

The indictment in No. 3,525 is for the transmitting to the office of the commissioner of pensions a false and altered affidavit with the intent to defraud the United States, and is based upon section 5418. It does not aver that it was so transmitted with relation to or in support of any claim against the United States, nor are any facts averred from which the court can find that the forwarding of the affidavit, even though false and forged, could in any way operate to the prejudice of the United States. The demurrer to this indictment is therefore sustained.

THE NORTH STAR.

NORTHERN STEAMSHIP CO. v. BROWN et al.

(Circuit Court of Appeals, Sixth Circuit. May 8, 1894.)

No. 105.

1. COLLISION—APPLICATION OF RULES.

As Act March 3, 1885, by which the revised international rules for preventing collisions at sea were adopted for the navigation of United States vessels on the high seas and coast waters, expressly excepted navigation on "harbors, lakes, and inland waters," Rev. St. § 4233, continued in force as to navigation on the Great Lakes.

2. SAME—STEAMERS MEETING IN FOG.

Under Rev. St. § 4233, rule 21, requiring every steam vessel approaching another so as to involve risk of collision to slacken speed, or, if necessary, stop and reverse, and, when in a fog, to go at a moderate speed, a steam vessel, in a fog, approaching another, whose whistle bears a few points off either bow, should stop, and, if necessary, reverse, until the exact position and course of the other vessel can be ascertained, unless such circumstances present themselves at the time as would lead a reasonably prudent and skillful navigator to the confident belief that no risk of collision exists.

3. SAME—CONFUSION OF SIGNALS.

Two steamers, the N. and the S., approaching each other on nearly opposite courses in a fog, when a mile or less apart, exchanged repeated double-blast signals; but the S., mistaking some of the signals of the N. for single blasts, without stopping to ascertain the N.'s exact position and course, herself gave a single blast, ported, and, running across the bows of the N., was sunk by collision with her. *Held*, that the S. was guilty of reckless navigation and gross negligence. 43 Fed. 807, affirmed.

4. SAME—FAILING TO STOP AND REVERSE—RATE OF SPEED.

The whistle of the S., as first heard from the N., bore but a point on the starboard bow, and was placed by the master of the N. only half a mile away, and there was no widening of the bearing of the S.'s subsequent whistles. *Held*, that the N. was also in fault, in failing to stop and reverse, especially after the cross signal of the S., and in keeping up a speed of eight to ten miles an hour, at which she could not have stopped in the distance at which, in the fog, she could have seen an approaching vessel, while she could steer at four miles an hour or less. 43 Fed. 807, affirmed.

5. SAME—EVIDENCE.

The rules that the burden on the manifest wrongdoer is greater than merely to show by a preponderance of evidence that the other vessel was guilty of fault, and that a slight fault is no ground for dividing damages, do not apply where the faults of such other vessel are shown by the allegations and proofs on her part, and where, but for her faults, the collision would have been avoided.

6. SAME—APPEAL—INTEREST ON DAMAGES.

The appellate court, when differing from the conclusions of the court below as to the grounds on which that court allowed interest on the damages awarded for collision, may modify the decree by excluding such interest. 44 Fed. 492, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Michigan.

Libel by Harvey H. Brown and others against the steamer North Star (the Northern Steamship Company, claimant) for a collision between said steamer and the steamer Sheffield. The district court found both vessels in fault, and decreed that the damages should be divided (43 Fed. 807); and, after a hearing of exceptions to the report of the commissioner on the question of damages (44 Fed. 492), a decree was entered for libelants. Claimant appealed.

This was an appeal from a decree of the circuit court of the eastern district of Michigan affirming the decree of the district court, which held that two steamers, the Charles J. Sheffield and the North Star, were both at fault in a collision between them on Lake Superior, and divided the damages.

Harvey H. Brown, E. M. Peck, Fayette Brown, and C. J. Sheffield, the owners of the Sheffield, which was sunk by the collision, began the litigation by filing their libel in the district court against the North Star. The libel alleged that on the 14th day of June, A. D. 1889; the Sheffield was bound on a voyage from South Chicago, Ill., to Two Harbors, Minn., with no cargo; that having passed Whitefish Point, on Lake Superior, and adopted a course W. N. W., she encountered foggy weather, with a strong southerly breeze; that it was not a steady fog, but would light up at intervals, affording a view for several miles ahead; that, to overcome the effects of the southerly wind, she was kept up a quarter of a point from about 1 to about 4 o'clock p. m. on that day, when the wind shifted ahead, moderating to a light breeze, the fog gradually setting in denser, and more steady; that from the time the wind began shifting the Sheffield was steered by compass W. N. W.; that her fog signal of one blast was blowing regularly, as required by law and the circumstances; that the water was smooth, and the wind, at the time of the collision about to be described, was light. The collision is then described in the libel as follows: "That about 4:40 o'clock the whistles of two steamers were heard. One, a loud whistle, was comparatively near; but, at first sounding nearly abeam, it passed, and required no further attention. The other was the faint, far-away sound of the steamer's whistle, nearly ahead, which steamer proved to be the North Star, and with which last-mentioned steamer the Sheffield, fifteen minutes later, came in collision, as hereinafter shown. The Sheffield's engine was at once checked, and close attention was paid to locate the direction of the whistle when it should sound again. It was heard again, a little on the starboard bow. The Sheffield was thereupon, the second time, checked, and to a speed so slow that, as afterwards appeared, she had not good steerageway, and a passing signal of two distinct blasts was blown to the approaching steamer. No answer was received. The signal was repeated by the Sheffield, and she was starboarded half a point. The approaching steamer then replied with one blast, still a long distance away. To make certain whether this was blown as a fog signal, or as a passing signal in response to her own blast, the Sheffield, two or three times, blew the signal of two blasts, to each of which signals the approaching steamer responded directly with a distinct signal of one blast. Thereupon, the Sheffield, acquiescing in the proposal or demand of the approaching steamer to pass port to port, also blew a passing signal of one blast, and ported her wheel. The vessels were then a mile and a half to two miles apart, the North Star then being less than a point on the Sheffield's starboard bow. The Sheffield was not steadied until she headed about northwest by north. In executing the maneuver, it was seen that she had not sufficient steerageway, for which reason her speed was slightly increased, enough to give her steerageway. The whistle of the North Star was thereafter heard on the Sheffield's port bow, each vessel blowing to the other passing signals of one blast, which signal was exchanged repeatedly, the

Sheffield proceeding as last above described; and the vessels being—as, in accordance with said signal, they should be—on such courses that the sound of the North Star's whistle was broadening each time off the port, until she was well off on the port side of the Sheffield, and all risk of collision seemed to be past. In this situation, those on the Sheffield, for the first time, heard a signal of two blasts, for starboard helm, from the North Star, sounded fully four points off the Sheffield's port bow, the vessels being now too close to change sides by starboarding. The Sheffield answered with one blast, and hard ported. Again the North Star blew two blasts, which were answered again by one, and then the North Star swung up through the fog, heading for the Sheffield, two lengths or more distant on the port side, and coming at great speed; those forward on her hailing the Sheffield to go ahead strong, while the master of the Sheffield was at the same time signaling the engine room for full steam, and ordered her wheel amidships. The North Star came on at so great speed that she struck the Sheffield at about a right angle, by her port mizzen rigging, crushing in her side, and after that cutting into her a distance of six to eight feet, inflicting such damage that within five minutes the Sheffield sank, and became and is a total loss." The libelants allege that the North Star was in fault—First, in that, after selecting a mode of passing and establishing an understanding to pass port to port, by passing signals of one blast, she improperly departed from that course, and attempted the opposite mode of passing, to wit, starboard to starboard, when it was too late to safely make or attempt the change; second, in that she improperly starboarded; in that she was proceeding at an unnecessary, excessive, and illegal rate of speed; and, third, in that she did not adopt seasonable and proper means for avoiding the collision.

The Northern Steamship Company appeared as claimant, and filed its answer. The answer averred that at about 5 o'clock p. m., Buffalo time (27 minutes faster than Cleveland time), the North Star was proceeding on a course of S. E. $\frac{1}{2}$ E., the usual course from Manitou island, to take her well off Whitefish Point, and that she was running under check, at a moderate and safe rate of speed, the wind being light from about N. W., and the sea nearly smooth. The collision, and the circumstances which led up to it, are thus described: "While running along in this way, shortly after 5 o'clock, the lookouts heard, and reported to the master, a signal of a steam vessel bearing about three-quarters of a point from the starboard bow. The signal was heard by the master at the same time, and, although indistinctly, it was made out to be two blasts of a steam whistle, from some vessel approaching. At the moment when the said two blasts on the whistle were heard as aforesaid, it was well known to those in charge of the North Star that the said signal was a passing signal of some vessel bound up Lake Superior, and in all probability in a parallel course with that of the North Star, and that if each of the vessels pursued her respective course no collision could occur, as the vessel which blew the signal was well off the starboard bow, inland, with miles of open lake between her and the nearest land to the south. The signal of the approaching vessel was promptly answered by two clear and distinct blasts of the steam whistle of the North Star. In less than a minute after the North Star so answered as aforesaid, the second signal of two blasts was heard from the same vessel, still on the starboard bow of the North Star. This was again answered by two clear and distinct blasts of the North Star's whistle. Again the approaching vessel blew a signal of two blasts, and again the North Star answered with two blasts. As there appeared to be no disagreement between the vessels as to their signals, or the mode of passing, and as the approaching vessel was still on the starboard, there seemed to be no reason why any danger of collision should be feared. After the last two blasts of the North Star, mentioned above, were given, the approaching steamer, which afterwards proved to be the Sheffield, suddenly blew a signal of one blast of her whistle, still off the North Star's starboard bow. As soon as this was blown, danger of collision was apprehended, and the North Star promptly answered this signal last blown by the Sheffield by adhering to her passing signal of two blasts; and her master immediately took the precaution to check down still further the speed of the North Star, which was then moderate. The Sheffield, however, again blew a signal of one blast of her whistle, still on the North Star's starboard bow, but closer. The engine of

the North Star was then immediately stopped, and while this order was being obeyed the Sheffield hove in sight, near to, and heading across, the North Star's bow and course, from starboard to port. The vessels were then so close to each other that a collision seemed inevitable, but notwithstanding this, the master of the North Star immediately ordered her wheel to port, so that she might swing under the stern of the Sheffield, and possibly pass her, and ordered the engine to back, and immediately followed this order to back strong; and, in response to this order, every available pound of steam was given the engine, and the steamer was backing with full power. But, notwithstanding these precautions (there remaining sufficient headway), the Sheffield, which was still crossing her bows, threw herself in the North Star's way, so that the latter collided with and struck her just forward of the port mizzen rigging, and her great weight imparted such energy to the blow that she cut into the Sheffield's side four or five feet. At the time of the collision the North Star was backing strong, but knowing that the Sheffield was so injured that she could not float, and knowing that her crew were in danger, the master of the North Star stopped the engine of the latter, and then ordered it ahead, so that the bow of the North Star might be kept in the breach made by the collision until the crew of the Sheffield could be taken on board. When this had been accomplished, the North Star backed out of the breach, and in a few moments thereafter the Sheffield sunk."

The answer alleged that "the collision was brought about solely on account of those in charge of the Sheffield failing to observe the signals of the North Star, which had been blown in answer to the former's signal to pass starboard and starboard, and improperly, and without sufficient warning, and in too close proximity to the North Star, attempting to cross the latter's bow, so that it became impossible for those on the North Star to avoid a collision with her."

After the hearing in the district court the claimant and respondent filed an amendment to the answer, as follows: "That at the instant the Sheffield's signal of one blast (i. e. the first cross signal) was heard, as aforesaid, the orders to check, stop, back, and back strong were given by the master of the North Star, almost simultaneously, and were promptly obeyed, and that no perceptible period of time elapsed between the first order to check, and the final order to back strong."

The district judge (now Mr. Justice Brown), after hearing the evidence, reached the conclusion, with the aid of nautical assessors (see *The North Star*, 43 Fed. 807), that the Sheffield was guilty of four manifest faults, in failing to stop at four different times when by reason of the signals of the North Star, her officers must have been uncertain as to the course which the North Star was pursuing. One good reason for uncertainty on their part he found to be that the fog signal and the signal announcing a porting of the helm were single blasts, differing only in length, so that it necessarily involved a risk of collision for the Sheffield's master to assume that single signals from the North Star indicated an agreement to pass port to port, and thereupon to port his helm on that assumption, without stopping to ascertain definitely its correctness. He held that the North Star was at fault in failing to stop and reverse at the first cross signal of the Sheffield, and also in running at a speed which was not moderate. The question of damages was referred to a commissioner, who reported that the damage suffered by the owners and crew of the Sheffield amounted, with interest to the date of report, to \$177,214, and that the damage to the North Star amounted to \$7,110.65; and the court awarded to the libelants the sum of \$85,051.67, being the one-half of the total damages arising out of said collision, including interest to the date of the decree. The decree in the circuit court was entered by Mr. Justice Brewer, without a hearing, for \$95,895.75, which included interest on the amount of the decree of the district court to the date of the decree in the circuit court.

Robert Rae and Charles E. Kremer, for appellant.

Harvey D. Goulder, for appellees.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Section 4233 of the Revised Statutes provides that "the following rules for preventing collisions on the water shall be followed in the navigation of vessels of the navy and of the mercantile marine of the United States." Rule 21 following, is: "Every steam vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or if necessary, stop and reverse; and every steam vessel shall when in a fog, go at a moderate speed."

By act of March 3, 1885 (23 Stat. 438), congress provided "that the following revised international rules and regulations for preventing collisions at sea shall be followed in the navigation of all public and private vessels of the United States upon the high seas and in all coast waters of the United States except such as are otherwise provided for, namely." Then follow 27 rules for navigation. Section 2 provides "that all laws and parts of laws inconsistent with the foregoing revised international rules and regulations for the navigation of all public and private vessels of the United States upon the high seas, and in all coast waters of the United States, are hereby repealed, except as to the navigation of such vessels within the harbors, lakes and inland waters of the United States."

By act of August 19, 1890 (26 Stat. 320), congress enacted that "the following regulations for preventing collisions at sea shall be followed by all public and private vessels of the United States upon the high seas and in all waters connected therewith by sea going vessels;" and then follow 31 articles for the navigation of vessels. Section 2 of that act provides that all laws or parts of laws inconsistent with the foregoing regulations for preventing collisions at sea, for the navigation of all public and private vessels of the United States upon the high seas, and in all waters connected therewith, navigable by seagoing vessels, are hereby repealed. Section 3 of the act provides that this act shall take effect at a time to be fixed by the president, by proclamation for that purpose. The president has never issued his proclamation, and the act of 1890 is not yet in force. The *Britannia v. Cleugh*, 14 Sup. Ct. 795, decided by supreme court of United States, April 23, 1894. Moreover, the collision in this case occurred in June, 1889, so that the act could not apply, even if it were in force. The act of 1885 only repealed the previous navigation rules so far as they affected the navigation by United States vessels of the high seas and coast waters, but it expressly excepted from its application the navigation of such vessels within the harbors, lakes, and inland waters of the United States. Now, it is true that the supreme court of the United States has construed the term "high seas," as it is used in Rev. St. § 5346, denouncing certain offenses "upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any state," to include the open, uninclosed waters of the Great Lakes; but we do not think it can be given