by such deviation in her course and her breach of contract the libelants sustained a loss of £60 sterling; that the respondents, composing the firm of Patton, Vickers & Co., of the city of New York, representing the said bark in this city, thereupon agreed to pay to the libelants for such damage the sum of £55 sterling, which has been demanded of them and payment refused. The respondents except to the libel on the ground that it does not show any cause of action within the admiralty jurisdiction of the court. The decision must turn wholly upon the question whether the respondents' contract was or was not a maritime contract. Nothing in the libel warrants the inference that the respondents were under any legal obligation to pay the damages sustained by the breach of the charter-party. There is no allegation that the charter-party was executed by the respondents, or that they were owners of the bark, or of any part of it. Their only relation to the bark appears to have been that they were her agents in New York. This did not impose upon them any liability for her previous breaches of contract. The only foundation of this action, therefore, is the new and independent promise, on their part, alleged in the libel, to pay the libelants for the previous debt of the ship and of her owners. It does not appear whether or not the debt of the ship and of her owners was discharged, or intended to be discharged, by this new and independent promise of the respondents. If it was not discharged, the libelants' remedy against them remains still available. If the former debt was discharged, then it is a case of novation, in which the only relation of