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Supreme Court of the Hawaiian Islands

In Admiralty.

R. B. AVERY ET AL. vs. STEAMSHIP "CYPHRENES."

ALLEN, C. J.

This is a libel in rem. against the British Steamship Cyphrenes for damages caused by collision with the British ship Ravenstondale, owned by the libellants. The steamer is a passenger and freight boat, and is running between the British Colonies of Australia and San Francisco. It appears in evidence that the Ravenstondale was at anchor in the harbor of Honolulu, and that the Steamer in the daytime, on her passage to her berth at the wharf in said harbor, collided with the Ravenstondale and caused the damage complained of, and the question is, whether the Steamer is liable?

It is contended on the part of the respondent that as the Steamer was under the charge of a Pilot—if the collision was caused by the neglect or mistake of the Pilot, that the owners of the Cyphrenes are not liable according to the general principles of the maritime law, or by express statute. In the case of the Neptune the Second, which was decided two years after the passage of the statute of 52 George III., which contained a provision that the owner, or master, of any ship shall not be answerable for any loss or damage occasioned by the neglect, incompetency or incapacity of any licensed pilot. Sir William Scott did not advert to the statute in giving his opinion, but said, if the mere fact of having a pilot on board, and acting in obedience to his directions, would discharge the owners from responsibility, I am of opinion that they should be excused in the present case. I think it is sufficiently established in proof that the master acted throughout in conformity to the directions of the pilot. But this I conceive is not the true rule of law. The parties who suffer are entitled to have their remedy against the vessel that occasioned the damage, and are not under the necessity of looking to the pilot, from whom redress is not always to be had for compensation."

In the case of the Givolamo, 8 English Admiralty Reports. 169, the Court ruled that a foreign ship, though in charge of a licensed pilot, is liable for the full amount of damages arising from a collision for which she alone was to blame, notwithstanding the stat. 1 and 2, George IV. c 75, and 6 George IV. c 125, which do not extend to proceedings in this Court. The Instance Court of Admiralty is guided by the principles of international and not by those of the municipal law. There were several British pilot acts passed in the reigns of George III. and George IV., and also the Shipping Act of the 17th and 18th Victoria. All of them contain a provision to the effect, that the owner or master of any ship shall not be answerable for any loss or damage occasioned by the neglect, default, incompetency, or incapacity of any licensed pilot. The Court say, in the same case, that it cannot be doubted that before these statutes were passed exonerating masters and owners where a licensed pilot is in charge of a vessel, that remedy existed in this Court, and the Legislature has not in express terms taken it away." The vessel was held liable, although in charge of a licensed pilot at the time of the collision. There were several other cases involving the same facts and principles and were decided in the same way by the same judge. So the English law stood until the decision of Dr. Lushington in the case of the Protector. The cases referred to above were overruled by him and held the true rule to be, that the statute took away the responsibility of the vessel, when the accident was imputable to the fault of the pilot *alone*. It may be regarded as settled in England, that if the pilot is alone in fault, the owners are not liable.

The same question was involved in the case of the steamer China, 7 Wallace 53, which was decided by the Supreme Court of the United States. This steamer, a foreign vessel, was bound from the port of New York, and being in pilot waters, and in charge of a licensed pilot of that port, ran into a vessel of the United States and sunk her. The collision, as the Court say, was occasioned by the gross fault of the licensed pilot then in charge of the vessel. The Court decided that under the statute of New York, vessels were compelled to take a pilot. But held further, 7 Wallace 53 (the statute containing no clause exempting the vessel or owners from liability for the Pilot's mismanagement) that the responsibility of the vessel for torts committed by it not being derived from the law of master and servant, or from the common law at all, but from maritime law, which impressed a maritime lien upon the vessel in whomsoever hands it might be for torts committed by it, the fact that the statute thus compelled the master to take the pilot, did not exonerate the vessel from liability to respond for torts done by it, as, ex. gr., for a collision, though the result only of the pilot's negligence."

Mr. Justice Wareasays in his 2d volume (89, The Huntress) of reports that "a Court of Admiralty is a Court of the law of Nations and derives in part its jurisdiction from that law. The maritime law in its general principles, as applicable to shipping has a higher antiquity than any other existing system of law, and has become so fully recognized by the commercial world, that no Court can with propriety depart from its principles and practice, unless by special act of legislation. In England the maritime law has been superseded by an act of Parliament as to the liabilities of owners of vessels in cases of collision, but no such enactment has been made by the Legislature of this Kingdom, and therefore this case must be decided upon the general principles of the maritime law, unaffected by statute provisions, and this renders the vessel liable for a collision attributable to the pilot's mismanagement; and it can only be upon the ground that the general admiralty laws have been superceded by an act of Parliament that the owners of vessels are exonerated from liability in case of collision.

In the case of Yates et al., vs. Brown et al. 8 Peck, 23. The facts in this case are very similar to the case at bar, and the question reserved for the whole Court was, whether, there being a person duly authorized to pilot the vessel, the owners of the vessel were liable for an injury arising from negligence or mismanagement in navigating the vessel out of the harbor. Parker, C. J. in giving the decision of the Court, says, that the owner of a vessel, which through the fault or negligence of anyone on board, injures another vessel by running foul of her, is liable to the injured party, although there be a pilot on board who has the entire control and management of the vessel.

The same principle is recognized in 160. 161. Abbott on shipping and note to the American edition: Bussy vs. Donaldson, 4 Dotlers. 206. Fletcher vs. Broddick, 5 Bos. and Pul., 182. The bark Lotty, Olcutt's Adm. p. 329.

It is argued that as the statute compels the payment of half pilotage, that it is compulsory and therefore exonerates the owners from responsibility. The statute, judging from its terms, was not passed for such a purpose, and does not involve any such consequences. It was passed merely to sustain the system of pilotage, and for no other purpose whatever. The Court would require clear and explicit enactments by the Legislature before it would be justified by the maritime law to change its principles and alter the ordinary rules of judicial construction. To displace a lien, and defeat a recourse in rem. and thereby release recognized responsibility or impose new obligations as well as to limit the rights of the parties injured to the individual pilot, cannot be inferred from such a statute although the pilot is answerable like other persons for any harm he may do, by negligence or default. It would be a summary mode of defeating the great principles of Admiralty jurisprudence, which no power can do, except a Parliament or Legislature, and that in express termsi.

It is very true that by section 388 of the English Merchant and Shipping Act, that *no owner or master* of any ship shall be answerable for any damage occasioned by the fault of the pilot, when the employment of the pilot is compulsory. Had the same principle of responsibility been recognized prior to the statute, it probably would not have been passed, and the English authorities are against this position.

The Statutes of New York and Massachusetts contain similar provisions to our own, and the Courts have not considered them as affecting the rights of parties in any other respect than the payment of the pilotage.

Chancellor Kent in his 3rd vol. Com. 238, says, that the Pilot while on board has the exclusive control of the ship. He is considered as Master pro hac vice, and if injury is sustained in the navigation of the vessel, while under the charge of the Pilot, he is answerable as strictly as if he was a common carrier for his default, negligence, or unskillfulness, and the owner would also be answerable to the party injured for the act of the Pilot, as being the act of his agent.

It is contended on the part of the respondents that the Ravenstondale was solely to blame, as she was in an improper place and obstructed the navigation. The Civil Code requiring that all vessels that may enter any port shall be anchored in the place designated by the Harbor Master. It is in evidence that the Harbor Master moved the vessel and he says that "I regard the Ravenstondale to be in a perfectly safe position." He adds that when the Ravenstondale first arrived "we put her along side the wharf to get iron out, that the ship might be repaired and then we dropped her off." He says, that she occupied a little over one third of the channel, that she is 295 feet long, and 25 feet from the wharf and that there remains more than five hundred feet of clear water.

It is a well established maritime rule that when a vessel is entering a harbor she is bound to exercise great care and diligence.

Culbertson vs. Shaw. 18 Howard, 584, 587, Ward vs. Schr. Darisman, 6 McLean C. C. 239. If a ship at anchor and one in motion come in collision, the presumption is, that it is the fault of the ship in motion, unless the anchored vessel was where she should not have been.

Strout vs. Foster 1 Haw. 89; The Sciota, Davies 359.

But whether she be in a proper place or not, and be properly anchored or not, the other vessel must avoid her if it be practicable, and consistent with her own safety.

Per Dr. Lushington in the case of the Batavia, 10 Jur. 19; Knowlton vs. Sandford, 32 Maine 148.

It cannot be denied that the steamer could have avoided the ship, as the United Sates frigate Pensacola had done in passing through the same portion of the harbor prior to the collision and by the steamer Mikado subsequently. It will be borne in mind that the steamer entered the harbor in the day time, in good weather and the ship which was in full view, occupied but a little more than one third of its width. But the pilot probably took the course he did, which was direct to the steamer's wharf, relying upon the steamer to answer his orders promptly. He attributes the accident to the bad steerng of the steamer, and he adds also, that had she backed in time, and had the anchor gone down, and the jib been hoisted as ordered, the accident would not have happened. But the Master of the steamer attributes the accident to the jib boom of the ship being rigged out, and to save the jib boom by a reversal of the engine the accident occurred.

There is most contradictory evidence in relation to the management and action of the steamer immediately before the collision; but I do not regard it necessary for the purposes of this investigation to analyse it, and to give an opinion as to its comparative weight, as it is immaterial in view of the circumstances of this case whether the fault was with the pilot, or the steamer, for in either case it would not be a defence to this suit. Indeed it is the duty of the Court to confine its decision to the rights of these parties, and not by indirection, give an opinion affecting the rights of others, which have not been represented.

There is no pretence that the injury occasioned by inevitable accident, and it is very evident that it was not necessary for the steamer to be in such dangerous proximity to the ship.

Mr. Justice Clifford said in the case of Wakefield et al. vs. steamer Governor, 1 Vol. Clifford's R. 96, that occurring as the collision did, in the day time, and in good weather, and at a place where there was no want of sea room and no obstruction to the navigation, it is clearly a case, where the rule applies, that a sailing vessel shall keep her course, and leave it to the steamer to adopt the necessary precautions to avoid a collision. The rule applies with more force to a vessel at anchor.

The respondent contends further that the libellants can not recover, inasmuch as the vessel had violated the law in not rigging in their jib and flying jib booms.

By Sec. 608 of the Civil Code it is enacted that "All vessels entering port shall, if so requested by the Harbor Master or any pilot, rig in their jib, flying jib, and spanker booms, and spritsail yards, and top their lower and topsail yards, within 24 hours after anchoring in such port; and in all cases before attempting to come alongside of, or make fast to either of the docks or wharves, and keep them so rigged in and topped until within 24 hours before leaving the harbor and until after removing from any wharf or dock, under a penalty of a fine not exceeding $100."

The Harbor Master testified that "he did not direct the jib boom to be rigged in, and did not consider it necessary, and adds, I regard the Ravenstondale as being in perfectly safe position.

It is not incumbent on vessels, unless requested by the Harbor Master to rig in their jib booms—and it is not pretended that any such request was made.

But it is contended, that while a request is necessary for vessels on entering the harbor, it is not made imperative by the last clause of the Section, in which it says, "that in all cases before attempting to come alongside of or make fast to either of the docks or wharves, and keep them so rigged in and topped until within 24 hours before leaving the harbor, and until removing from any wharf or dock, under a penalty of a fine not exceeding $100."

This presupposes that the vessels have rigged in their jibs, jib booms, &c. on entering the harbor, and it makes it imperative to keep them so rigged in and topped until 24 hours before leaving the harbor. The penalty applies for a violation of law on entering the harbor as well as when the vessels come alongside of the dock. It is an entire section and must be in connection and from the evidence there has been no violation of either provision.

The Counsel for the respondents contend "that Courts of Admiralty in suits between foreigners will decide according to the laws of the country to which the ships belong."

This position is repugnant to the general principles of International law.

In the case of Smith et al. vs. Candey, 1 How R. 28, which arose from a collision in the port of Liverpool, between two American vessels, the Court ruled, that the question whether there is a legal liability for the consequences of a collision in an English port, must be determined by the laws of England, and that when a collision occurs in a port of a foreign country, the rights and responsibilities of the parties are to be determined according to the laws of that country.

Conkling admt. 305.

I suppose that courts always regret that foreigners can not be remitted to their domestic forum for the settlement of their difficulties and for the adjudication of their legal rights. But it is a duty imposed by international law and as a matter of comity, in cases like the one at bar to entertain the jurisdiction. Indeed the home forum is so remote, that it might be regarded as a neglect of international duty and a decided want of comity, and to some extent a denial of justice, to refuse to entertain it. But when a court entertains the jurisdiction it must be governed by the laws of the country where the act complained of took place.

In view of the law and circumstances of the case, I am of opinion that a decree must be entered for the libellants. I regard the true measure of damages to be the amount fully sustained by the party at the time and place of the injury.

Supreme Court of the Hawaiian Islands.

IN ADMIRALTY.

R. B. AVERY ET AL. vs. STEAMSHIP "CYPHRENES."

This case came on for hearing before the Chief Justice, who, on the 6th Sept. adjudged that a decree should be entered for the libellants for the full amount of the damages actually sustained.

From this judgment an appeal was taken to the full Court.

Having heard the arguments of Counsel and considered the same, we are of opinion that the judgment of the Chief Justice should be affirmed; and we adopt his reasons with this modification.

The section 608 of the Civil Code, reads as follows; "All vessels entering port shall, if so requested by the Harbor Master or any pilot, rig in their jib, flying jib, and spanker booms, and spritsail yards and top their lower and topsail yards, within 24 hours after entering such port; and in all such cases before attempting to come alongside of, or make fast to either of the docks or wharves, and keep them so rigged in and topped until 24 hours before leaving the harbor, and until after removing from any wharf or dock, under the penalty of a fine not exceeding $100."

The construction that we have placed upon this statute is, that the words, "in all cases," in the fourth line, refer to the time, thus, if the vessel on entering the harbor, comes to anchor and is requested by the Harbor Master to rig in her booms &c, she may have 24 hours wherein to obey the order, but if she is to come alongside the wharf, even though it may be on the day on which she arrives, and is requested by the Harbor Master to rig in her booms, &c. she must do so at once, and cannot wait for the 24 hours after she has got alongside the wharf. But the request of the Harbor Master is always necessary, in order to impose upon the vessel the obligation to rig in her booms.

But even if this be not the proper construction of the statute, and if the Ravenstondale was in disobedience to the statute in not having rigged in her jib boom and flying jib boom, though not having been requested so to do by the Harbor Master, it would furnish no defence for the steamer.

The only question is, whether the Cyphrenes was in fault, and whether the steamer could have avoided the ship, if proper precautions had been taken; and it would be superfluous to enquire, whether the ship was obeying in all respects the harbor regulations.

"When the collision was caused by a vessel having the power to move or stop at her pleasure, in a channel of sufficient breadth, without any superior force compelling her to the place of collision. The fact that thest eamer did collide with the ship is conclusive evidence that she was not properly managed." (Granite State, 3 Wallace, 314) more especially when it is shown that the collision occurred in broad daylight and that the ship which was moored to the wharf, could be seen all the way from the entrance of the harbor and even before entering.

The Court while affirming the judgment of the Chief Justice adopts his reasoning with this slight modification.

ELISHA H. ALLEN,
CHAS. C. HARRIS,
A. FRANCIS JUDD,

A. S. Hartwell, Proctor for Libellants; E. Preston and E. T. O'Halloran, Proctors for Respondents.

Honolulu, October 20th 1875.

Supreme Court of the Hawaiian Islands.

OCTOBER TERM, 1875.

AVERY ET AL. vs. STEAMSHIP "CYPHRENES."

BY THE FULL COURT.

Having decided that the steamship Cyphrenes is liable for the damage which she caused the Ravenstondale by collision, it remains to ascertain what amount should be paid for such damage.

The first claim which we will consider is that for Counsel fees; There are instances in which Counsel's fees should be allowed, but it has not been the practice of this Court hitherto, and we see nothing in this case which should induce us to vary from the previous usage of the Court, and therefore decline to allow them.

The Iron Works bill is for $2757.57. It was the duty of the Master of the Ravenstondale or any one who acted for him to procure this work done at as low a rate as possible, taking into consideration however, the quickness of time. With this view it would have been well to have invited competition. There are obvious reasons why the establishment at which the work was done, should be preferred, for certainly they are the best equipped for the accomplishment of any such work.

The manager of the establishment testifies to the effect that the bill is a fair one for this port, but would not be so in any other port that he knows of, and gives as a reason, that they have expensive machinery and expensive laborers, for which there is not a full amount of work and therefore they are obliged to make their charges on such jobs as they may have, higher than they otherwise would make them. This is undoubtedly true, and the fact should have been well known to the agent of the ship, before he undertook to engage the work at the Iron Works. On analyzing their bill by the testimony, many of the charges must appear to any one exceedingly high. Mr. Young, the Manager of the works, in his testimony says, that he suggested to the Captain of the vessel, to put out some of the work, but that the Captain said he wanted it all done at the Works under Mr. Young's eye. Mr. Young further testifies that it was not possible to do all the work in the day time (at his establishment), and that there is not enough men in Honolulu to doit in time; and that men cannot work as well in the night as in the day; and that they charge twice as much to work in the night time as in the day time, for both machines and men; and that both jobs, meaning thereby, the damage done to the same ship at sea and by the collision were going on at once. All this, clearly shows, that it would have been prudent to have divided the work with other shops. And Mr. Daniel Foster, who has great experience in such matters, testifies that this would have been his course.

Mr. Chayter testifies to the effect, that he was able to do the workt and had a conversation with the Captain about it, who told him that it must go to the Iron Works, and Chayter further says that he could have done the work for something less than $2000.

Mr. Weight says that he told the Captain that he would like to do the job and the charge now made by the Iron Works is higher than he the witness told the Captain. The Captain told him he could not get the work; and he further testifies, that if he had tendered for it he should have done it for $1800.

Mr. Chayter says that if he had sent in an estimate he should have tendered for $1800.

On a review of the account with the Iron Works, and in view of this testimony, we are of opinion that the Cyphrenes should pay $2000 of the Iron Works account.

With regard to demurrage, if the services of other mechanics had been employed, the weight of testimony is, that the repairs could have been effected in less time.

Mr. Chayter says it could have been done within a month, and the Iron Works could have done it in three or four weeks without working over time.

We are fully aware that rivals in business are apt to take a favorable view of what they themselves could have done and an unfavorable view of what others have done, but Mr. Foster, who is entirely disinterested, says; "if the ship had been mine I should have got her away I think in 25 or 30 days."

Capt. Jacob Brown, likewise disinterested, says, "I think they (the repairs) could have been completed within 30 days."

Notice was given that demurrage would be at the expense of the Cyphrenes after the 14th September. Making due allowance for the time necessary to procure labor and make bargains, in view of the testimony we adjudge, that the Cyphrenes should pay for demurrage of the Ravenstondale at the rate agreed by Counsel $119.75½ per day for 16 days.....$1915 74

The Surveyor's bill we regard as necessary	72 00
Fore topmast stay as agreed by Counsel	125 00
New figure head " "	300 00
Mr. Emme's bill undisputed	238 42
Mr. Bolles' bill do	121 60
Bill at the Consulate we regard as a reasonable charge against the Cyphrenes	18 75
Same of Lloyd's Agent's bill	60 00
Wharfage is controlled by the same reasoning which we have applied to the demurrage, and therefore we adjudge 16 days for wharfage, at 23.50 per day, Harbor Master fee at $9	385 00

The crew, so far as they were employed before the time when demurrage begins to run should be paid by the Cyphrenes, but after the demurrage begins to run their wages are included in the demurrage, for which allowance has been made. There is nothing in the work done by the crew that entitles them to extra wages; nothing in fact was done by them that it is not the ordinary and usual work of seamen when a ship meets with a disaster, and it does not appear in any way, that the crew either demanded or received any extra wages We regard the Captain's bill as far as the per diem is concerned as reasonable, and allow the Ravenstondale for the work done by her crew Augt. 24, 25, 6 and 7th., 72.00.

On the subject of commissions, the employment of a commission merchant in a foreign port, where the captain is unacquainted with either persons or prices is a reasonable and prudent thing; but it is a fixed principle of law, that a person may not be an agent at the same time for persons having opposite interests. Mr. Davies therefore, who was agent for the Iron Works, cannot have commissions for making a bargain for the ship with the Iron Works. It cannot be supposed that he would regard it as his duty to abate the charges of the Iron Works as against the ship; all his interests and motives would be the other way, we therefore disallow commissions on the item for the Iron Works and allow it as follows:

On Surveyor's fees	$ 72 00	
Harbor Master's bill	385 00	
Bolles' bill	121 60	
Emmes'	238 42	
Consulate	18 75	
Lloyd's Agency	60 00	
		895 77
At 5 per cent		44 78

There is no reason for allowing exchange, the amounts are to be paid here and the hull of the Cyphrenes is holden for them, and the agents of the Cyphrenes must take their own means of raising the money. But interest should be allowed upon the amount found due for damage done to the Ravenstondale by the Cyphrenes from the day when the amount was ascertainable, which we find to be October 4th, the day when the repairs were completed and the accounts in a condition to be settled, the rate of interest being 9 per cent, the legal interest of this country.

The amount which we have adjudged to be due from the Cyphrenes is	$5353 29
And interest at 9 per cent	36 13
In all	5389 42

RECAPITULATION.

Iron Works	2000 00
Demurrage	1915 74
Surveyor's Bill	72 00
Fore Topmast Stay	125 00
New Figure Head	300 00
Mr. Emmes' Bill	238 42
Mr. Bolles' Bill	121 60
Consulate Bill	18 75
Lloyd's Agent's Bill	60 00
Wharfage	385 00
Captains' Bill for labor of men	72 00
Commissions	44 78
	$5353 29
Interest at 9 per cent. to 28th October 1875	36 13
	$5389 42

ELISHA H. ALLEN,
CHAS. C. HARRIS,
A. FRANCIS JUDD.

A. S. Hartwell, Esq., Proctor for Libellants.
Messrs. Preston and O'Halloran for Respondents.

Honolulu, Oct. 28th, 1875.