

vening insurance companies, which must also be dismissed. The decree of the district court is therefore reversed, with directions to enter a decree in accordance with these conclusions.

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### THE GENERAL

#### BROWNELL v. THE GENERAL.

(District Court, D. Rhode Island. September 29, 1897.)

No. 1,031.

**1. COLLISION—WEIGHT OF EVIDENCE.**

The direct and positive testimony of the captain and pilot of a steamer that they were keeping a careful lookout, and saw no light on a sailing yacht with which they collided, and that neither the lookout at the bow or the quartermaster at the wheel discovered or reported a light, cannot be disregarded, in the absence of absolute inconsistency with the circumstances; and such testimony is a very strong circumstance in support of the contention that the yacht's light was obscured by her jib.

**2. SAME—STEAMER AND SAIL—HOLDING COURSE.**

The rule that a sailing vessel shall hold her course on the approach of a steamer does not justify her master, on seeing a steamer a mile and a half away at night, in holding his vessel on an intersecting course, making no calculation as to a strong tide which is bearing him towards her, and giving her so little further attention that he first discovers her dangerous proximity on looking under his boom, and seeing her only 40 feet away.

This was a libel by Edward I. Brownell, owner of the sloop yacht *Gypsy*, against the steamer *General*, to recover damages resulting from a collision.

H. W. Hayes, for libellant.

C. A. Ives, for claimant.

BROWN, District Judge. This libel is for a collision between the small sloop yacht *Gypsy* and the steamer *General*, of the Newport & Wickford Line, shortly after 8 o'clock on the evening of August 5, 1896, in Narragansett Bay, at a point in the northern entrance to Newport Harbor, three or four hundred feet westerly of Coaster's Harbor Island. The yacht was approaching the harbor through the northern entrance on a course estimated as S. E. by S., with the wind on her port side a little abaft the beam. The steamer's course was N. by W., until, at a point about 400 feet westerly of Poor House Point, it was changed to N. Soon after this change the collision occurred, the yacht being struck on her starboard quarter, and considerably damaged. The important question in the case is whether the steamer *General* was in fault for failure to discover the green light of the *Gypsy*. The presence of the sloop was not known aboard the steamer until the steamer's headlight showed the sloop's mainsail at a distance of about 30 feet, and it was then too late for the steamer to keep clear. The fact that the lights of the sloop were burning is not conclusive evidence of the fault of the *General* in not observing them. If the evidence from the steamer is to be credited, she fully performed her duty of keeping a

careful lookout. Her captain and pilot testify that on the night of the collision unusual precautions were taken to discover small craft, as it was known that the yacht squadron in Newport Harbor would attract a large number of pleasure craft, and as the northern sky was darkened by an approaching thunder storm. In addition to the lookout at the bow on the saloon deck, the captain and pilot were in the wheel house, solely engaged in keeping a careful lookout, the quartermaster being at the wheel. Of these four persons no one discovered or reported a light or saw the sloop until they all simultaneously saw the sloop's mainsail by the steamer's headlight. This direct and positive testimony from persons whose calling and interest require constant diligence, as to their conduct upon an occasion that would naturally excite diligence, is entitled to great weight, and cannot be disregarded unless absolutely inconsistent with the circumstances. That four persons should have failed to see a light which, if visible, must have been nearly in their course for four or more minutes, is a very strong circumstance in support of the respondent's contention that the light was obscured by the jib of the yacht. *The Daylight*, 20 C. C. A. 81, 73 Fed. 878. The testimony from the sloop seems entirely consistent with the contention that the sloop's jib was full and obscured her starboard light, and inconsistent with the claim of the libellant that the jib was flattened.

As was said in *The Charles L. Jeffrey*, 5 U. S. App. 370, 5 C. C. A. 246, and 55 Fed. 685:

"When one vessel makes a claim against another in the case of a collision, admiralty courts are bound by the same rule which forbids any other court from condemning any one in damages, except in behalf of a party who supports his demand by a preponderance of evidence."

Finding no reason to discredit the testimony of the witnesses for the steamer as to their actual diligence, and the obscuration of the *Gypsy's* light being, under the circumstances, a reasonable explanation of their failure to observe it, I am of the opinion that the libellant has failed to establish by a preponderance of evidence any fault in the steamer.

The charge that the steamer did not perform her duty to stand by is fully met by the positive testimony that she did do so; and, although she declined the request to tow the sloop into Newport Harbor for the reason that there was danger of sinking her, she did stand by, ready to render assistance, until the sloop proceeded into the harbor under her jib. The burden of proof, therefore, is not cast upon the steamer by a failure to perform her duties arising after the collision. Nor am I satisfied that, but for a violation of her own duty, the sloop could not have avoided the collision. The sloop's owner was manifestly under a complete misapprehension of his own duty, and erroneously supposed that the duty of the steamer to keep clear relieved the sloop of her duty to keep a lookout. Though seeing the *General* brilliantly lighted at least a mile and a half away, he held his sloop on a course that intersected the usual path of the steamer, making no calculation upon the strong tide that was bearing him towards her, and paying so little attention to the rapidly approaching steamer that he first

discovered her dangerous proximity when, looking out under his boom, he saw her only 40 feet away.

In the case of *The Sunnyside*, 91 U. S. 208, 217, conduct in respect to the lookout similar to that of the owner of the *Gypsy* was characterized as negligence, manifest, culpable, and indefensible. In that case, after the light of a steamer was sighted, the mate said to the lookout that he guessed she would take care of herself, and no further attention was paid to her until she was so close that a collision could not be averted. Had the sloop immediately observed the steamer's change of course, she might have done her part to avoid the collision, as a slight departure from her course would have taken the sloop clear. Knowledge of the single rule that a steamer shall keep clear of a sailing vessel is by no means a complete guide for a sailing vessel approached by a steamer. Article 20 of the sailing rules provides:

"Nothing in these rules shall exonerate any ship, or the owner, master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of the neglect of any precaution which may be required by the ordinary practice of seamen or the special circumstances of the case."

The rule that a sailing vessel shall hold her course is a rule for the prevention of collisions, and "no vessel is justified, by a pertinacious adherence to a rule, for getting into a collision with a ship which she might have avoided." *The Sunnyside*, 91 U. S. 208, 217. The duties of approaching vessels are reciprocal, and, even if one vessel is clearly in fault, it is the duty of the other to use all means in her power to avert the danger, even under the condition of affairs unlawfully produced by the other's negligence.

So complete a disregard of the duty to observe an approaching vessel as existed in the present case was a grave fault, since it prevented the sloop from promptly learning that the steamer had not seen her, and was bearing down upon her, and prevented any effective action by the sloop based upon this knowledge. The libel is dismissed.

## SAMPSON et al. v. CAMPERDOWN COTTON MILLS.

(Circuit Court, D. South Carolina. October 19, 1897.)

## 1. CORPORATIONS—ULTRA VIRES—CONTRACTS FOR FUTURE DELIVERY.

The fact that a cotton-mill corporation purchases cotton for future delivery, through a broker, and puts up margins necessary to carry it, does not render the purchases ultra vires, if they were not in fact speculations on the rise and fall of cotton, but were made in the ordinary and legitimate business of the mill for its own use.

## 2. CONTRACTS FOR FUTURE DELIVERY—VALIDITY.

Where such contracts are not illegal in their origin, the carrying of them, and paying from time to time the margins on them, are not invalid if their purpose is to save the corporation from loss.

## 3. SAME—TEST OF VALIDITY.

The true test of the validity of a contract for future delivery is whether it could be settled only in money, and in no other way, or whether the party selling could tender and compel the acceptance of the particular commodity sold, or the party buying could compel the delivery of the commodity purchased.

## 4. SAME—INTENT OF PARTIES.

Under Acts Assem. S. C. 1883 (18 St. at Large, p. 454), relating to contracts for sales for future delivery, validity depends upon the bona fide intent of the parties.

## 5. SAME—BURDEN OF PROOF.

The burden of showing that a contract of sale for future delivery, which expressly gives the right to the seller to deliver and to the buyer to demand the delivery of the article sold, is invalid, is on the party attacking its validity.

## 6. SAME—ADVANCES BY THIRD PARTY—MARGINS.

Though a third party advancing money to pay losses on an invalid contract of purchase for future delivery might, under some circumstances, be so connected with the immorality of the contract as to be affected by it, yet where he had no knowledge of the inception of or early payments on the transaction, which was on its face regular and valid, and carried on in good faith, and his advances were made to prevent loss, and after the whole risk had been incurred, it would not be equitable to hold him responsible.

## 7. SAME—VALIDITY OF MORTGAGE.

In such a case a mortgage given to the third party by the purchaser, a corporation, to secure his advances, would be binding.

Cothran, Wells, Ansel & Cothran, for complainants.  
Haynsworth & Parker, for defendant.

SIMONTON, Circuit Judge. This case comes up on an original and a cross bill. The original bill is filed to foreclose a mortgage given by the Camperdown Mills to secure past and future advances. Pending this main cause, Julius C. Smith and other stockholders filed their petition for leave to intervene in the cause, and to be made parties hereto. Leave having been granted, they came in, and, filing their answers, filed also their cross bill. The cross bill charges that certain items of indebtedness to the complainants, as shown in their account, were incurred by the officers of the corporation without lawful authority, in fact and in law, and are not binding on the corporation; certainly not on those stockholders who did not authorize or participate in the unauthorized and illegal acts.

The main facts are these: The Camperdown Mills is a corporation of the state of South Carolina, engaged in the manufacture and sale of