

**Thorp Vs. Hammond**

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**Court :** US Supreme Court

**Decided On :** 1870

**Appeal No. :** 79 U.S. 408

**Appellant :** Thorp

**Respondent :** Hammond

**Judgement :**

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**Thorp v. Hammond**

**79 U.S. (12 Wall.) 408**

*APPEAL FROM THE CIRCUIT COURT FOR*

*THE SOUTHERN DISTRICT OF NEW YORK*

## **SYLLABUS**

1. When a vessel is sailing in close proximity to other vessels, the fact that her hands are engaged in reefing her mainsail is no sufficient excuse for failure to keep a lookout or to take such precautions as are needful to avoid collisions.

2. One of several general owners who sails a vessel on shares, under an arrangement between himself and the other owners whereby he in effect has become the charterer, hiring his own crew, paying and victualing them, paying half the port charges, retaining half the net freight after the port charges are taken out, and paying the other half to the general owners, is to be considered the owner "*pro hac vice*," and as such is liable personally for a tortious collision with another vessel.

3. Though sued jointly with the other general owners in a libel which does not describe him as owner *pro hac vice*, a decree may be made against him alone.

By an Act of Congress of March 3, 1851, it is enacted:

" *Section 3.* That the liability of the owners of any vessel for any loss, damage, or injury by collision occasioned without the privity of such owners shall in no case exceed the amount or value of the interest of such owners respectively in such vessel and her freight then pending."

" *Section 5.* That the *charterer* of any ship or vessel, in case he or they shall *man, victual, and navigate* such vessel at *his or their own expense*, shall be deemed the owner of such vessel within the meaning of this act, and such ship or vessel, when so chartered, shall be liable in the same manner as if navigated by the owners thereof."

With this statute in force, three schooners -- the *Capes*, the *Huntley*, and the *Brothers* -- were sailing towards New York along the New Jersey coast not far from Sandy Hook. There was nothing special in the ownership of the first and last named of the vessels. The *Huntley*, however, was owned by one S. S. Hammond and eight others as general owners, Hammond alone sailing her, he doing this on

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shares, hiring, paying, and victualing his own crew, paying half the port charges, retaining half the net freight afterwards, and paying to the general owners the remaining half.

The collision which was the cause of this suit occurred on a winter morning of 1860. All three vessels were heavily laden, and were sailing close-hauled, having the wind about north-northwest, blowing fresh and fitfully. The general direction of their courses was about the same. The vessels were near each other, the *Capes* in advance, and perhaps somewhat the most out toward sea, the *Huntley* next, and the *Brothers* last and nearest to the shore. After sailing thus from eight in the morning until after nine, the wind having veered more northwardly, all the schooners tacked toward the northeast, thus standing off shore. When the *Huntley* tacked to stand out, she lowered her mainsail in

image:a

order to take in reefs, but the *Capes* and the *Brothers* continued to carry the same sail they had carried before. In consequence of this, the *Brothers* passed the *Huntley*, though on the leeward side, at the distance of about one hundred yards, running at the speed of seven or eight knots, while

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the speed of the *Huntley*, carrying her foresail and jib and falling to the leeward, was only four or five. All the vessels ran on the off-shore tack some fifteen or twenty minutes, which carried them about two miles out to sea. The *Capes* then went about and stood in shore on her starboard tack, the *Brothers* following very soon after. Whether the *Brothers* had beaten out her tack when she thus came about was not clear upon the evidence, though the weight of testimony perhaps tended to show that she had. However this fact was, before the *Brothers* could gather headway after tacking, the *Huntley* -- running freely on the off-shore tack, four or five knots an hour, foresail and jib set -- ran into her head on, striking her abaft the main rigging and causing her to sink in about half an hour. The diagrams on p. [79 U. S. 409](#) will perhaps better illustrate positions at different times.

At the time of the collision, all hands on board of the *Huntley* were engaged in reefing the mainsail. When the *Brothers* tacked to stand in shore, the *Huntley* was astern of her, not less than five or six hundred yards, the *Huntley* being

slightly to the windward. There was no lookout on the *Huntley*; no one on board of her saw the *Brothers* when she tacked, or when she was in stays, or noticed her at all after her tacking until it was too late to avoid the collision. Though hailed from the *Brothers* and told to keep off, no attention was given to the hail, and the evidence left no doubt that had those in charge of the *Huntley* been watchful, had they seen the *Brothers* when she went about, it would have been entirely in their power, by porting their helm, to pass under the *Brothers'* stern.

The owner of the *Brothers* (Thorp) hereupon filed a libel in the District Court of New York *in personam* against Hammond and the eight others, general owners of the *Huntley*, averring that the *Brothers* had been negligently run into and sunk by the *Huntley* in consequence of the mismanagement of those on board the *Huntley* and in charge of her. The libel, which averred nothing about the ownership of the *Huntley* except that she "was owned by and in possession

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of the respondents," claimed \$12,000 damages, as the value of the *Brothers*.

The owners of the *Huntley* set up as defense:

I. That they were, in fact, only her general owners, and that she was commanded, sailed, and exclusively managed by Hammond under an agreement made between him and them; that he was to have entire control and management of her as charterer on and for his own account; that he was the owner *pro hac vice* at the time of the collision, and, under the Act of Congress of March 3, 1851, alone responsible for the catastrophe.

II. That the entire value of the *Huntley* did not exceed \$5,000, and that her freight was but \$424.

III. That on the merits, the *Brothers* was in fault herself.

1. In not beating out her tack.

2. In improperly turning about when the *Capes* turned about, whereby, with a slight variation of her helm, she could have easily passed under the stern of the *Capes*.

3. In that when the *Brothers* turned about on the inshore tack, and whose direction was across the *Huntley's* bow, the *Brothers* knew that the *Huntley's* crew were engaged in reefing her mainsail, by reason of which she was in a crippled condition, and that, in disregard of the rights and condition of the *Huntley*, the *Brothers* had placed herself in such a position as to render a collision inevitable. The respondents brought witnesses to show that it was a custom of the sea not to have a lookout in the daytime, and that it was the duty of all vessels to keep out of the way of a reefing vessel. But their evidence was contradicted by the libellants.

The district court dismissed the libel. That court considered that as Hammond, a part owner, was on board and had charge of the vessel at the time of the collision; as he had the exclusive possession and control of her, and manned, victualed, and navigated her at his own expense, he was to be deemed a charterer within the meaning of the act of Congress of March 3, 1851, which exempted the owners from personal liability. And that as Hammond, the captain,

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was sued merely as a part owner, and not as the charterer, wrongdoer, or active cause of the disaster, and as his liability was placed, by the libel, on the same ground as that of the other owners, the suit necessarily stood or fell as to all the respondents. The court therefore thought the statute a bar to the suit in this form, and dismissed the libel. This decree being affirmed by the circuit court, the case was brought here on appeal.

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MR. JUSTICE STRONG delivered the opinion of the Court.

It is plain, as respects the merits of this suit, that the collision

was the result of gross carelessness in the management of the *Huntley*. Knowing, as the master did, that there were two schooners in close proximity to his own; knowing also, as he must have known, that they were beating out their tacks, and would probably soon come about and put in shore, there can be no excuse for his failure to keep watch of their movements and to notice the change of course by the *Brothers* in season to port his helm and thus pass under her stern. That the hands on the *Huntley* were engaged in reefing the mainsail certainly did not relieve her from all obligation to observe the commonest precautions against inflicting an injury upon a neighboring vessel ahead, especially when the movements of that vessel were precisely what ought to have been anticipated.

The respondents, however, insist that it is a custom of the sea not to have a lookout in the daytime or while reefing, and they have produced witnesses to prove such a custom. But the evidence falls far short of showing that such a custom exists generally, and if it were proved, it would not be a reasonable one sufficient to justify the absence of a lookout in such a case as this when the *Huntley* was in close proximity to two other vessels, both beating to the windward and one of them at least expected soon to cross her bow.

It has not been claimed that the collision was the result of inevitable accident, without fault, but the respondents contend that it was due to the mismanagement of the *Brothers* rather than to that of the *Huntley*. Their argument is that the *Brothers* was under full sail and perfectly controllable, while the *Huntley*, being under head sails only, with her hands engaged in reefing, was a crippled vessel, and therefore one to be favored. Hence it is inferred that it was the duty of the *Brothers* to keep out of the way. It may be conceded that when two vessels are approaching each other, the one crippled and the other in good manageable condition, it is the duty of the latter, if possible, to give way to the former. But the *Huntley* can in no sense be said to have been a crippled vessel. She was running freely on her

off-shore tack, four or five knots an hour, with her foresail and jib set. She obeyed her helm perfectly, and though she may not have been able to come about as easily as she would had her mainsail been set, there was not the slightest difficulty in the way of her taking care of herself and avoiding collision with other vessels. The most obvious maneuver, that of porting her helm, was not embarrassed at all by the fact that her mainsail was not spread.

It is further urged that the *Brothers* had not beaten out her tack when she came about, and hence that her putting her helm down and turning in shore when she did was a fault which, by throwing her in the way of the *Huntley*, caused the disaster. Was it, however, a fault? It is by no means clear from the evidence that the *Brothers* had not beaten out her tack fully. On the contrary, the evidence that she had appears to us to preponderate. But whether she had or not, it is fully proved that her coming about when she did was rendered proper, if not necessary, by the fact that the *Capes* changed to the starboard tack. The *Capes* was the leading vessel, and while it is possible that the *Brothers* might have ported her helm and gone astern of her, it is obvious that the safer course was to tack when the *Capes* tacked. And there was no reason to apprehend that the *Huntley*, following astern at the distance of five or six hundred yards and very little, if at all, at the windward, would be embarrassed by her tacking. She had passed the *Huntley* close on the latter's lee side, at a distance of not more than one hundred yards, and the *Huntley*, carrying on her foresail and jib, had been constantly falling off to the leeward. Abundant sea room was therefore left for the following vessel. It required only that the *Huntley's* helm should be ported half a point to carry her safely past the *Brothers*. We think, therefore, the whole fault of the collision is justly chargeable to the *Huntley*.

It remains to inquire whether the respondents, or any of them, are personally responsible for the injury. They were all general owners of the schooner at fault at the time when

the collision occurred, but the evidence shows that she was commanded, sailed, and exclusively managed by S. S. Hammond, one of them, under an arrangement made between him and the other owners, whereby he had in effect become the charterer of the vessel, to be employed on his own account, without the management, control, restraint, or possession of the other owners. He sailed the vessel on shares, hiring his own crew, paying and victualing them, paying half the port charges, retaining half the net freight after the port charges were taken out, and paying to the general owners the other half. It is clear, therefore, that he must be considered as having been the owner "*pro hac vice*." This accords with the authorities generally. [ [Footnote 1](#) ] Notwithstanding this, however, and though Hammond was the special owner, it has been contended on behalf of the libellants that all the general owners are liable for the torts committed by the schooner while she was thus let to charter. The circuit court was of opinion that they are not, and this Court is equally divided upon the question.

But we are all of opinion that the owner *pro hac vice* is liable, and that he may be charged in this proceeding. The court below held that he had been sued merely as a part owner, not as the charterer, wrongdoer, or active cause of the disaster, and that as his liability was placed by the libel on the same ground as that of the other owners, the suit must stand or fail as to all the respondents, and they held the Act of March 3, 1851, a bar to the suit in the form in which it had been brought. The court therefore dismissed the libel. This, we think, was an error. The Act of March 3, 1851, enacts by its 5th section that the charterer or charterers of any ship or vessel, in case he or they shall man, victual, and navigate such vessel at his or their own expense or by his or their own procurement, shall be deemed the owner or owners of such vessel within the meaning of the act. The previous section had declared what shall be

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the liability of owners for collisions. Hammond therefore is to be regarded as the owner, because the charterer, and as such responsible for the tortious acts of the vessel. If the other general owners are not, he is. The libel, it is true, avers that all the respondents were owners at the time of the collision. It does not set forth

whether they were general or special owners. Such an averment was unnecessary, for it is immaterial to their liability whether they were one or the other if they had the possession and control of the vessel. It is ownership which determines the liability, and an averment of the mode in which ownership was acquired would be superfluous. Had Hammond been sued alone, as he might have been, the libel need not have averred more respecting his ownership than is averred now. It would have been of no importance to set out whether he became owner by purchase of the schooner, or by bequest, or by charter party, for his liability would have been as fixed in each case as in the others. Nor does the libel in this case charge general ownership, as distinguished from ownership *pro hac vice* or ownership as defined by the statute. There is nothing, then, in the structure of the libel which stands in the way of a recovery against Hammond as owner, unless it be that others are also sued with him. And surely that is no bar to a recovery against him. The libel is for a tort, and tortfeasors are jointly and severally responsible. At common law, when several are sued, there may be a recovery against one alone or against more than one and less than the whole number. We know of no reason for a different rule in admiralty, and it is in accordance with admiralty practice to decree against one of several respondents to a libel for a tort, and to discharge the others. [ [Footnote 2](#) ]

Our opinion therefore is that even if the libel was rightly dismissed as to all the respondents except Hammond, the libellants are entitled to a decree against him.

*Decree reversed and the record remitted with instructions*

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to order a reference to ascertain the damages and to decree that the libellants recover against Hammond.

[ [Footnote 1](#) ]

*Hallet v. Columbian Insurance Company*, 8 Johnson 272; *Webb v. Peirce*, 1 Curtis 104; [Thomas v. Osborn](#), 19 How. 22. See also Act of Congress of March 3, 1851, 5, 9 Statute at Large 636.

[ [Footnote 2](#) ]

[\*Newell v. Norton and Ship\*](#), 3 Wall. 257; *Smith v. Creole and Sampson*, 2 Wall.Jr. 485.

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