

THE MAJOR WILLIAM H. TANTUM.¹SHOE *et al.* v. LOW MOOR IRON Co. *et al.*

(Circuit Court of Appeals, Second Circuit. December 14, 1891.)

GENERAL AVERAGE—VOLUNTARY STRANDING—SAVING OF LIFE.

Where the master of a vessel, which was dragging her anchor in a gale and in danger of going ashore, slipped the cable, and voluntarily stranded her, in substantially the same place, under the same conditions, and with the same result to her cargo, as must necessarily have soon resulted from her dragging anchor, *held* no case of general average. 46 Fed. Rep. 125, affirmed.

In Admiralty. Appeal from a decree of the district court of the United States for the southern district of New York, dismissing the libel of the libellant. Affirmed.

The schooner Major William H. Tantum, loaded with a cargo of iron, went for refuge inside the Delaware breakwater, September 8, 1889. The bad weather developed into the great storm of September, 1889, and the vessel gradually dragged her anchors, until the 10th, when some of her anchor chains gave way, and at 4 o'clock in the afternoon but a single one remained, and the vessel was drifting towards the beach, broadside on. In this situation, her master, fearing for the lives of those on board, determined to slip his cable and run ashore, head on. The cable was accordingly slipped, and the vessel, without canvas, paid off and went head on the beach, afterwards turning broadside to the sea, and becoming a total loss. Part of the cargo was saved, and forwarded to its destination. The ship-owner claimed a general average, and brought this suit against the cargo-owner to recover \$2,939.03, the amount charged against the cargo by the average adjusters. The district court held that the act of the master in slipping his cable was done for the purpose of saving life, and with no other motive, and therefore dismissed the libel. 46 Fed. Rep. 125. The libellants thereupon appealed to this court.

Wing, Shoudy & Putnam, for appellants.

Sidney Chubb, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

PER CURIAM. At the time she slipped her cable, the Major William H. Tantum was on the eve, not of foundering in deep water, as her counsel contends, but of going ashore. Her hatches were not even started, she was making no water, and, at the rate at which she was drifting, all the indications were that she would, in a few minutes, ground on the beach, to leeward of her, broadside to the seas. The master slipped his cable, and thus hastened the end, not averting any imminent peril of foundering in deep water, selecting no more favorable locality for stranding, and, though she struck bow on, swinging afterwards broadside to the seas;

¹Reported by Edward G. Benedict, Esq., of the New York bar.

in other words, as the learned district judge expresses it, stranding her "substantially in the same place, under the same conditions, and with the same result to the cargo," though by striking bow on there was secured a better chance to save the lives of all on board. No case of general average is made out. The decree of the district court is affirmed, with costs.

McKEEN v. MORSE.¹

(Circuit Court of Appeals, Second Circuit. November 7, 1891.)

1. DEMURRAGE—FAILURE TO PROTEST—LACHES.

On claim of demurrage it was shown that neither the charter nor the bill of lading contained any provision as to demurrage; the master made no formal protest against the delay, but signed without objection the bill of lading, and did not bring suit until long after. *Held*, that demurrage could not be recovered.

2. ACCORD AND SATISFACTION—RETAINING CHECK—PROTEST.

A master of a vessel received from the charterer a check, which charterer claimed was in full payment of the master's claim for demurrage. The master retained the check, but notified the charterer that it was not sufficient, and that he would sue. *Held*, that his retaining the check was not an accord and satisfaction.

In Admiralty. Appeal from a decree of the district court of the United States for the southern district of New York, dismissing the libel of the libellant.

The respondent chartered libellant's schooner to carry ice from Richmond, Me., to New York. The vessel arrived at Richmond August 27, 1890, and her master at once gave notice of his readiness to load. The loading was not completed until September 10th. Libellant claimed that five days would have been sufficient in which to load, but it appeared that he made no formal protest against his detention. Neither the charter nor the bill of lading contained any provision in regard to demurrage, and the master signed the bill of lading without protest. He also made no complaint on his arrival in New York, or at any time until the commencement of this suit. The district court dismissed this part of the libellant's claim. There was also a further claim by the libellant for demurrage at Poughkeepsie. The respondent admitted some liability, and gave the master a check for \$125. The latter retained it, but did not agree to accept it in full settlement, or to retain it. He also notified the charterer that he would sue. On suit being brought, respondent claimed that the retaining of the check by the master was an accord and satisfaction. The district court declined to sustain the claim, and awarded judgment to the libellant for \$484 demurrage, less the \$125 already paid, and both parties appealed to this court.

Wilcox, Adams & Green, for libellant.

Wing, Shoudy & Putnam, for respondent.

Before WALLACE and LACOMBE, Circuit Judges.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

PER CURIAM: There is no merit in the claim of the libellant for the detention of his vessel at Richmond. He was aware of this himself, and did not assert any such claim in his conversations with the respondents, but insisted upon compensation for the detention at Poughkeepsie. The respondents, recognizing their liability for the detention at Poughkeepsie, tried to induce him to accept \$100 in full. He refused, and they handed him a check for \$125. When he read it, and saw the amount, he told them it would not satisfy the owners; but they insisted upon his keeping it, telling him, if he found it did not satisfy the owners, to return it; and he replied that he would sue them. Not only did he not promise to accept the check in full settlement, but he did not expressly promise to return it. If his conduct led them to suppose he would return it before suing them, they have lost nothing by his omission to do so. Even if he had expressly promised to do so, his subsequent neglect or refusal would not afford the respondents a defense. He was entitled to a much larger sum; and nothing short of an accord and satisfaction, or the acceptance of the check as a discharge in full, is a release. The decree is affirmed, without costs of this court to either party, both parties having appealed, and the cause is remanded to the circuit court with instructions to enter a decree accordingly, with interest.

THE FRED. JANSEN.

LYNCH *et al.* v. THE FRED. JANSEN *et al.*

(*Circuit Court of Appeals, Second Circuit. January 13, 1892.*)

COLLISION—SAIL AND TUG WITH TOW.

The schooner T. was going westward through East river, at flood-tide, keeping close to the eastern shore of Ward's island to avail herself of the slack-water. The wind died out as she reached Negro point, and here she was overtaken by a tug towing a schooner on a hawser of about 300 feet. The tug passed on her port side at a distance of from 40 to 150 feet, but, as the T. struck the tide, which here sets strongly towards Long island, she sheered to port, and struck the tow, though she put her wheel hard a-port, and dropped her main peak. *Held*, that the tug was solely in fault, as it was her duty, as an overtaking vessel, to take sufficient room for a safe passage. 44 Fed. Rep. 773, reversed.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Admiralty. Libel by Daniel Lynch and others against the steam-tug Fred. Jansen for collision. The libel was dismissed in the district court, which decree was affirmed by the circuit court. Libellants appeal. Reversed.

Edward D. McCarthy, for appellants.

Wm. W. Goodrich, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.