UNITED STATES v. 250 KEGS OF NAILS.

(District Court, S. D. California. September 26, 1892.)

SHIPPING—TRADE BETWEEN AMERICAN PORTS—FOREIGN VESSELS.

Act March 1, 1817, § 4, (now Rev. St. § 4347,) prohibits, under pain of forfeiture, the transportation of merchandise from one American port to another in foreign vessels. Act July 18, 1866, (now Rev. St. § 3110,) declares that, if any merchandise "shall at any port of the United States, on the northern, northeastern, or northwestern frontiers thereof," be laden on a foreign vessel, and taken to a foreign port, and thence reshipped to any other "port of the United States on said frontiers," with intent to evade the provisions of the fourth section of the act of 1817, such merchandise shall be seized and forfeited. *Held*, that while it is a palpable evasion of the act of 1817 to ship goods from New York to Antwerp in a foreign vessel, and thence reship them in another foreign vessel to San Francisco, such transshipment is not within the prohibition of either act, when the two are construed together.

Libel to Enforce a Forfeiture of Merchandise.

M. T. Allen, U. S. Atty.

Andrus & Frank, *Page & Eells*, and *J. H. Shankland*, for claimant.

Ross, District Judge. This is an action by the United States to enforce an alleged forfeiture of certain merchandise on the ground that it was transported from one port of the United States to another port therein, in foreign bottoms. The answer of the owner of the property proceeded against admits the bringing of it into the port of Redondo, in this judicial district, as alleged in the libel, and sets up as a defense that the merchandise was wholly of the produce and manufacture of the United States, and was shipped from New York in the Belgian ship Waesland, consigned to a commercial house at Antwerp; that it was there discharged and landed; that subsequently it was shipped on the British ship Kirkcudbrightshire, consigned to the respondent at San Francisco, Cal., and brought to San Francisco, where it was entered as a manufacture of the United States, which had been exported and returned to this country; that, prior to the departure of the ship Waesland from the port of New York, the respondent procured from the collector of customs and naval officer at that port a certificate of the exportation of the merchandise from that port, and that the consignees thereof at Antwerp, prior to the departure of the ship Kirkcudbrightshire, procured from the consul of the United States at that port a certificate that the said merchandise, bound by the said ship Kirkcudbrightshire to the port of Redondo, consisted of articles of the manufacture of the United States which had not been advanced in value or improved in condition by any process of manufacture or other means. The answer further avers that, at the time the merchandise in question was shipped from New York, the respondent intended to export the same to a foreign country, and thereafter to cause the same to be returned to the United States; that the merchandise was at all times the manufacture of the United States; and that it was, by the respondent and his agents, returned to the United States after having been exported, without having been advanced in value or improved in condition by any process of man-

ufacture or other means. The sufficiency of the defense thus set up is challenged by exceptions thereto filed on the part of the government. The libel is based on section 4347 of the Revised Statutes, which reads as follows:

"No merchandise shall be *imported*, [*transported*,] under penalty of forfeiture thereof, from one port of the United States to another port of the United States, in a vessel belonging wholly or in part to a subject of any foreign power; but this section shall not be construed to prohibit the sailing of any foreign vessel from one to another port of the United States, provided no merchandise other than that imported in such vessel from such foreign port, and which shall not have been unladen, shall be carried from one port or place to another in the United States. * * *"

This section is a re-enactment of the fourth section of the act of March 1, 1817, (3 St. at Large, p. 351,) entitled "An act concerning the navigation of the United States." It was manifestly passed in the interests of American shipping, and to prevent foreign vessels from engaging in domestic commerce. In 1817, when the statute was first enacted, the coasting trade of the United States was comparatively small, and was confined to the Atlantic coast. In the course of time, however, it assumed larger proportions, and it became an easy thing for foreign vessels to take a cargo from the United States, touch and discharge at a Canadian port, then reload, and proceed to an American port, or, without herself proceeding, forward the cargo by another foreign vessel. To prevent this from being done, congress, by section 20 of the act of July 18, 1866, (14 St. at Large, p. 182,) enacted that—

"If any goods, wares, or merchandise shall at any port or place in the United States, on the northern, northeastern, or northwestern frontiers thereof, be laden upon any vessel belonging wholly or in part to a subject or subjects of a foreign country or countries, and shall be taken thence to a foreign port or place to be reladen and reshipped to any other port or place in the United States on said frontiers, either by the same or any other vessel, foreign or American, with intent to evade the provisions of the fourth section of the 'Act concerning the navigation of the United States,' approved March 1, 1817, the said goods, wares, and merchandise shall, on their arrival at such last-named port or place, be seized and forfeited to the United States, and the vessel shall pay a tonnage charge of fifty cents per ton on her admeasurement."

Section 4 of the act of March 1, 1817, was carried into the Revised Statutes as section 4347, and section 20 of the act of July 18, 1866, was therein embodied, in substance, as section 3110. These sections are *in pari materia*, and must be read together. It is entirely clear that congress thought that section 4347 could be evaded by the mode of shipment described in section 3110, and, to prevent such evasion on the northern, northeastern, and northwestern frontiers, enacted the latter section, and attached the consequences of the offenses therein defined, not only to the merchandise, but to the ship as well. If the act proscribed by section 3110 was the same as that prohibited by section 4347, it is difficult to see the necessity of enacting section 3110 at all, or any reason for inflicting a penalty on the ship in the one case, and allowing it to go unpunished in a precisely similar case. Congress evidently recognized that section 4347 could be evaded by so directing the voyage

that it would not be from one port of the United States to another port of the United States, and that the prevention sought could not be attained by existing legislation. It consequently made it an offense to evade the provisions of section 4347, under the circumstances set forth in section 3110. As congress thus made the evasion of the provisions of section 4347 an offense under certain defined conditions, the courts cannot say that any other conditions than those thus defined constitute an offense, without departing from the manifest intent of the statute, and usurping the powers of the legislative department of the government. The act of the respondent in the present case was a palpable evasion of the provisions of section 4347 of the Revised Statutes, but it was not the act thereby prohibited. Nor was there any concealment about the transaction, for the respondent disclosed to the collector of customs all that he had done, producing before him the certificates showing that he had shipped the goods from New York to Antwerp, and then back to the United States. If such evasions as are here shown should be prohibited, it is for congress to prohibit them. It is not for the courts to make the law, or to depart from the intention of the lawmaking power, as manifested by its enactments. *Merrit* v. *Welsh*, 104 U. S. 694; *U. S.* v. *Breed*, I Sumt 160. Exceptions overruled.

THE SARAH.

THE SARAH *v.* BELLAIS.

(*Circuit Court of Appeals, Fifth Circuit.* June 23, 1892.)

No. 26.

1. COLLISION—VESSELS ENTERING CANAL—EVIDENCE.
   The steamer Sarah lay aground next to the pier in the deepest water at the entrance of the New Basin canal leading from Lake Pontchartrain to New Orleans, waiting for high water. Afterwards the small schooner Clarke hauled up alongside of her, and made fast. Later a northwest wind blew a full sea into the mouth of the canal, and, both vessels attempting to enter, their bows came in contact, and the schooner was sunk. At the time the schooner was manned only by one seaman and a boy. *Held*, that the schooner was insufficiently manned; and, on the weight of the evidence, that her stern line was cast off, and her stern thrown round by the sea, so as to bring her bow against the steamer's side; that she was never even with the steamer's bows, and being, therefore, the overtaking vessel, was bound to keep out of the way; that it was immaterial whether the steamer was pushing slowly forward at the time, as it was plain that her motion did not contribute to the injury; and that the steamer was not liable.
2. COSTS ON APPEAL—RECORD—IRRELEVANT MATTER.
   Where the record contains a vast amount of irrelevant evidence, consisting of the examination and cross-examination of witnesses, for which the court cannot apportion the responsibility, the costs of taking and embodying the same in the printed record will be taxed equally to the parties.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

In Admiralty. Libel by Auguste A. Bellais, owner of the schooner J. J. Clarke, against the steamer Sarah, (the H. Weston Lumber Company and C. D. and F. Koch, claimants,) for damages for a collision. Decree for libelant. Claimants appeal. Reversed.

Statement by LOCKE, District Judge:

This is a case of collision occurring between the steamer Sarah and the schooner J. J. Clarke, at the entrance into the New Basin canal, leading to the city of New Orleans from Lake Pontchartrain, on the 12th December, 1890. The opening of the canal from the lake is formed and protected by a row of strong piles on the northward and westward sides, starting from a short distance out in the lake, extending thence in a westerly direction, and gradually varying to a nearly south course, thus describing very nearly the arc of a quadrant before the canal proper is reached. On the opposite southward or eastward side of the canal is the lighthouse. The water, when low, is of insufficient depth to float the vessels that ordinarily trade through the canal, and it does not appear to be an unusual occurrence for them to lie aground upon the mud bank at this place. On Tuesday, the 10th of December, the steamer Sarah, of about 40 tons, 80 feet long, loaded with lumber piled on deck fore and aft, drawing 6 feet 2 inches of water, arrived at this entrance to the canal, but found so little water that it was impossible for her to get in, even alongside the pier piles, or so-called "pickets," sufficiently far to make her stern line fast to them, so she tied up by head lines, and lay hard and fast aground that night, the next day, and the next night. There were several schooners ahead of her, all aground; and after her arrival the Leander Jane, a schooner drawing five and a half feet, came in and lay alongside her. Wednesday evening the schooner afterwards injured, the J. J. Clarke, of about 20 tons, about 50 feet long, and 17 feet beam, drawing 5 feet and 6 inches, loaded with rosin and turpentine, came into the middle of the canal, and hauled alongside of the Leander Jane. There was another schooner, the Pippo, lying a little to the southward and westward of the Clarke, in shallow water, hard and fast aground. Early in the morning of Thursday, the 12th, it commenced to blow heavily from the northward and westward, driving a full sea from the lake into the canal, by means of which all of these vessels were driven more or less forward on their course. The steamer Sarah succeeded in moving about her length so as to get stern lines out to the piling. The several schooners ahead of her passed on their way into the canal. The Leander Jane, lying alongside of the Sarah, succeeded in pulling in by the Sarah's bow, and getting into the canal. The schooner Clarke attempted to follow the Leander Jane, but libelant alleges that the steamer Sarah pushed forward into and upon her, doing great damage and injury to her, and causing her to sink and become a total loss. In answer to this the claimants of the steamer allege that at the time of the collision she was lying aground, tied to the piling of the side of the canal, and, by reason of the high wind and sea, the schooner was driven and worked up against her, by which means the damage was done, without

any fault on the part of the steamboat Sarah or those in charge of her. Whichever way it was done, the schooner Clarke and steamboat Sarah came together, so that the bowsprit and stanchions of the former were broken, her knightheads and plank-sheer started and raised, and she so damaged that she sank and became a total loss. Suit was brought by the owner of the schooner, and the court below gave a decree for the libelant, from which this appeal has been taken.

R. L. Tullis, *Wm. Grant*, and *John D. Rouse*, for appellants.

John D. Grace, for appellee.

Before PARDEE and MCCORMICK, Circuit Judges, and LOCKE, District Judge.

LOCKE, District Judge, after stating the facts, delivered the opinion of the court:

There are but few questions of fact in this case and none of law; the relative positions of the vessels previous to the collision and their movements determining the rights of either the one or the other of the parties. Unquestionably, in cases of inevitable or unavoidable accident by collision or otherwise, the damage and loss must rest where it falls. In ordinary cases it is a well-known rule that steam vessels must give way and look out for sailing vessels, and the presumption in cases of collision between such vessels is that the steamer is in fault, but such presumption may be overcome by evidence of the circumstances of the individual case showing that such is not the fact. One question upon which there has been much conflicting testimony, and which is deemed of considerable importance in the case, is as to where, at the entrance of the canal, the channel was located,—whether in the middle, as alleged by libelant, or along the northerly and westerly side, as is urged by claimants. The term "channel" is properly applied to the portion of the bed of a river or canal which furnishes uninterruptedly through its course the deepest water, and the fact that the steamer Sarah, drawing eight inches more of water than the schooner, was able to get in alongside of the piling on the side at all, while the schooner, while lying with her stern in about the middle of the canal, and her bow towards the Sarah, was aground as to her stern, but afloat as to bow, shows conclusively that at that time, at least, the greatest depth of water was on the side where the steamer was lying, and that must be accepted as the channel, and it be considered that the steamer was properly in it.

Upon the arrival of the schooner Clarke at the mouth of the canal on Wednesday evening, her crew consisted of the master, one seaman, and a boy. The master came into the city, and had not returned at the time of the collision, leaving the one seaman and the boy the only ones on board to bring the schooner in,—an insufficient crew for a vessel of her size, and particularly so, considering the crowded condition of the canal. It also appears that at the commencement of the collision, when the steamer Louisiana desired to take a line to tow her out of danger, they had to unreave one of the halliards to use as a tow line, which, being

of insufficient strength, failed to accomplish what would otherwise probably have saved her. The schooner, therefore, seems to have been insufficiently furnished with both crew and lines.

According to the uncontradicted testimony of libelant's witnesses, just before the collision occurred the steamer Sarah, which arrived first, was in the deepest water alongside the piling. The Leander Jane, drawing a little less water, had managed to pull in by the steamer's bows, and had gone on her way into the canal; and the schooner Clarke was lying alongside the Sarah, with her stern about 10 feet forward of the Sarah's stern, and her bow consequently about 20 feet abaft of the Sarah's bows, made fast with head and stern lines, the latter fast on board the Sarah. How the head lines were made fast does not appear; they had had one line made fast to the Leander Jane, but this was cast off when she got under way. From this point the testimony becomes conflicting. Fred Heidenstrom, in charge of the Clarke, in his testimony says that they had two lines ashore, one from the head and one from the stern; one line ashore on the steamboat Sarah; and they had to turn their stern line loose, "being that the Sarah wanted to come in, and that threw us across the channel alongside the Sarah, and the Sarah pushed ahead and struck our bowsprit and kept on breaking it." He says that she broke the stem open, broke the knighthead and a few stanchions, and raised the plank-sheer off, so that she began to leak. William Bellais, the boy on board, says that the Clarke's bowsprit struck the end of the lumber pile forward; that the Sarah struck the Clarke by steaming ahead; that the Clarke's stern was aground, but her bow was afloat; that the Sarah hit her a couple of times by steaming ahead.

These are the only witnesses who claim to have seen the collision, and say that it was done by the Sarah running into or against the Clarke. On the other hand, the testimony of the master, the engineer, and two seamen of the Sarah; Dyes, master of the schooner Pippo; Boyd, master of the schooner Laura L.; George Long, a witness standing on the platform at the Southern Yacht Club House, but a few yards distant from the place of collision, as well as the statement of Heidenstrom himself, in regard to the position of his vessel prior to the collision,—satisfies us, by an overwhelming preponderance, that the Sarah was holding onto the piling by lines; that she was so hard aground that she was unable to change her position with any degree of rapidity, if at all; that the schooner was never ahead of, nor up even with, the steamer; and that the damage was done by casting off the stern line of the schooner,—thus permitting the stern to be driven around by the wind and sea, bringing the bowsprit and stem against the broadside of the lumber piled upon the steamer's deck.

We do not consider it material whether or not the steamer may have been pushing along slowly forward into the canal either by force of the wind and sea, by heaving on lines, or even by her steam power, as her bow was at all times ahead of the bow of the schooner, and what slight motion she appears to have had could in no way have changed the final result. We are satisfied the damage was done by the schooner beating

herself against the steamer by the force of the wind and sea, rather than by any movement of the steamer. We do not find that there was any action on the part of those in charge of the steamer that resulted in the injury to the schooner, or that they could possibly have done anything to prevent or mitigate the loss does not appear. The steamer was the first vessel properly in the channel, and the schooner the overtaking vessel trying to get past. It will necessarily follow, therefore, that the decree of the court below must be reversed, but, in the taxation of costs, we do not consider that there should be taxed as legitimate costs in the case the taking and embodying in the record the vast amount of irrelevant and immaterial matter of examination and cross-examination of witnesses, swelling the record to nearly 200 printed pages, for which we cannot apportion the responsibility. It is therefore ordered that the case be remanded to the court below, with instructions to dismiss the libel, and tax the costs equally against the parties.

THE CITY OF ST. AUGUSTINE.

THE NORMAN.

HENDERSON *et al.* *v.* THE CITY OF ST. AUGUSTINE.

ST. AUGUSTINE S. S. Co. *v.* HENDERSON *et al.*

(*District Court, S. D. New York.* July 12, 1892.)

COLLISION—STEAM AND SAIL—FAILURE TO ALLOW SUFFICIENT MARGIN FOR SAFETY.

The steamer City of St. A., bound S. W. ¾ W., saw the green light of the schooner Norman a little on her starboard bow. The red light of the schooner afterwards became visible to the steamer, which thereupon altered her course to starboard so as to bring the red light on her port bow. Afterwards the schooner's green light appeared again, and the steamer starboarded further, but collided with the sailing vessel. Her excuse was that the sailing vessel had not held her course. On conflicting evidence, and regarding the schooner's narrative as better confirmed by the circumstantial proof, the court found that, with the exception of a slight change *in extremis*, the course of the schooner had not been altered, and that the fault which brought about the collision was that the steamer did not make allowance for the usual and necessary variation in the course of the schooner, or her changes of lights through leeway and the crossing of her lights, and, consequently, did not allow a sufficient margin for passing the schooner, which she was bound to avoid. *Held*, that the steamer was alone liable for the collision.

In Admiralty. Cross libels for collision.
Wing, Shoudy & Putnam, for Henderson and others.
Wilcox, Adams & Green, for the City of St. Augustine.

BROWN, District Judge. At about half past 1 o'clock in the morning of November 25, 1891, the schooner Norman of 367 tons, loaded with a cargo of lumber, bound from Savannah to Baltimore, and then heading about northeast, came in collision off the coast of North Caro-