

G. URRUTIA & CO., PLAINTIFF AND APPELLEE, VS. BACO RIVER PLANTATION CO., DEFENDANT AND APPELLEE. M. GARZA, INTERVENER AND APPELLANT.

G.R. No. 7675. March 25, 1913

Ponente: MORELAND, J.

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MORELAND, J.:

This action springs from a collision between the steamship Nuestra Señora del Pilar, owned by the plaintiff, and the schooner Mangyan, owned by the defendant, which occurred in the early morning of the 8th of April, 1910, in Verde Island North Passage. The sail vessel was sailing with a fresh breeze dead astern, her sails wing and wing. The steamer was seen by those on board the sailing vessel some time before the actual collision, sailing erratically. The sail vessel kept her course steady until just before the actual contact when her helmsman threw her hard to port in an effort to avoid the collision. The movement, however, was unsuccessful and the sail vessel rammed the steamer on the starboard quarter well aft. The steamer sank and eight lives were lost. The sail vessel was considerably injured.

This action was brought by the owners of the steamship against the owners of the sail vessel, to recover the value of the destroyed steamer and the damages caused by reason of its destruction, alleging as a basis therefor the negligence of the sail vessel. The defendant denied the material allegations of the complaint and set up a counterclaim for damages, alleging as grounds therefor that the injuries sustained by the sail vessel were due to the gross negligence of those handling plaintiff's steamer.

Before the action was tried, M. Garza made an application to intervene under the provisions of section 121 of the Code of Civil Procedure, he alleging in support of his application that the steamer was carrying for him at the time several thousand pesos' worth of merchandise as freight, which was lost as a result of the collision. He was permitted to intervene and accordingly filed a complaint setting up the loss of his merchandise and the value thereof and alleging, as the basis for his right to recover, the negligence of one or the other of the vessels, without specifying which, and praying that the court award him damages against that vessel the negligence of which, upon the trial, was shown to have caused his loss.

The case turns upon the question which of the vessels was negligent in failing to conform to the International Rules for the Prevention of Collisions at Sea. The learned trial court found that those managing the steamer were guilty of gross negligence and that for that reason the plaintiff could recover nothing.

An examination of the record leaves no doubt that the finding of the trial court that the steamer was handled in a grossly negligent manner is clearly and fully supported by the evidence. No other finding could be sustained.

Relative to the alleged negligence of the sail vessel the learned trial court said :

"I am satisfied beyond any reasonable doubt that the steamer Ntra. Sra. del Pilar was sailing erratically, that it did not have a proper watch on board, and that it therefore contributed neglect to the collision.

"I am also thoroughly satisfied that the sailing vessel Mangyan had its lights properly on it long before the time the collision occurred, and that the lights were so arranged upon the rigging of the vessel as to comply with the rules, and that they were visible and were seen by the crew of the steamer Elcano and could have been seen by the watchman or the chief officer of the steamer Ntra. Sra. del Pilar, if they had been on the lookout for them;

"That the steamer Ntra. Sra. del Pilar, being bound to keep out of the course of the sailing vessel and suddenly seeing the sailing vessel very close, went over hard to port and crossed the course of the sailing vessel.

"I also find that the sailing vessel, notwithstanding the erratic movements of the steamer, proceeded directly on its course regardless of consequences when with all the searoom there was it could easily have maneuvered so as to very well avoid the collision, and thereby having contributed neglect to the collision, neither is entitled to recover from the other any damages which may have occurred."

These facts and circumstances clearly appear in the record and fully sustain the conclusions reached.

We are of the opinion that under the facts stated in the decision of the trial court the defendant was entitled to recover upon its counterclaim.

It being clear from the evidence that the gross negligence of those managing the steamer brought it into such close proximity to the sail vessel that a collision was apparently inevitable, the question is whether or not the sail vessel was negligent in continuing its course without variation up to the moment that it found itself in extremis.

Article 20 of the International Rules for the Prevention of Collisions at Sea is as follows: "If two ships, one of which is a sailing ship and the other a steam ship, are proceeding in such directions as to involve risk of collision, the steam ship shall keep out of the way of the sailing ship."

Article 21 is as follows: "Where by any of these rules one of two vessels is to keep out of the way, the other shall keep her course and speed."

Generally speaking, in collisions between vessels there exist three divisions of time, or zones: The first division covers all the time up to the moment when the risk of collision may be said to have begun. Within this zone no rule is applicable because none is necessary. Each vessel is free to direct its course as it deems best without reference to the movements of the other vessel. The second division covers the time between the moment when the risk of collision begins and the moment when it has become a practical certainty. The third division covers the time between the moment when collision has become a practical certainty and the moment of actual contact.

It was during the time when the sail vessel was passing through the third zone that it changed its course to port in order to avoid, if possible, the collision. This act may be said to have been done in extremis, and, even if wrong, the sailing vessel is not responsible for the result.

The question before us, as presented by the finding of the trial court, arises wholly over the action of the schooner in keeping her course through the second zone, that is, during the period when there was a risk of collision. In resolving this question we have to note the well-established presumption which favors the sail vessel in cases of this character. The rule relative to this presumption is conservatively stated in volume 25 of the American and English Encyclopedia of Law, page 926:

"Subject to the genera] rules of evidence in collision cases as to the burden of proof, in the case of a collision between a steam vessel and a sail vessel, the presumption is against the steam vessel, and she must show that she took the proper measures to avoid a collision."

Hughes on Admiralty, page 242, declares the law thus:

"A steamer must keep out of the way of a sail vessel. In doing so she must allow the sail vessel a wide berth. *

* *

"A steamer may take her own method of passing a sail vessel. The mere approach of the two vessels does not bring about risk of collision. The steamer may assume that the sail vessel will do her duty and do nothing to embarrass her. Hence the steamer may shape her course so as to avoid the sail vessel. * * *

"This rule that vessels may each assume that the other will obey the law is one of the most important in the law of collision. Were it otherwise and were vessels required to take all sorts of measures to keep out of the way, when they are not in each other's way, navigation would be impossible. * * * There is, however, one important qualification which must be borne in mind. It is that a steamer must not approach so near a sailing vessel, and on such a course as to alarm a man of ordinary skill and prudence. If the man on the sailing vessel makes an improper maneuver, he is not responsible. It is what is called an 'error in extremis.' * * * The leading case on the subject is *The Lucille* (15 Wallace, 676). In that case a steamer and schooner were approaching on converging courses only half a point apart, so that they would have come within thirty yards of each other, and that in Chesapeake Bay. The court held that this was too close and condemned the steamer."

On page 245 the same author says:

"Article 21 * * * renders it obligatory on the vessel which has the right of way to pursue her course. * * * She must rely on the other vessel to avoid the collision and not embarrass her by any maneuver. All she need do is to do nothing. Then the other vessel knows what to expect and navigates accordingly. * * *

"In collisions between steam and sail vessels the steamer's defense is almost invariably that the sail vessel changed her course."

On page 255 of the same work appears the following:

"In *The Clara Davidson* (24 Fed., 763), the court said: 'But I do not find myself at liberty to ignore the inquiry whether a statutory rule of navigation was violated by the schooner. These rules are the law of laws in cases of collision. They admit of no option or choice. No navigator is at liberty to set up his discretion against them. If these rules were subject to the caprice or election of masters and pilots they would be not only useless, but worse than useless. These rules are imperative. They yield to necessity, indeed, but only to actual and obvious necessity. It is not stating the principles too strongly to say that nothing but imperious necessity or some overpowering vis major will excuse a sail vessel in changing her course when in the presence of a steamer in motion.' "

Spencer on Marine Collisions, page 154, says:

"The duties imposed upon vessels are of a mutual character; and where the statute directs one to give way to the other, it imposes an equal duty upon the latter to continue on its course, and a change of course on its part is as unlawful as it would be for the other to refuse to yield the right of way. * * *

"It is one of the conditions of the duty 'to keep out of the way,' that the other vessel shall act intelligently, and afford reasonable evidence of her intention; while it is doubtful what the other will do, the former should hold her course. Like all other rules for the prevention of collisions at sea, there may be special circumstances which would warrant a ship in departing from her course, where collision appears inevitable by pursuing it; indeed, it is her duty to do so; but until it plainly appears that there is no other alternative, a vessel should hold her course when in a position required to do so by the statute."

On page 181 the same author says:

"The duty of one vessel to keep her course is not intended by the rules as a privilege conferred, but as an obligation imposed, in order to enable the other vessel with certainty to keep out of the way. In order to warrant a vessel to either change her course or speed, there must be reasonable certainty that the other is not

doing her duty, and that the situation imperatively demands a departure from the rules. It is the duty of the vessel required to keep out of the way to give an early and intelligible expression of her intentions to do so; and while there is any doubt as to what her actions will be, the vessel required to hold her course may presume that the other will act intelligently and lawfully, and she should hold her course until the contrary appears. It is no excuse for a vessel taking a course forbidden by law that the unlawful course was the best one."

In the American and English Encyclopedia of law (vol. 25, p. 925) the rule is stated as follows:

"But it must be a strong case which puts the sail vessel in the wrong for obeying the rule to hold her course, for the court must clearly see, not only that a deviation from the rule would have prevented the collision, but that the officer in charge of the sail vessel was guilty of negligence or a culpable want of seamanship in not perceiving the necessity for a departure from the rule and acting accordingly. The sail vessel is justified in holding her course to the last minute possible for the steamship to avoid her by making the necessary maneuver."

In the case of *St. John vs. Paine* (10 How., 557), the collision was between a schooner and a steamer. The schooner had no lights visible; the night was starlight and clear. The court reviewed the rules governing the management of sail vessels at some length, explained the rules applicable to the management of steam vessels, and gave the reasons why the rules which govern travelers on the highways of the sea should be strictly enforced. After showing the greater facility of maneuvering which a steamer has over a sail vessel and, therefore, the greater ability to avoid collisions, the court said:

"As a general rule, therefore, when meeting a sailing vessel, whether close hauled or with the wind free, the latter has a right to keep her course, and it is the duty of the steamer to adopt such precautions as will avoid her. (Cites cases.)

"By an adherence to this rule on the part of the sailing vessel the steamer with a proper lookout will be enabled, when approaching in an opposite direction, to adopt the necessary measures to avoid the danger, and she will have a right to assume that the sailing vessel will keep her course. If the latter fails to do this, the fault will be attributable to her, and the master of the steamer will be responsible only for a fair exertion of the power of his vessel to avoid the collision under the unexpected change of the course of the other vessel, and the circumstances of the case."

A similar case is that of *The Genesee Chief vs. Fitzhugh* (12 How., 443). This pertains also to a collision between a steamer, *The Genesee Chief*, and a sail vessel. The two watched each other for some time before the collision. The sailing vessel kept her course until in extremis when she made a wrong maneuver. The court said:

"The collision took place in the open lake. It was a starlight night, and although there was a haze near the surface of the lake, it was not sufficient to conceal the *Cuba* from those on board of the propeller. * * *

"The lake was smooth. The steamboat had the entire command of her course and a wide water, by which she might have passed the *Cuba* on either side, and at a safe distance. She was going at the rate of eight miles an hour. And if proper care had been taken on board the *Genesee Chief*, after the schooner was first seen, it would seem to be almost impossible that a collision could have happened with a vessel moving so slowly and sluggishly through the water even if she was carelessly or injudiciously managed. There was no necessity for passing so near her as to create the hazard. The steamboat could choose its own distance. * * *

"And the captain and crew of the *Cuba* appear to have been watchful and attentive from the time the propeller was discovered. Nor do we deem it material to inquire whether the order of the captain at the moment of collision was judicious or not. He saw the steamboat coming directly upon him; her speed not diminished; nor any measures taken to avoid a collision. And if, in the excitement and alarm of the moment, a different order might have been more fortunate, it was the fault of the propeller to have placed him in a situation where there was no time for thought; and she is responsible for the consequences. She had the power to have passed at a

safer distance, and had no right to place the schooner in such jeopardy, that the error of a moment might cause her destruction, and endanger the lives of those on board. And if an error was committed under such circumstances it was not a fault."

In the case of *The Ottawa* (3 Wall., 269), the court said:

"Rules of navigation are obligatory from the time the necessity for precaution begins, and continue to be applicable as the vessels advance, so long as the means and opportunity to avoid the danger remain; but they do not apply to a vessel required to keep her course after the approach is so near that the collision is inevitable, and are equally inapplicable to vessels of every description while they are yet so distant from each other that measures of precaution have not become necessary."

This case exemplifies the three-zone theory already referred to. In the first zone no rules apply. In the second the burden is on the vessel required to keep away and avoid the danger. The third zone covers the period in which errors in extremis occur; and the rule is that the vessel which has forced the privileged vessel into danger is responsible even if the privileged vessel has committed an error within that zone.

The duty of the sailing vessel to keep her course is well exemplified in the leading case of *The Lucille vs. Respass* (15 Wall., 676), which was a collision between a schooner and a steamer. Both vessels saw each other in time to have avoided the collision. The court said:

"The principles of law applicable to the case are well settled. They are not disputed by either party. In the case of *The Carrol* (8 Wall., 302), it is thus laid down, 'Nautical rules require that where a steamship and sailing vessel are approaching each other from opposite directions, or on intersecting lines, the steamship from the moment the sailing vessel is seen, shall watch with the highest diligence her course and movements so as to be able to adopt such timely means of precaution as will necessarily prevent the two boats from coming in contact. Fault on the part of the sailing vessel at the moment preceding a collision does not absolve a steamer which has suffered herself and a sailing vessel to get in such dangerous proximity as to cause inevitable alarm and confusion and collision as a consequence. The steamer, as having committed a far greater fault in allowing such proximity to be brought about, is chargeable with all the damages resulting from a collision.'

"The rule laid down in the case of *The Fannie* (11 Wal., 238) is still more applicable to the case before us. It was held that a schooner meeting a steamer approaching her on a parallel line, with the difference of half a point in the course of the two, ought to have kept in her course; that a steamer approaching a sailing vessel is bound to keep out of her way, and to allow her a free and unobstructed passage. Whatever is necessary for this it is her duty to do, and to avoid whatever obstructs or endangers the sailing vessel in her course. If, therefore, the sailing vessel does not change her course so as to embarrass the steamer, and render it difficult for her to avoid a collision, the steamer alone is answerable for the damage of a collision, if there is one."

In the case of *The Sea Gull* (23 Wall., 165), the court said:

"Steamers approaching" a sail ship in such a direction as to involve risk of collision are required to keep out of the way of the sail ship; but the sail ship is required to keep her course unless the circumstances are such as to render a departure from the rule necessary in order to avoid immediate danger.

"Vessels with sails being required to keep their course, the duty of adopting the necessary measures of precaution to keep out of the way is devolved upon the steamer subject only to the condition that the sail ship shall keep her course and do not act to embarrass the steamer in her efforts to perform her duty. Doubtless the steamer may go to the right or left if she can keep out of the way, but if not and the approach is such as to involve risk of collision she is required to slacken her speed, or, if necessary, stop and reverse, and if she fails to perform her duty as required by the rules of navigation she is responsible for the consequences if the sail vessel is without fault. * * *

"Attempt is made in argument to show that the schooner also was in fault and that the case falls within the rule which requires that the damages shall be divided.

"Support to that charge is attempted to be drawn from the assumed fact that the schooner changed her course in violation of the rule of navigation which requires the sail ship to keep her course, as a correlative duty to that of the steamer whenever the latter is required to keep out of the way. * * *

"Two answers are made by the libelants to that defense, either of which, if found to be true, is sufficient to exonerate the schooner: * * * (2) That the schooner made no change in her course until the collision was inevitable, nor until it became indispensably necessary in order to avoid immediate danger caused by the fault of the steamer. * * *

"Rules of navigation continue to be applicable as long as the means and opportunity remain to avoid the danger, but they do not apply to a vessel required to keep her course after the wrongful approach of the opposite vessel is so near that a collision is inevitable. * * *

"Nor will an error committed by the sail vessel under such circumstances of peril, if she is otherwise without fault, impair the right of the sail vessel to recover for the injuries occasioned by the collision, for the plain reason that those who produce the peril and put the sail vessel in that situation are chargeable with the error and must answer for the consequences. (Steamship Co. vs. Rumball, 21 How., 383.)

"Subject to that exception the sail vessel must keep her course."

In the case of *The Benefactor* (102 U. S., 214), the court laid down the following conclusions:

"1. Upon the steamship and schooner discovering each other proceeding in such directions as to involve risk of collision, as stated in the foregoing findings of fact, it was the right and duty of the schooner to keep her course, and the duty of the steamship to keep out of the way of the schooner, and the steamship was in fault in failing to perform that duty.

"2. It was also the duty of the steamship under the circumstances stated, to pursue a course which should not needlessly put the schooner in imminent peril; and the steamship was in fault in failing to perform that duty.

"3. It was the duty of the steamship, before the time when she did so, to slacken her speed or stop, and the steamship was in fault in failing to perform that duty.

"4. If, when a collision had become imminent by reason of the fault of the steamship, any error was committed in extremis by those in charge of the schooner, the schooner is not responsible therefor.

"5. The steamship had no right, under the circumstances stated, needlessly to place herself in such close proximity to the schooner that the error of a moment would bring destruction.

"6. The collision was occasioned by the fault of the steamship, and the steamship should be condemned therefor."

In the case of *The Badger State* (8 Fed. Rep., 526), the court said:

"Where a sailing vessel and one propelled by steam are approaching each other bow on, the steamer must give way. In case of a collision between such vessels, the steamer is *prima facie* in fault."

In the case of *The Gate City* (90 Fed. Rep., 314), the court held, according to the syllabus:

"The rule requiring a sailing vessel meeting a steamer to hold her course is a broad and general one intended to put the burden of avoiding a collision upon the steamer; and, if the sailing vessel departs from the injunction the burden is on her to show some reasonable excuse therefor.

"A disregard of the rule not demanded by a clearly existing exigency should not be excused.

"Therefore, she will not be held in fault for adhering to her course, although the steamer seems to be maneuvering in an uncertain and dangerous way."

We are satisfied from the authorities that, under the facts stated in the opinion of the trial court, the defendant is entitled to recover such damages as reasonably and naturally flowed from the collision. There is sufficient evidence in the record to fix such damages with reasonable accuracy. It was proved upon the trial that it would require an expenditure of P3,525 to put the sail vessel in the condition in which it was before the injury; that it cost P245 to get the vessel to Manila after the injury; that the value of the supplies lost was P240.99. The evidence relative to the loss of earnings is not sufficient to permit the court to formulate any conclusion in relation thereto, even if it be considered a proper item of damage.

We think the judgment of the trial court was correct in dismissing the complaint of intervention. The intervener had no "legal interest in the matter in litigation, or in the success of either of the parties, or an interest against both." Their action was personal, involved no rights in property which extended beyond their immediate selves, and touched no third party in any of the ramifications of those rights.

The judgment of the court below, in so far as it finds against the plaintiff and the intervener, is hereby affirmed. As to that portion which dismisses the counterclaim of the defendant, the Baco River Plantation Company, the judgment is reversed and the cause remanded, with instructions to the trial court to enter judgment in favor of the defendant, the Baco River Plantation Company, and against the plaintiff, G. Urrutia & Company, for the sum of P4,010.99, and costs. No costs on this appeal.

While it was held in the case of *Philippine Shipping Co. vs. Vergara* (6 Phil. Rep., 281), that, in accordance with articles 837 and 826 of the Code of Commerce, the defendant in an action such as the one at bar cannot be held responsible in damages when the ship causing the injury was wholly lost by reason of the accident, we do not apply it in this case for the reason that the vessel lost was insured and that the defendant collected the insurance. That being the case, the insurance money substitutes the vessel and must be used, so far as necessary, to pay the judgment rendered in this case.

In coming to this conclusion we have not lost sight of the case of *Place vs. Norwich and N. Y. Trans. Co.* (118 U. S., 468), in which it was held that, under the provision of the Act of Congress relative thereto, insurance money obtained by reason of the loss of a vessel causing damages, as in the case at bar, was not subject to the payment of the damages sustained by the negligence of the vessel lost by reason of the accident in which the damages occurred. We do not follow that case because we are met in this jurisdiction with article 1186 of the Civil Code, which provides that "after the obligation is extinguished by the loss of the thing, all the actions which the debtor may have against third persons, by reason thereof, shall pertain to the creditor," and with article 2 of the Code of Commerce, which provides that where the Code of Commerce is silent as to the law relating to the matters of which it treats, those matters shall be governed by the provisions of the Civil Code.

That said article 1186 is, under the Spanish jurisprudence, applicable to money obtained from the insurance of the thing lost or destroyed, there can be no doubt. (Manresa, vol. 8, 353.)

The judgment in this case is, therefore, collectible, but the amount collected cannot exceed the amount of insurance money actually received. The writer of this opinion had doubts of the applicability of article 1186, referred to; but has yielded to the learning of the majority relative to the Roman and Spanish jurisprudence on this point.

Arellano, C. J., Torres and Trent, JJ., concur.

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