

garded, and Poole found guilty of a most atrocious piece of chicanery. He must be convicted of a fraud, alike infamous and transparent; a trick which could not have remained long undiscovered, and which would brand him not only as a scoundrel, but also as a simpleton. There is nothing in the proof to warrant such a conclusion. The weight of evidence and the presumptions are with the respondent upon this issue. It follows that the libels must be dismissed, with costs.

THE HUNTER No. 2.

(District Court, W. D. Pennsylvania. January 8, 1885.)

1. COLLISION—UNLICENSED PILOT AT WHEEL—FAULT.

While the mere fact that an unlicensed pilot was at the wheel at the time of a collision will not of itself fix the responsibility therefor, yet that circumstance may well be taken into consideration in determining the question of which party was at fault.

2. SAME—CONFLICTING EVIDENCE.

In a conflict of evidence as to the exact position at the time of a collision of a fleet of flat-boats, moored at an abutment at the libelants' landing, greater weight should be given to the testimony of the witnesses who, by reason of their connection with the fleet, had the better opportunity of knowing what the fact was.

In Admiralty.

Morton & Hunter, for libelants.

Barton & Son, for respondents.

ACHESON, J. This suit is for the recovery of damages caused by the sinking of the libelants' flat, loaded with coal, which occurred about noon of May 17, 1882. This flat was one of a fleet moored at the libelants' abutment or ice-breaker at their landing at East Liverpool, Ohio. It was struck by a flat in the tow of the steam tow-boat Hunter No. 2, and sunk immediately after the collision. The tow-boat, having seven craft in tow, had come down the Ohio river, her destination being the landing of Turnbull & Sharp, which is a few hundred feet above the libelants' landing on the same side of the river. She attempted to land at the abutment of Turnbull & Sharp, but failed to do so, missing the landing, and in backing out from the Ohio shore the collision occurred. Charles E. Sloane, the pilot of the tow-boat, in his testimony says: "We lost control of the boat and tow that far that we missed making the landing at Turnbull & Sharp's." But why they so lost control of the boat and tow he does not satisfactorily explain. It is true, the water was high,—at a stage of about 18 feet; but Sloane further states: "We have made that landing at Turnbull & Sharp's frequently before on water about the same stage. There was nothing unusual in the water, nor in the size of our fleet, nor in the elements, to prevent us making the landing, excepting a

little wind, which was not very strong, and which we encounter nearly every trip." At the time of the collision, Sloane was not in the pilot-house, as he should have been. The captain of the tow-boat, Henry W. Wolfe, who, though a licensed Monongahela river pilot, was not licensed to run as pilot on the Ohio river, was then at the wheel, and had been for some time, perhaps half an hour. It is, indeed, testified that Sloane was also in the pilot-house up until within a few minutes of the collision, when, seeing it imminent, he ran forward to the Hunter flat and cut it loose from the tow. Now, while the mere fact that Wolfe was not a licensed Ohio river pilot would not of itself fix responsibility for the collision upon the Hunter No. 2, yet, in determining the question of negligence, the fact that the wrong man was at the wheel may well be taken into consideration.

A careful reading of the testimony has brought me to the conclusion that in approaching the landing of Turnbull & Sharp, on this occasion, the tow-boat was not properly handled. She should have "rounded to" above their landing, and got straightened up in the river by the time she reached their abutment; but this she failed to do, and was not in good shape to make the landing. George F. Thompson, the mate of the tow-boat, says: "We were out of our ordinary course when we were not straightened up opposite the landing of Turnbull & Sharp, in shape to make the landing." I am quite clear that the navigation of the tow-boat here was faulty, and led to the subsequent collision, although it is perhaps true, that, after the boat failed to make her landing, reasonably proper efforts were made to avoid the collision.

But it is claimed on the part of the defense that the libelants' flat was too far out in the river, and was an improper and unlawful obstruction to navigation, and that the collision was due to this fact. The respondents claim that their diagram — Exhibit A — correctly shows the position of the libelants' fleet on this occasion, and that the whole fleet (the upper tier containing six pieces) lay entirely outside of the libelants' abutment. The testimony directly upon this point is conflicting, but, in my judgment, the clear weight of it is against the respondents. Such of their witnesses as place the whole fleet outside the abutment, in view of their respective stand-points of observation, may well be mistaken as to the exact position of the fleet. The libelants' witnesses (being connected with the fleet) had a much better opportunity to know what the fact was, and they testify that the fleet lay below the abutment, but extending outside of it by the width of two flats and one-half only. There is very strong circumstantial evidence sustaining the witnesses for the libelants in respect to the position of their fleet. Thus it is shown beyond any question that the Hunter flat, which did the mischief, and which was but 80 feet long, after its stroke rebounded and lodged on the libelants' abutment. Now this was scarcely possible if the fleet lay wholly outside the abutment, whether the injured flat was the extreme outside one, as the respond-

ents say, or next to the outside, as the libelants affirm. This, Capt. Wolfe, in the course of his cross-examination, is forced to admit. Again, Joseph Merrington, the wrecker who raised the sunken flat, testifies that he found its lower end on a line with the outside edge of the abutment. Furthermore, in the then stage of water it would seem to have been impracticable to hold the fleet in the position shown by Exhibit A without an anchor or a line fastened to shore above the libelants' landing, neither of which was employed.

Upon the whole evidence, I find that the position of the libelants' fleet was as claimed by them, and that it did not extend outside their abutment more than the breadth of two and one-half flats, or about 40 feet in all. In that position the fleet did not unduly encroach on the river, which, at that time and place, was about one-half mile wide. There was ample room for all the legitimate purposes of navigation outside the libelants' fleet, and, under all the circumstances then existing, the libelants exercised the right of moorage in a reasonable and customary manner. The conclusion I have reached is that the loss in question was due altogether to inexcusable carelessness and want of proper skill on the part of those navigating the tow-boat Hunter No. 2. The proofs seem to establish the correctness of the several items of the libelants' claim, as set forth in their bill of particulars attached to the libel.

Let a decree in favor of the libelants be drawn for the amount of their claim, with interest from May 17, 1882, and costs.

THE ROBERT JENKINS.

(District Court, W. D. Pennsylvania. January 17, 1885.)

1. ADMIRALTY PRACTICE—VERBAL AGREEMENT TO DISCONTINUE—JURISDICTION.

A verbal agreement between the parties, after libel in admiralty filed, for the settlement and discontinuance of the suit, about the terms of which, however, they soon differed, and which was not set up in the answer afterwards filed, cannot at final hearing, after full proofs taken, be insisted on as having ousted the jurisdiction of the court, even if originally such effect might have been given to it.

2. SAME—COSTS.

Although on account of the voluntary reparation by the respondents for most of the libelant's damages from a collision, and for other reasons, the court inclined to deny him costs, yet, in view of the absolute denial of responsibility contained in the answer, *held*, that the respondents were justly chargeable with full costs, they having chosen to litigate that question unsuccessfully.

In Admiralty.

Barton & Son, for libelant.

Knox & Reed, for respondents.

ACHESON, J. I am not convinced that the injury to the libelant's flat-boat was by reason of unavoidable accident. If a wind-storm

prevailed, the Robert Jenkins, in the midst of it, voluntarily put herself in perilous proximity to the flat; and while the injury was not the result of willfulness or gross negligence, there was such a lack of due care as fairly made the tow-boat answerable for the collision. The owners of the Robert Jenkins, the respondents, raised the sunken flat, delivered its cargo of stone, and had the flat docked and repaired by Oswald Kellar, all at their expense. The flat was old and long used, and, it would seem, needed additional repairs to those thus made; but the evidence satisfies me that Kellar repaired all the damage to the flat which had been occasioned by the collision. The only remaining duty incumbent upon the respondents as respects the flat was to have it towed from Kellar's docks to the landing at which it had been sunk; but, according to the clear weight of the evidence, the libelant dispensed with this, he directing the respondents to leave the flat at Kellar's for further repairs which he himself desired to have made. The libelant does, indeed, deny the genuineness of the written order of November 24, 1883; but it is incredible that Mr. Hoag should have forged the libelant's name. The charitable supposition is that the libelant's recollection is at fault. The testimony of Mr. Jenkins and Mr. Hoag is strongly confirmed by Kellar, who testifies: "He [the libelant] talked about having the flat put on the dock again, and the bottom calked all new and a plank or two put in. This was work he wished me to do for him."

The evidence, however, indicates that besides the injury to the flat the libelant sustained some other damages which, I think, may be justly fixed at \$15. But the respondents contend that this suit is not open to further prosecution, because of an agreement for the settlement of the case entered into by the parties immediately after the libel was filed; the respondents asserting that by raising and repairing the flat and delivering its cargo they performed in the main what they agreed to do, and that they tendered performance of what remained to be done by them; and they maintain that the libelant's only remedy is upon the said agreement. But to this argument there are two answers: *First*, the agreement was verbal, and the parties soon differed (as they yet do) as to its terms; the libelant alleging that the respondents were to pay the fees of his counsel, which the respondents deny. Under the conflicting evidence, it is hard to decide which side is right. I think the solution which must be accepted is that the parties did not understand each other, and hence their minds never met. Then, in the *second* place, the respondents did not set up the agreement of settlement in their answer, although it was not filed until after this new dispute had arisen. Certainly, after proofs taken upon the whole case, it is too late for the respondents to insist at the final hearing that the agreement ousted the jurisdiction of the court, even if originally such effect could have been given to it.

I would incline to deny costs to the libelant save for the character of the answer, which denies *in toto* the responsibility of the Robert

Jenkins for the collision. As the respondents chose to litigate that question, and the proofs show them to be in the wrong, they cannot very well complain that they are adjudged to pay the costs. Let a decree in favor of the libellant be drawn for \$15 and costs.

THE GEORGE TAULANE.

(District Court, D. Delaware. January 23, 1885.)

PRACTICE IN ADMIRALTY—AMENDMENTS—DISCRETION OF COURT.

Particular facts necessary to be stated in libels *in rem*, the character of amendments and conditions on which they may be made, prescribed by admiralty rules 23 and 24; the design of the rules being to secure certainty and uniformity in pleading and practice.

In Admiralty.

Hoffecker & Hoffecker, for libellant.

Harry Sharpley, for claimant.

WALES, J. Libel *in rem* for damages to a cargo of canned fruit shipped on board the *Taulane*, at Lebanon, in the state of Delaware, and consigned to parties in Philadelphia. Libel filed July 15, 1884. On the same day the marshal attached the vessel at Lebanon. Claim, stipulation, and order of discharge were made July 19, 1884; answer and exception filed September 3, 1884. It is alleged that, by the carelessness and negligence of the master and crew in stowing the goods, the latter were exposed to the rain and damaged to the amount of several hundred dollars. Special exception has been taken that "it is not alleged, nor does it appear by said libel, that the said schooner was or is in this district." The libellant is, in fact, a corporation created by the laws of the state of Delaware, whereas it is described in the libel as a corporation of the state of New Jersey. The allowance of the exception is not resisted, but the libellant now appeals for leave to amend by substituting Delaware for New Jersey, and by adding to the second section of the libel the words, "and that the said schooner is now within the district of Delaware and the jurisdiction of this honorable court."

The question is, should this amendment be allowed as of course, and without terms? And this is a matter, within the discretion of the court, which is to be exercised in view of all the circumstances of the case, of the rights of the parties, and of a proper application of the admiralty rules and practice.

It is contended that the proposed amendment would not change the cause of action, or affect the stipulators who will not be discharged by an amendment, but are subject to all legal dispositions of the case by the court within the amount of their bond. Amendments in form only, in the addition and subtraction of parties, and