

was considerably greater than in this, while the value of the vessel and cargo rendering the salvage in that case was eight times greater than in this.

In our opinion, a liberal recompense to the Tillamook for the salvage service rendered in this case would be the sum of \$8,000. The case is therefore reversed and remanded, with instruction to enter a decree for the libelant for that sum, with interest from the date of the service rendered, and the costs in the district court, the same to be apportioned among the libelants and interveners in the ratio adopted in the decree appealed from; and that the appellants recover their costs on this appeal.

THE GYPSUM PRINCE.

HIGGINS et al. v. THE GYPSUM PRINCE.¹

(District Court, S. D. New York. July 15, 1893.)

COLLISION—SAIL VESSELS MEETING—CHANGE OF COURSE—FAILURE TO WATCH EFFECT OF MANEUVER.

Two schooners, the Tarbell and the Gypsum Prince, came in collision at night in Vineyard sound, the collision resulting in the sinking of the Tarbell. On conflicting evidence, the court found that the vessels approached on nearly opposite courses, the Tarbell heading W., the Gypsum Prince about E. $\frac{1}{2}$ N.; that the Gypsum Prince had the wind aft of the beam, and it was her duty to avoid the Tarbell, and the duty of the latter to hold her course; that the Gypsum Prince altered her course from half a point to a point to N., to avoid the Tarbell, but, as the wind freshened, the latter also gradually changed from W. to W. by N., thus thwarting the effect of the change made by the Gypsum Prince to avoid her; that the Gypsum Prince, after her change of course, might have observed that the green light of the Tarbell did not broaden off as it should have done, and so might have known that she was not sailing away from the Tarbell. *Held*, that both vessels were in fault,—the Tarbell for not holding her course, as she was bound to do, the Gypsum Prince for failing to watch the effect of her own change of helm, and continuing that change on seeing that she was not avoiding the Tarbell.

In Admiralty. Libel by Lewis H. Higgins and others against the Gypsum Prince for collision. Decree for half damages.

Carver & Blodgett and Convers & Kirlin, for libelants.

Wing, Shoudy & Putnam, for claimant.

BROWN, District Judge. The above libel was filed to recover the damages arising from the loss of the libelants' three-masted schooner George S. Tarbell, through collision with the four-masted schooner Gypsum Prince, between 10 and half past 10 on the evening of November 12, 1892, about five miles westerly of Vineyard Haven light. The wind was from N. W. to N. N. W. The Tarbell, deeply loaded with plaster, and drawing about 16 feet of water, was bound from Windsor, N. S., via Gloucester, to New York. She

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

had been sailing by the wind, close hauled, on her starboard tack; and from 8 to 10 P. M. she was heading from W. $\frac{1}{2}$ N. to W. The Gypsum Prince was bound from New York to Windsor. She was light, having only about 15 tons of ballast, and was drawing only 8 feet of water. She was 163 feet long by 36 feet beam. The Tarbell was 150 feet long by 32 $\frac{1}{2}$ feet beam. The Gypsum Prince was upon her port tack, with the wind aft of her beam, and was heading E. $\frac{1}{2}$ N. It was her duty to keep out of the way of the Tarbell. The night was clear, but overcast, and excellent for seeing lights. The weather was good.

According to the testimony of the witnesses on board each vessel, each first made the green light of the other; and each soon afterwards saw also the red light of the other for a brief period, after which the red light of each was shut in, leaving the green light clearly visible. The mate was in charge of the navigation of the Gypsum Prince. At first, seeing green light to green light, no change of course was thought by him to be needful; but when the red light was seen for a few moments, and then shut in, he starboarded his wheel and hauled either half a point or a point more to the northward, thereby changing his course from E. $\frac{1}{2}$ N. to E. by N., or to E. by N. $\frac{1}{4}$ N., supposing that to be sufficient to pass safely to windward of the Tarbell. When a few lengths distant, the Tarbell again showed her red light, still on the starboard bow of the Gypsum Prince; whereupon the mate of the latter ordered his wheel hard a-starboard. Her master then hurried on deck from below, and seeing the Tarbell's red light one or two lengths away on his starboard bow, ordered his helm hard a-port; but the stem of the Gypsum Prince struck the port side of the Tarbell near the fore rigging, at an angle of from four to seven points, and the Tarbell sank soon after.

The witnesses for the Tarbell say that they had the green light of the Gypsum Prince on their port bow, and hence showed her always their own red light; that she made no change of course until within two or three lengths of the Gypsum Prince, when, collision being unavoidable, she luffed in order to ease the blow, not changing her heading over one point. Each estimated the distance of the other, when first seen, to be from 1 to 1 $\frac{1}{2}$ miles; and the time between that and the collision, to be from 10 to 15 minutes. The Gypsum Prince was sailing at the rate of about seven knots; the Tarbell, about five. A mile would, therefore, be traversed by them in 5 minutes; and a mile and a half, in 7 $\frac{1}{2}$ minutes.

The contention of the claimants is that the maneuver of the Gypsum Prince was sufficient to avoid the Tarbell; and that that maneuver was thwarted solely by the fault of the Tarbell in porting her wheel, not when in extremis, but when at a considerable distance, whereby she changed her course about four points to starboard, when the Gypsum Prince was already on her starboard hand, thus running up across the bows of the Gypsum

Prince, and rendering collision unavoidable. The Tarbell, on the other hand, insists that the Gypsum Prince was approaching her always on the Tarbell's port side, and that it was for that reason only that the Tarbell ported her helm to ease the blow.

I have found extreme difficulty in this case; not so much in the endeavor to ascertain the truth whether it was probably the Tarbell's green light, or her red light, that was chiefly exhibited to the Gypsum Prince, as to find any satisfactory and certain explanation of how and why the collision occurred. For careful consideration of the testimony satisfies me that the master of the Tarbell is mistaken in supposing that the green light of the Gypsum Prince was a point or a point and a half on his port bow, as he constantly asserts. Patterson, who was walking on the deck forward, says that the green light when first reported was "ahead, or a little on the port bow." He also testifies that the lookout reported it "right ahead." And the master in his first answer says that he reported it "ahead, or on his port bow." The master also watched it from his position aft, standing within a foot of the port rail; and after considerable hesitation in his testimony, he finally states that he saw the green light of the Gypsum Prince from that position ranging between the fore rigging and the fore staysail, which was well hauled in; and that in order to see the green light ranging outside of the fore rigging, he would have been obliged to lean over the port rail. The distance from the port rail to the foremast was at least 15 feet, and the rigging sloped inward; and the master probably stood from 80 to 100 feet aft of the fore rigging; hence if the green light ranged inside the port rigging, and only one-third of the distance to the foremast, that would make the Gypsum Prince bear nearly a quarter of a point on the Tarbell's starboard bow, sufficient to shut in the Tarbell's red light, and at the distance of a mile, to locate the Gypsum Prince nearly 300 feet to the northward of the line of the Tarbell's heading. A very slight change of the Tarbell's heading to northward by yawing, or by unsteadiness in steering, would be sufficient to show her red light. This agrees precisely with what the lookout and mate of the Gypsum Prince testify that they saw; and this concurrence in the testimony is conclusive to my mind that the green light of the Gypsum Prince did not in fact bear on the Tarbell's port bow, but was on her starboard bow; and that it was the Tarbell's green light that the lookout and mate of the Gypsum Prince mostly saw, as they testify. The master of the Tarbell did not go to the starboard side of his vessel to see how the light ranged from that side; and there is no evidence that any one on that vessel took the range from the starboard side.

The positive testimony of the lookout and mate of the Gypsum Prince, that it was the Tarbell's green light and not her red light that they saw continuously, would be entitled, even under contradiction, to great weight; because the circumstances detailed by them show that they were observant and alert in watching the

Tarbell's lights, and in noting the changes; and that they acted upon these observations. Having seen and noted both lights, it is not reasonably possible that the green light could have been mistaken for the red, or that they did make any such mistake. Their testimony as to what they saw and did is, therefore, either true, or a pure fabrication. I must accept it as true, both because no reason to discredit those witnesses appears, and because the testimony of the master of the Tarbell in fact confirms them. He testifies in effect to his supposition only of the bearing. His fatal error was that he did not go to the starboard side of the Tarbell to verify his supposition. Had he done so, I have no doubt he would have seen the Gypsum Prince plainly to starboard. The Pomona, 35 Fed. Rep. 921.

In accepting as true, however, the claimant's contention that the Gypsum Prince was upon the starboard bow of the Tarbell, and with the exceptions stated, saw only the Tarbell's green light, and in thus rejecting the libelants' theory as to how the collision occurred, the difficulty of explaining it is not diminished. For if the Tarbell was heading W. by N., as her wheelsman says she was, when the lights were first seen, and if she kept that course substantially till the vessels were only a few lengths apart, and the Gypsum Prince being at say five minutes before collision, and when a mile away, at least 200 feet to windward of the Tarbell's course, i. e. enough to shut out the Tarbell's red light, then, even if the Gypsum Prince had not luffed at all, but had kept her course N. $\frac{1}{2}$ E., there would have been a difference in their courses of a point and a half from opposite; and supposing the leeway made by the two vessels to have been the same, the Gypsum Prince would have been sailing away from the Tarbell at the rate of 1,800 feet to the mile, i. e. in seven-twelfths of a mile, 1,050 feet; and their distance apart when they passed each other should have been at least 1,250 feet. Approaching in that manner, it is not credible that when within six or eight lengths, the master of the Tarbell could have made the mistake of supposing the Gypsum Prince to be on his port bow, instead of on his starboard bow; or that there should have appeared to be need of any change of course by the Tarbell; or any possible danger of collision; or that she would have luffed to avoid collision when so far from danger. And if the Gypsum Prince, soon after first seeing the red light, say at the distance of two-thirds of a mile, changed her course a point or a half point more to port, the vessels would have passed each other at a distance of from 1,500 to 1,750 feet.

It is plain, therefore, not only that the collision did not come about in that way, but also that when the vessels came near each other, no mere luffing by the Tarbell of even four points could explain this collision. For a luff of four points, the most contended for by the defendant, would not produce a northerly offing of over 350 feet from her former course; and the Tarbell, by such a luff merely, could not have come within 800 or 1,000 feet of the Gypsum

Prince. Some different explanation must, therefore, be looked for.

To account for the collision at all, I am, therefore, forced to find, first, that the course of the Tarbell when her green light was first seen was about W. and not W. by N. There is sufficient warrant in the testimony for this conclusion. For the master says that at 10 P. M., the last time he looked at the compass and within half an hour of the collision, the Tarbell's course was W. by compass. Patterson, who had the wheel for the two hours previous, says that the vessel was all the time sailing by the wind, making "about W. $\frac{1}{2}$ N., but sometimes fell off some, though not so much as to W. $\frac{1}{2}$ S." Peterson took the wheel at 10 P. M.; and he says the course was W. by N. This contradicts the master; and no dependence can be placed on his testimony, since he makes the course of the Tarbell the same after his admitted luff of one point, as before the luff. When he took the wheel at 10 P. M. the vessel's course was west, as the master testifies; and he received from the master an order, in its nature somewhat discretionary, viz.: "If the wind started up, to keep her west by north." This was the order as finally stated by the master, and shows clearly that the course was then W. The wheelsman says nothing about this qualification in the order; but he doubtless acted upon it; and when at some time afterwards the wind freshened, as the master says it did, the wheelsman no doubt hauled from west to west by north. It is entirely consistent with the evidence that this change occurred soon after the green light of the Gypsum Prince was seen; and that makes the solution of the collision easy. For this change of the Tarbell's course completely neutralized the maneuver of the Gypsum Prince to avoid her. It is also probable that the Gypsum Prince, being very light, and having the wind nearly abeam, made a quarter or a half point more leeway than the deeply-laden Tarbell; and that she was thus drifting down constantly upon the course of the Tarbell.

My view of the collision, therefore, is, that the two vessels, when the lights were first seen, were on nearly opposite courses, the Tarbell heading W.; the Gypsum Prince, about E. $\frac{1}{2}$ N.; that the latter bore about a quarter of a point on the Tarbell's starboard bow, while the Tarbell's light bore about half or three quarters of a point on the Gypsum Prince's starboard bow; that each first saw the green light of the other; that soon afterwards the Tarbell, by a little yawing to the northward, or unsteadiness of steering, showed her red light for a few moments only, when it was shut in again; and that the Gypsum Prince in like manner by a little yawing to the southward, or by unsteadiness in steering, also showed her red light for a few moments and then shut it out, on returning to her former course; that the Gypsum Prince thereupon, by starboarding her helm, changed her course from half a point to a point more to the northward, until she had the Tarbell's green light from a point to a point and a half on her starboard bow; that the Tarbell soon after, on the freshening of the wind,

gradually changed her course to the northward, until she headed W by N, thus thwarting the effect of the change made by the Gypsum Prince to avoid her; and that she continued on this course till very shortly before the collision, when she had hauled up enough to bring her red light into view, when only a few lengths from the Gypsum Prince, and then hard a-ported her wheel; that the Gypsum Prince, moreover, probably made leeway to the amount of a quarter or half a point in excess of the leeway made by the Tarbell; and that the collision was brought about through this excess of leeway and by the Tarbell's change of course soon after the red lights were first seen, and through the failure of the Gypsum Prince to starboard sufficiently to counteract both of these causes.

While this view of the facts of the collision charges the Tarbell with fault in changing her course, without reference to her final luff, which may be disregarded, it does not exempt the Gypsum Prince from blame. For the Tarbell's light, when first seen, could not have been over three-fourths of a point off the starboard bow of the Gypsum Prince; and after the latter had changed her course a point, or half a point more to port, it is certain that the Tarbell's green light did not broaden off on the starboard bow of the Gypsum Prince beyond $1\frac{1}{2}$ points, as it would have broadened had no change of course been made by the Tarbell. The testimony of the lookout and mate of the Gypsum Prince shows that the bearing kept about the same till the red light again appeared, when the Tarbell was very near; and the breadth of the green light off the bow must in fact have diminished before the red light last appeared. This ought to have made it evident to the Gypsum Prince, some minutes before the collision, that she was not sailing away from the Tarbell, or keeping out of her way, as she ought to have done, either through her own excess of leeway, or through some change in the Tarbell's course. It was not enough for the Gypsum Prince to go off a point, and then give no further heed to the Tarbell. She was bound to continue watchful of the effect of her maneuvers; and when her first change was seen, as it ought to have been seen, to be not effectual to make the Tarbell's light broaden off more and more as the two approached nearer to each other, the Gypsum Prince was bound to make a timely further change, instead of waiting until the red light appeared nearly ahead, as it evidently did, when only a few hundred feet distant. Both vessels, are, therefore, in fault, and the libelants are entitled to a decree for one-half their damages and costs.

MOLLIE GIBSON CONSOLIDATED MIN. & MILL. CO. v. THATCHER et al.

(Circuit Court of Appeals, Eighth Circuit. September 18, 1893.)

No. 266.

1. MINES AND MINING—CONVEYANCES—CONTRACTS FOR ROYALTIES.

After 1.67 acres of the territory within the exterior lines of location of the Silver King lode mining claim had been awarded to the Sauquoit claim by a judgment of the state court, the owners of the Sauquoit claim purchased the Silver King claim, and in the contract to purchase, the deed, and an agreement to pay royalty for ores extracted, the parties described the Silver King claim as survey No. 4,746, and referred to the exterior lines of the location, and to such lines extended vertically downward, as being the subject-matter of the contract. *Held*, that the deed and contracts included the 1.67 acres as part of the Silver King lode mining claim.

2. WRITTEN INSTRUMENTS—PAROL EVIDENCE TO VARY—CONFLICTING TESTIMONY.

Where parol testimony, if competent to vary the legal effect or construction of a deed and written contracts, is conflicting, an evenly-balanced cause must be determined from inspection and construction of the instruments.

Appeal from the Circuit Court of the United States for the District of Colorado.

In Equity. Suit by M. E. Thatcher and others against the Mollie Gibson Consolidated Mining & Milling Company for an accounting for ores mined pursuant to certain contracts. Decree for plaintiffs. Defendant appeals. Affirmed.

Statement by CALDWELL, Circuit Judge:

This was a bill filed by M. E. Thatcher, G. W. Thatcher, George L. Brown, and A. V. Hunter, plaintiffs, against the Mollie Gibson Consolidated Mining & Milling Company, defendant, to compel the defendant to account for the royalty alleged to be due the plaintiffs for ores extracted from the Silver King lode mining claim under the contracts and deed set forth below, and to permit plaintiffs to inspect the workings and ore in said mine.

Agreement of the 25th of March, 1891: "This agreement, made this 25th day of March, A. D. 1891, between the Mollie Gibson Consolidated Mining and Milling Company, a corporation existing under the laws of the state of Iowa, of the first part, and M. E. Thatcher, G. W. Thatcher, and G. L. Brown, of the city of Aspen, county of Pitkin, state of Colorado, and A. V. Hunter, of Leadville, Lake county, said state, parties of the second part, witnesseth, that the said parties of the second part have bargained and sold to the said party of the first part, in consideration of the following payments and covenants hereinafter mentioned, all that certain mining claim situated in Roaring Fork mining district, Pitkin county, Colorado, known as the 'Silver King,' (and lying near and to the west of the Mollie Gibson lode,) free and clear of all incumbrances and liabilities whatsoever; and said second parties hereto agree, upon fulfillment of the covenants herein to be kept and performed by said first parties, to convey by good and sufficient mining deeds, or cause to be conveyed, the said Silver King lode, as above. And the party of the first part hereby promises and agrees to pay to said parties of the second part for said Silver King lode the sum of one hundred and fifty thousand dollars, (\$150,000,) to be paid as follows, to wit: Twenty-five thousand dollars on the placing of a good and sufficient mining deed for said above-described lode in escrow in the Denver National Bank, conveying said lode to said party of the first part, to be delivered to said party of the first part on the further payments of (\$25,000) twenty-five thousand dollars on each thirty days thereafter till all is paid. And the said parties of the first part hereby further agree to pay to said second parties, their heirs and assigns, a royalty of 15 per cent. on the net smelter returns received from all ore marketed in and under the said Silver King lode, and its side and end