

MOSES v. HAMBURG-AMERICAN PACKET CO. et al.

(District Court, S. D. New York. April 12, 1898.)

COLLISION—PERSONAL INJURIES—TICKET EXEMPTIONS—\$100 LIMITATION—HARTER ACT.

On a collision in New York harbor causing loss of the hand of a boy four years old, a steerage passenger, *held* that the steamer, being in fault, was not exempted by the third section of the Harter act, nor by a limitation to \$100 for any personal injuries expressed in the ticket, this not being a reasonable provision; nor by exemptions from liability for negligence.

Libels in personam to recover damages for personal injuries.

Grossman & Vorhaus (De Lagnel Berier, of counsel), for libelants.
Wheeler & Cortis, for Hamburg Line.
Robinson, Biddle & Ward, for Clyde Steamship Co.

BROWN, District Judge. In the collision between the steamships Persia and Saginaw, for which both vessels were held to blame (84 Fed. 705), the libelant Jacob Moses, then four years and eight months old, and a steerage passenger with his mother on the Persia, suffered such injuries of the right hand that it was amputated just below the wrist. Libels were filed for damages in his own behalf and also by the father, Abraham Moses. By stipulation between the parties, it was agreed that the decision upon the trial of the principal cause between the Persia and the Saginaw, as respects the question of negligence, should stand as the decision in the present case; and that issue is therefore disposed of in favor of the libelants.

The answer of the Hamburg Company, the owners of the Persia, set up as a further defense, (1) the provisions of the Harter act (Feb. 13, 1893; 2 Supp. Rev. St. p. 81); and (2) the following provision in the contract of carriage:

"Neither the ship, the shipowner or the agent is responsible beyond the amount of \$100 for loss of or injury to the passengers of the Persia, arising from steam, latent defects in the steamer, * * * default or negligence of the shipowner's servants, whether on board the ship or not, or from the negligence in navigation of any other vessel."

Neither of these defenses can I think be sustained. The first is not consistent with previous adjudications in this court, or with the proper construction of the act of 1893, as recently expounded in the case of *The Delaware*, 161 U. S. 459, 16 Sup. Ct. 516. In the latter case the libel was filed by the master, owner and crew of the tug *Talisman* to recover damages arising from a collision of the *Delaware* with the *Talisman* through the faulty navigation, as it was determined, of the *Delaware* alone. Upon an appeal from a decree in favor of the libelant, the question was submitted upon certificate to the supreme court, whether the Harter act afforded any defense. The third section of that act, read literally, is broad enough to include all damages inflicted upon other vessels by collision; just as it is claimed in this case that the statute is broad enough to include, and must, it is therefore urged, include personal injuries to passengers. The supreme court, however, held otherwise as respects col-

lision damages to other vessels; and in the opinion of the court, delivered by Mr. Justice Brown, it is said:

"It is entirely clear, however, that the whole object of the act is to modify the relations previously existing between the vessel and her cargo. This is apparent not only from the title of the act, but from its general tenor and provisions, which are evidently designed to fix the relations between the cargo and the vessel, and to prohibit contracts restricting the liability of the vessel and owners in certain particulars connected with the construction, repair and outfit of the vessel, and the care and delivery of the cargo." Page 471, 161 U. S., and page 522, 16 Sup. Ct. "It is true that the general words of the third section above quoted, if detached from the context and broadly construed as a separate provision, would be susceptible of the meaning claimed, but when read in connection with the other sections and with the remainder of section 3, they show conclusively that the liability of a vessel to other vessels with which it may come in contact was not intended to be affected." Page 474, 161 U. S., and page 523, 16 Sup. Ct.

The entire course of reasoning in the opinion in support of the decision of the court that the only object of the act is "to modify the relations previously existing between the vessel and her cargo," is equally applicable in excluding the act from any application to passengers.

A further consideration not there referred to, but suggested by the present case, is the fact that section 3 is expressly limited in its application to vessels "transporting merchandise or property." The Persia carried merchandise as well as passengers. But there are many vessels that carry passengers only, and to those vessels the act cannot apply. But it is not conceivable that congress intended by this act to discriminate between these two classes of vessels in respect to their liability for negligent injuries to passengers, and to provide that the one class should be exempt from liability and the other class not exempt, simply because the former carries merchandise and the latter does not. The restriction of the third section to "vessels carrying merchandise" is indicative of the limited scope of the act, as construed by the supreme court, extending only to the relations between the vessel and her cargo, or its owners. See *The Viola*, 59 Fed. 632, 634, 60 Fed. 296; *The Niagara*, 77 Fed. 335. That the third section does not apply to passengers or their baggage was ruled by this court in the recent case of *The Rosedale and The Oregon*, 88 Fed. 324.

2. In cases not within the exemptions of the Harter act, the law of this country in respect to the liability of carriers for damages arising though the negligence of their servants, as established in *Railroad Co. v. Lockwood*, 17 Wall. 357, has not been changed. A reasonable provision, however, in the bill of lading or other contract, limiting the extent of the carrier's liability for loss or injury of goods, operating as a liquidation of damages in advance, and having reference to the price of carriage, is sustained. *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151. If the provision of the contract of transportation in this case were a reasonable provision of that character, I think it should, therefore, be upheld. But considering the nature of the injuries liable to happen to passengers through careless navigation, including, it may be, the loss of life or limb, and the large awards often made therefor, which the courts have often held to be not unrea-

sonable or excessive, it seems to me that a stipulation that the damages for any possible personal injury shall not exceed \$100, cannot be seriously considered as any reasonable or substantial provision whatever. Where the right to limitation as respects damages to property has been sustained, there has been at least some reasonable or appreciable proportion between the sum fixed and the loss contemplated. In this stipulation, there is no such reasonable relation. The sum of \$100 is scarcely more than a nominal sum. Under the decision above referred to I must, therefore, find that this clause of the contract cannot be upheld as a reasonable provision.

3. The father, in the present case, was engaged in the clothing business, as a manufacturer or dealer in a comparatively small way. The son was likely to be brought up in the same or a similar business. Taking all the circumstances into account, I think an allowance should be made of \$2,500 to the son, and \$500 to the father, for which sums decrees may be entered with costs.

THE KENSINGTON.

(District Court, S. D. New York. July 6, 1898.)

1. **CARRIERS BY SEA—PASSENGERS' BAGGAGE—SEA PERILS—BURDEN OF PROOF—STOWAGE—EXEMPTIONS FOR NEGLIGENCE—FOREIGN LAW—HARTER ACT.**

Extraordinarily rough weather warrants a finding of damage to cargo or baggage by sea perils, provided proof of ordinary good stowage is first given by the ship. This preliminary burden is upon the ship, and cannot rest upon mere presumption. Exemptions for negligence contracted for in a foreign port on a foreign vessel, though valid where made, will not excuse torts and consequent damage within our territorial jurisdiction. The Harter act does not apply to passengers or their baggage.

2. **SAME—LIMITING LIABILITY BY CONTRACT.**

It is competent for carriers by sea to limit their liability for passengers' baggage to a specified sum, unless higher rates are paid for any excess in value; and when this provision is plainly incorporated in the body of the ticket, and ample opportunity is afforded the passenger to know it and comply with it, it becomes a part of the contract of carriage and binding, and in this case was held to limit the libelants' recovery.

Roger Foster, for libelants.

Robinson, Biddle & Ward, for claimant.

BROWN, District Judge. The above libel was filed by Mrs. Bleecker and her daughter to recover for the loss of their trunks and personal effects upon their passage by the British steamship Kensington, of the Red Star Line, from Antwerp to New York in December, 1897. The defense was a loss by sea perils, and second, a limitation to the sum of 250 francs under the provisions of the passenger ticket.

The libelants' trunks were stowed in what was known as No. 2 upper steerage in the after part of the third deck above the hold, sometimes used for passengers. A few other trunks were stowed there, and some crates of china. The steamer sailed from Antwerp December 11th. The voyage was extremely rough. For the most of the time the passengers were not allowed on deck. On December

20th the steamer met a very heavy gale in which she labored heavily and was obliged to lie to for 14 or 15 hours, which had not previously occurred in the master's experience of 23 years. The steamer was a first-class ship of about 8,000 tons. In this gale some of the baggage got adrift, both in No. 2 steerage and in the steerage on the deck below. As soon as it was possible the apartment where the libelants' baggage was stowed was examined, and the captain describes it as being in a state of chaos. Trunks and crates were broken and damaged by water in the apartment, coming from the condensation of steam from a steam pipe which had been carried away in the storm. The vessel arrived in New York on the morning of December 23d. The value of the contents of the trunks was above 250 francs for each of the two passengers, and it is stated in the libel to have been of the value of \$2,000. The libelants had been traveling in Europe for about a year. The evidence leaves no doubt that the ticket for the two passengers, which is marked "Claimant's Exhibit A," was purchased by Mrs. Bleecker in Paris on December 2d. She testifies that at that time she paid part of the money for the passage and afterwards on arrival at Antwerp paid the rest. The ticket is dated at Paris December 2, 1897; and there is a stamped receipt beneath the signature of the ticket, dated at Antwerp, December 10th, for the balance of the passage money. This accords with the testimony of Mrs. Bleecker, that she paid this balance at the office of the company in Antwerp on the day before the steamer sailed, and at the same time delivered her trunks and received her baggage check, stating that it was shipped "subject to the conditions contained in the company's ticket and bill of lading."

In the body of the ticket, under the head of "Notice to Passengers," it is stated as follows:

"It is a condition upon which this ticket is granted and is mutually agreed for the consideration aforesaid that" * * *. Here follow 10 paragraphs in type somewhat smaller than the preceding type, but perfectly clear and legible, stating numerous conditions. These 10 paragraphs are followed by the provision: "All questions arising hereunder are to be settled according to Belgian law with reference to which this contract is made;" after which is the signature of the company's agent. The third paragraph provides that "the shipowner or agent are not under any circumstances liable for loss, default, injury or delay to the passenger or his baggage, arising from the act of God, public enemies, fire, robbers, thieves of whatever kind, whether on board the steamer or not, perils of the sea, rivers, or navigation, accidents to or of machinery, boilers or steam" * * * "or from any act, neglect or default of the shipowners' servants, whether on board the steamer or not."

"The shipowner or agent shall not under any circumstances be liable for any loss or delay or injury to passengers' baggage carried under this ticket beyond the sum of 250 francs, at which such baggage is hereby valued, unless a bill of lading or receipt be given therefor and freight paid in advance on the excess value at the rate of one per cent. or its equivalent."

At the time when her baggage was delivered to the company at Antwerp on the 10th of December, Mrs. Bleecker made no statement of its value, and paid no freight on its excess over 250 francs.

No evidence was introduced as to the particular mode of stowage, except that it was stowed by the company's stevedore at Amsterdam under the supervision of the third officer, who at the time of the trial was sick there.

1. Contrary to the libelants' contention, I must hold upon the authorities that a ticket of the character above described for a transatlantic passage is a unilateral contract, and like a bill of lading is binding upon the person who receives it, so far as its provisions are reasonable and valid. It is essentially of the same character as the ticket in the case of *Steers v. Steamship Co.*, (57 N. Y. 1.) where Johnson, J., in reference to a claim similar to this observes:

"The plaintiff, by her agent, was an applicant for a passage to Europe by the defendant's ship, the voyage to be commenced at a future day, and received on payment of the price a written engagement from the defendant expressing its undertaking. A printed facsimile of this paper is before us, and although part of it is in smaller type than the rest, no part of it is in such type as to suggest to the mind the idea of concealment as the possible motive for its being so printed." * * * "Looking to the course of business, the court may take notice that an engagement for a voyage across the ocean is a matter of more deliberation and attention than buying a railroad ticket or taking an express company's receipt for baggage or for freight. There is, therefore, no room in such a case for the suggestion that the party is surprised into a contract, when he supposes himself only to be taking a token indicative of his right. The paper in evidence ought, therefore, to be regarded as having received the mutual assent of the parties, and as being, as its language purports, their contract touching the voyage in question."

I find nothing later diminishing the force of these observations. See *Zimmer v. Railroad Co.*, 137 N. Y. 460, 463, 33 N. E. 642.

2. One of the exemptions specified in this ticket or contract is losses "by perils of the sea," and upon the evidence, if preliminary proof of good stowage had been given, I think a prima facie case of loss by sea perils would have been made out, which it was incumbent on the libelants to rebut by proof of negligence in the ship. The evidence leaves no doubt that the passage was one of very extraordinary severity, such as might account naturally for what happened, viz. the baggage getting adrift and breaking the steam pipe, even though the baggage was well stowed; but it might also have happened from poor stowage, of which some evidence was sought to be given, though I do not regard it as of much weight. There is no direct evidence of the mode of stowage, but only that the baggage was stowed by the regular stevedore of the line. It is urged that this furnishes a reasonable inference of customary good stowage; and when there is proof, as there is in this case, of very extraordinary weather and rolling of the ship, such as would naturally cause baggage stowed with ordinary care to get adrift, it is claimed that the authorities indicate that the burden of proof is on the libelants to show some negligence, but for which the loss might nevertheless have been avoided. See *Clark v. Barnwell*, 12 How. 272, 280. The supreme court in that case approved the ruling of Lord Chief Justice Denman in *Muddle v. Stride*, 9 Car. & P. 380:

"That if on the whole it be left in doubt what the cause of the injury is, or if it may as well be attributable to perils of the sea as to negligence, the plaintiff cannot recover," * * * "but the jury were to see clearly if the defendants were guilty of negligence before they could find a verdict against them."

In the case of *The Neptune*, 6 Blatchf. 193, Fed. Cas. No. 10,118, the same point was ruled where a steamship "encountered on the voyage an unusually violent storm which fully accounted for the damage within an exception in the bill of lading"; and it was held by Mr. Justice Nelson that this threw the onus on the shipper to establish carelessness or negligence on the part of the master or owner of the vessel leading to the particular loss; and for failure to establish this a decree dismissing the libel was affirmed. See *The Fern Holme*, 24 Fed. 502, 503; *The Portuense*, 35 Fed. 670. These cases, however, do not dispense with the usual proof of good stowage by the ship. To assume proper stowage upon mere inference, and to throw upon a shipper or passenger the burden of proving the contrary, without any proof by the ship, seems unreasonable and inequitable; considering that proof on this subject is peculiarly within the power of the ship to produce, and comparatively easy for her, but difficult if not impossible for the passenger or shipper. Proper stowage, moreover, is essential to seaworthiness as respects cargo, or baggage; and hence this essential preliminary condition of seaworthiness should have been established by the ship by proof of proper stowage, just as in *The Edwin I. Morrison*, 153 U. S. 210, 14 Sup. Ct. 829, it was held necessary to be established by proof of proper inspection. In *Clark v. Barnwell*, supra, it is expressly stated in the opinion of the court (page 281) that the stowage was good. The record and the opinion of Shipman, J., in the court below in the case of *The Neptune* show the same; and the same appears in the other cases above cited. This branch of the defense, therefore, I cannot sustain.

3. The limitation of liability to 250 francs, is a limitation which it was competent for the defendant company to make. *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151. The libelants are chargeable with notice of this provision whether they read the contract or not. The ticket was in their possession for more than a week before the ship sailed, and before the baggage was delivered to the company. Every European traveler knows how much more exacting there than with us are the usual conditions as respects the transportation of luggage, and the extra charges therefor. There was nothing to justify the libelants in supposing there were no restrictions as to baggage; and they had abundant opportunity to examine the clear provisions of their ticket; and if they were ignorant of them it was by their own choice. It is not unreasonable that carriers should refuse for an ordinary charge to hold themselves answerable for an extraordinary or indefinite responsibility, and to charge extra compensation for increased risks; if travelers pay no attention to the provisions on these points incorporated into the contract of carriage, it is right that they should themselves bear the additional risk.

In the recent case of *Calderon v. Steamship Co.* (April 25, 1898) 18 Sup. Ct. 588, the supreme court, in refusing to the carrier the benefit of any limitation, did so upon the distinct ground that the limitation there sought was against all liability, and recognized the validity of such a limitation as is here provided.

4. Proof was taken by depositions that the Belgian law sustains exemptions of carriers from responsibility for the negligence of servants when the contract so provides. In the answer to the cross interrogatories on this point, the witness did not state at length the authorities and decisions in the sense in which the libelants' counsel intended by his interrogatories that the witness should state; but the answer is in such form, with a reference to the authorities relied upon, that I do not think there was any intent on the witness' part to evade the question, which in translation into another language may have appeared only to call for the references to the authorities instead of the language of the decisions; and indeed the language of the decisions was not in terms asked for by the interrogatories. I do not think the failure to answer the cross interrogatories more fully, therefore, detracts from the credit to be given to the deposition, which is in fact in accord with the general law of Continental Europe. The libelants' counsel, however, in preferring to proceed to trial rather than incur the delay of sending the commission back to the commissioner for further answers on this point, in effect waived any objection on this score.

This contract of carriage was, however, to be performed in part within our own jurisdiction, by the delivery of the baggage here in good condition; and though the presumed negligence as respects proper stowage was negligence abroad, it cannot be said that none of the consequent damage occurred within our jurisdiction. Upon the evidence I think that damage to the extent of at least 250 francs, as to each libelant, did occur here; so that the cause of action in part arose here; and in such cases our own law, as respects exemptions that are against public policy, must, I think, control. It is not competent for the respondent to defend a tort committed here by proof of a foreign contract void as against our public policy. It is a question of comity purely; and comity does not require us to reverse our own policy as respects torts committed within our own territorial jurisdiction. *The Brantford City*, 32 Fed. 324.

I have heretofore held that the Harter act has reference to the transportation of "cargo," and does not apply to the transportation of passengers, nor to their baggage when not shipped as cargo, or on payment of freight. *The Rosedale and The Oregon* (March 28, 1898) 88 Fed. 324.

Decree for the libelants for the equivalent of 250 francs each, with interest and costs.

THE ROMAN PRINCE.

(District Court, S. D. New York. April 20, 1898.)

SALVAGE—FIRE—PROMPTNESS—PERSONAL DANGER—FIRE DEPARTMENT.

The tug D. being prompt to render assistance, and the deck hand incurring some exposure in rendering effective aid, though the engines of the fire department soon appeared in force, was allowed \$300, one-half to owners, and one-half to master and crew, of which the deck hand and master were each awarded \$50.

This was a libel in rem by Augustus Demarest and others against the steamship Roman Prince to recover for salvage services rendered in extinguishing fire.

Cowen, Wing, Putnam & Burlingham, for libelants.
Convers & Kirlin, for claimant.

BROWN, District Judge. At about 6 p. m. of May 4, 1897, shortly after the discharge of the steamship Roman Prince had begun at the Atlantic Docks, a fire broke out in the steamship's middle hatch among some bales of wool and liquorice. The libelants' tug Defiance, attracted by the smoke, arrived alongside about five minutes after the fire broke out; her aid was asked by the ship's officers, and her pump and hose were immediately applied to the fire; first, through the middle hatch, and a few minutes afterwards, through a small side hatch, down which the deck hand Le Fontaine went with the hose, at some peril to himself and at the cost of some burns. The steamship's donkey pump and hose, as I must find upon the evidence, were also used from the first. Upon signal to the fire department of Brooklyn, several engines arrived about 10 or 15 minutes after the fire broke out; but at that time it was nearly under control, and no flames were then visible, in consequence of the previous service of the pumps of the steamship and of the Defiance combined. Pumping was continued for some time afterwards to extinguish the smoldering fire; and so successful was the result, that the entire damage amounted to only about \$1,200.

The chief elements of merit in this case are (1) the great promptness of the tug in rendering assistance; (2) the close application of her hose where most needed, by going down the small hatch; and (3) the success in preventing any large damage from a fire, which if not immediately checked, would probably have caused a far greater loss. The aid obtainable from the fire department, however, and its appearance on the scene, in force, only a few minutes after the arrival of the Defiance, must prevent any large award. Upon all the circumstances, I think an allowance should be made to the Defiance of \$300; of which \$50 should go to the master, \$50 to Le Fontaine, who took the hose down the hatch, and \$50 to the rest of the crew in proportion to their wages; the residue, to the owners. Decree accordingly with costs.