PEARSON v. DUANE.

1. Although a common carrier of passengers by sea, as a master of a steamship, may properly refuse a passage to a person who has been forcibly expelled by the actual though violent and revolutionary authorities of a town, under threat of death if he return, and when the bringing back and landing of such passenger would in the opinion of such master tend to promote further difficulty—yet this refusal should precede the sailing of the ship. If the passenger have violated no inflexible rule of the ship in getting aboard the vessel, have paid or tendered, himself or through a friend, the passage-money, and have conducted himself properly during the voyage, the master has no right, as matter of law, to stop a returning vessel, put him aboard it, and send him back to the port of departure. And if he do so, damages will be awarded against him on a proceeding in admiralty.
2. However, where a person who had been thus banished from a place got on board a vessel going back to it, determined to defy the authorities there and take his chance of life, and the captain, who had not known the history of the case until after the vessel was at sea—on meeting a return steamer, of a line to which his own vessel belonged—stopped his own and sent the man aboard the returning one, to be taken to the port where he embarked—such captain, not acting in any malice, but acting from a humane motive, and from a belief that the passenger, if landed at the port where his own vessel was going, would be hanged—in such a case, the apprehended danger mitigates the act, and the damages must be small. Accordingly, in such a case, this court, on appeal from a decree which had given four thousand dollars damages, modified it by allowing but fifty dollars, with directions, moreover, that each party should pay his own costs on the appeal.
3. In a case such as above described, a passenger is entitled to compensation for the injury done him by being put on board the return vessel, so far as that injury arose from the act of the captain of the other vessel in putting him there. But he is not entitled to damages for injuries that he suffered from obstructions which he afterwards met with in getting to the place from whence he had been expelled and where he wanted to return; and which injuries were not caused by this act, but were owing to the fact that all to whom he afterwards applied for passage to that place knew the power and determination of the authorities there and were afraid to carry him back.

IN the month of June, 1856, the steamship Stevens, a common carrier of passengers, of which Pearson was master, on her regular voyage from Panama to San Francisco, arrived at the intermediate port of Acapulco, where Duane got on

board, with the intention of proceeding to San Francisco. He had, shortly before this, been banished from that city by a revolutionary, yet powerful and organized body of men, called "The Vigilance Committee of San Francisco," *upon penalty of death in case of return.* This committee had, in the fore part of June, against his will, placed him on the Golden Age, a steamer in the harbor of San Francisco, destined for Panama, with directions that he should be conveyed beyond the limits of California; and he was forcibly carried to the Mexican port of Acapulco. The presence of the Stevens afforded the first opportunity to get back, which he was anxious to embrace, being willing to encounter the risk to which his return might expose him. Duane went openly on the boat, at the public gangway, and talked freely with some of the officers and passengers. It is not certain that the master knew of his being aboard until after the ship got to sea, but no directions had been given for his exclusion, and although he was without a ticket, or money to buy one, yet a passenger, who had the means, offered to pay the purser his fare, who declined receiving it.

It was usual for those persons who wished to secure a passage, to procure a ticket at Acapulco, but there was no imperative rule of the ship requiring it, and the customary fare was often paid to the purser after the boat had left the port.

There was no evidence that Duane would have been excluded, had the master been aware that he was on board before he left Acapulco, for it was quite clear that the circumstances of his banishment were unknown at that time.

The master, Pearson, was aware that the Vigilance Committee were in control of San Francisco, and ascertained in some way that Duane had been expelled by them from California, and if he returned, would be in danger of losing his life. Having learned this, he resolved to put Duane aboard the first down ship he met, and send him back to Acapulco. The steamer Sonora, commanded by Captain Whiting, and one of the same line of steamers of which Pearson was master, very soon came in sight, and was stopped. Whiting in-

formed Pearson that he had orders not to carry back any banished person, and that Duane *would certainly be executed if he returned*, and advised that he should be sent to the Sonora, and he would endeavor to persuade him to go on with him.

Thereupon Duane was transferred to the Sonora, and landed at Acapulco. The transfer was effected without any personal indignity to Duane, who at first resisted, but was induced to yield to superior force, by friendly counsels.

Duane did not return to California until the month of February, 1860. The Vigilance Committee no longer existed, and he then filed a libel in admiralty for damages, in the District Court of the Northern District there, setting forth essentially the facts above stated; that having been expelled as he was from the Stevens, all efforts to get aboard vessels going to San Francisco were unavailing; that he went thus to Aspinwall, in the Republic of New Grenada, to try and get passage thence to San Francisco, but that a line of steamers previously existing there and on which he expected to go, had been discontinued, its last vessel having set off two or three days before his arrival. That finally, through charity, he obtained a passage to New York, in which city he was without money or means, his character and reputation blasted, and himself a dependent on charity for subsistence, and was for several months confined in the hospital there, physically unable to attempt the voyage to San Francisco until February, 1860.

By the 12th article of his libel, he assigned as a reason for delay in bringing his action, the state of things in San Francisco, the numerous executions there by the Vigilance Committee, and his own belief that if he returned his life would be put in jeopardy; a belief which, he alleged, "existed up to the time of his departure from New York to California."

The answer, besides a defence from lapse of time, asserted that the libellant was not "a good or law-abiding citizen of San Francisco," and that he had "secretly and without any right or authority so to do, got on board of the Stevens and

remained secreted on board as a stowaway;" and that the defendant in sending the libellant back on the Sonora, had been influenced by humane motives.

The District Court decreed in favor of Duane, with $4000 damages; a decree affirmed in the Circuit Court. Appeal.

Messrs. Lyon and Alexander Hamilton, Jr., for the appellant:

I. The condition of affairs in San Francisco, in July, 1856, is a matter of public history. It was that of an organized rule of anarchy, irresistible from its force, and unyielding in the execution of its purposes. It was submitted to, if not created by, a body of men otherwise supporters of law, and was formed to correct an evil which the law could not or did not reach. In whatever way it judged, it executed its judgments with inflexible certainty. The defendant could not disregard the existence of this power, nor defy its edicts because they emanated from an unlawful source. His duty, in common with every other citizen, was to abstain from participating in anything which this tribunal had pronounced against until the supremacy of the law should be re-established. To have taken back an obnoxious exile, would have been a direct challenge to the Vigilance Committee, which they would have answered by hanging the victim, under a sentence already pronounced.

To sustain a recovery, under such a state of facts, for the refusal of the defendant to carry this exile to the gallows, would be to disregard the principles on which the law of common carriers is founded.

The first and most general obligation on the part of the public carriers of passengers is, without doubt, to carry persons who apply for passage. The obligation is, nevertheless, subject to several qualifications.

In *Jencks* v. *Coleman*,* a case before Story, J., it was said:

"The right of passengers to a passage is not an unlimited right; but is subject to such reasonable regulations as the proprietor may prescribe for the due accommodation of passengers.

* 2 Sumner, 222.

and for the due arrangement of their business. The proprietors have not only this right, but the further right to *consult and provide for their own interests* in the management of such boats as a common incident to their right of property."

"They are not bound to admit passengers on board, who refuse to obey the reasonable regulations of the boat, or who are guilty of gross and vulgar habits of conduct, or who make disturbance on board, or whose characters are doubtful, or dissolute or suspicious, and *a fortiori* whose characters are unequivocally bad; nor are they bound to admit passengers on board, whose object it is to interfere with the interest or patronage of the proprietors so as to make the business less lucrative to them. While, therefore, I agree that steamboat proprietors, holding themselves out as common carriers, are bound to receive passengers on board under ordinary circumstances, I at the same time insist that they may refuse to receive them, if *there be a reasonable objection.*"

The report of this case shows that Mr. Webster, who tried the case for the plaintiff, made no exception to any of the propositions involved in this part of the charge.

In *Cook* v. *Gourdon*,* a South Carolina case, Mr. Justice Bay, in delivering the opinion of the court, speaking of the rights and liabilities of ferrymen, says:

"In fact, the law gives him the right of judging when it is safe and proper for him to cross or not."

In *Bennett* v. *Dutton*, in the Supreme Court of New Hampshire,† Chief Justice Parker says:

"We are of opinion that the proprietors of a stage-coach for the regular transportation of passengers for hire, are bound to take all passengers who come, so long as they have convenient accommodation for their safe carriage, *unless there is a sufficient excuse for them for a refusal.*"

Like innkeepers, carriers of passengers are not bound to receive all comers.‡

* 2 Nott and McCord, 22.

† 10 New Hampshire, 486.

‡ Markham *v.* Brown, 8 New Hampshire, 523.

"*The character of the applicant*, or his condition at the time, may furnish just grounds for his exclusion, and his object at the time may furnish a sufficient excuse for a refusal, as if it be to commit an assault upon another passenger, or to injure the business of the proprietor."

The fact that the libellant was willing and desirous to return to San Francisco, makes no difference as to the defendant's duty. His conduct in acting like a madman did not justify the master of the ship in imitating it. The value or worthlessness of the libellant's life is not involved in the question. The crime of murder or any lesser breach of the peace, is an offence against the body politic; in any measures taken to avoid this, the civil rights of individuals are subordinate to the requirements of a public duty.

An agent of a railway would be justified in refusing to sell a ticket to a pugilist on his way to participate in a prize fight, as would the conductor of a train in putting him off before reaching the place where the fight is to take place. Will it be asserted that a disappointed prize-fighter could recover damages against the carrier for thus averting a flagrant breach of the peace? The case before the court is stronger against a recovery.

If a carrier has reason to suppose that a passenger is engaged in canvassing for another line, the law excuses him for refusing to carry the passenger; or if he is of dissolute habits and not a fit companion for other passengers, he may be excluded; how much more is the carrier justified in excluding a person, who he well knew would meet, at the end of the route, with death at the hands of an armed and organized body of men in open rebellion against the constituted authorities?

Questions affecting the carriage of persons are comparatively of modern date, the first case coming under the notice of the court being in 1791, before Lord Kenyon. The carrier of goods, as will be conceded, is held to wider obligations than the carrier of passengers. Yet, if the goods offered are of a nature which will at the time expose them

to extraordinary danger or popular rage, he need not take them. This was decided in the King's Bench, in *Edwards* v. *Sherrat*,* a case where the plaintiff had a lot of wheat at Wolverhampton to be sent to Birmingham. There was a great disposition to riot manifested in the neighborhood, on account of the prevailing scarcity. The mob had pulled down a corn-mill not far distant, and it was understood that they had threatened to come to the warehouse where this corn was deposited. The defendant was a common carrier, by water, between Birmingham and Wolverhampton, and on to Radford. The plaintiff's agents, finding one of the defendant's boats going by, without any intention of staying at Wolverhampton, or seeking to take in goods there, stopped the boat, and prevailed upon the boatman to take in the corn, which was seized by the rioters at a distance of four or five miles from Wolverhampton. The defendant had a verdict, and opinions were delivered by Lord Kenyon and Barons Gross, Lawrence, and Le Blanc. Lord Kenyon said:

"All the circumstances and urgency of the case should have been disclosed to the boatman at the time, and he should have been asked whether he chose to undertake the risk. Common honesty would have suggested this; for *no man in his senses would, under these circumstances, have taken the corn under a liability as common carrier*."

That is, there being a disposition to riot in the neighborhood, and a reasonable probability that the corn would be seized by the rioters in case it was taken on board the boat, the boatman would have been justified in acting upon the belief, and in refusing to take the corn.

Baron Gross says, in the same case:

"What are the facts? A boatman, in the night, is induced to take goods on board *under such circumstances as, if the defendant had been apprised of them*, it is clear that he would not have contracted to receive them as a common carrier."

Almost all legal propositions which are true in the abstract

* 1 East, 604.

have their exceptions in applying them. Thus, no feature of the common law is more conspicuous than the tenacity with which it has maintained the sacredness of a man's person. Yet in an indictment for an assault and battery, the defendant may justify laying his hands upon another *to prevent him from fighting or committing a breach of the peace;** or *to prevent him rescuing goods taken in execution;*† or the like.‡ "A man may justify an assault and battery in preventing the commission of a felony, *or a breach of the peace, or the suppression of a riot.*"§

In fact, the mere belief, if sincere, that the danger existed, was enough to justify the captain's conduct.

In the *Commonwealth* v. *Power*, in the Supreme Court of Massachussets,‖ a person named Hall, actually had a ticket, intending to take passage. He had, however, on a former occasion, while on the passage, violated the rules of the company, and Power, the superintendent, now put him out of the car. The Chief Justice, referring to Hall's former conduct, uses this language:

"And if he, Hall, gave no notice of his intention to enter the car as a passenger, and of his right to do so, *and if Power believed* that his intention was to violate a subsisting, reasonable regulation, then he and his assistants were justified in forcibly removing him from the depot."

In addition, carrying the libellant to San Francisco was calculated not only to endanger the safety of the ship and passengers, but would have subjected the cargo to risk, for which the owners would have been responsible. It has been held, that the phrase, "king's enemies," does not include the violence of a mob, or riot, or civil commotion of any nature.¶

* Comyn's Digest, tit. Pleadings, 3 M. 16.

† Bridgwater v. Bythway, 3 Levinz, 113.

‡ Glever v. Hynde, 1 Modern, 168.

§ Roscoe's Criminal Evidence, 213.

‖ 7 Metcalf, 596.

¶ 1 Parsons' Maritime Law, 181; citing the cases.

II. But if the court should hold that the libellant is entitled to recover, then the damages allowed are excessive. No special damage is averred or proved; no unnecessary violence was used in removing him from the ship; nor did he receive bodily harm. He does not show a pecuniary injury of a dollar resulting from the act.

Mr. Ashton, *contra:*

I. "A common carrier for passengers," says Professor Parsons, citing *Bennett* v. *Dutton*,* quoted on the other side, "is bound to receive all passengers who offer, to carry them the whole route, to demand no more than the usual and established compensation, *to treat all his passengers alike*, to behave to all with civility and propriety, to provide suitable carriages and means of transportation."†

The libellant went publicly on board the Stevens, at Acapulco, and was not refused his passage, and having been carried from Acapulco, after coming publicly on board, with the knowledge of Pearson, the captain, and having tendered his fare, was as much entitled to his passage as any other person, and his rights were as grossly violated as would have been those of any other, the most respectable and most respected passengers on board, if the captain had taken a freak against them and tendered them back their fare, and then forcibly put them on board the Sonora.

In *Coppin* v. *Braithwaite*,‡ a leading case in England, the plaintiff was reported to be a pickpocket and associate of what was called the "swell mob," and as such, being found on board the vessel, though by consent of the officers, it was determined by the master that he was unfit to be a passenger. He was accordingly disembarked against his will at an intermediate point; the act of expelling him being accompanied with contemptuous and insulting language. At *nisi prius* judgment was for the plaintiff, and a motion in arrest of judgment, on the ground that the declaration was

* 10 New Hampshire, 481.
† Treatise on Contracts, vol. i, p. 698.
‡ 8 Jurist, 875.

bad in that it alleged as breach that the defendant, by his agent, had caused the disembarkation to be conducted in a scandalous and improper manner, &c., whereby the plaintiff suffered injury, &c., was emphatically overruled by the court.

It is not pretended that the libellant did anything on the Stevens that was improper. The only argument is that if he arrived at San Francisco he would have been maltreated. But that was a risk which he had a right to take. The matter all rested in uncertainty. He had a right to be the sole judge of it.

II. The damages are a matter which are in the nature of a finding by a jury, and belonged properly to the case below. As on questions of fact, brought up here on appeal, this court, even where it may strictly have a right to reverse, will be slow to exercise its action, so here, it will consider that this matter belonged rather to the court below than to the appellate tribunal. The question of law, that is to say, the question whether, under the circumstances, Pearson had a right to expel Duane, is the only proper question for this tribunal.

Independently, however, of this, the damages cannot be regarded as grossly excessive. The expulsion of Duane was a great and mortifying indignity to him. It was an injury, too. He had been banished from San Francisco on the shortest notice. He was without funds, of course; and was unable to return to his former home for years; suffering the greatest hardships in the mean time over the whole continent.

The act of expulsion by Pearson was, in addition, a great breach of public rights; rights, at least, which every man is interested to maintain. The master of a ship has powers practically despotic. It is of great importance that every such person be taught that his powers must be exercised in subjection to law.

Mr. Justice DAVIS delivered the opinion of the court.

This case is interesting, because of certain novel views which this court is asked to sustain.

Two questions arise in it: 1st, was the conduct of Pearson justifiable? 2d, if not, what should be the proper measure of damages? It is contended, as the life of Duane was in imminent peril, in case of his return to San Francisco, that Pearson was justified, in order to save it, in excluding him from his boat, notwithstanding Duane was willing to take his chances of being hanged by the Vigilance Committee.

Such a motive is certainly commendable for its humanity, and goes very far to excuse the transaction, but does not justify it. Common carriers of passengers, like the steamship Stevens, are obliged to carry all persons who apply for passage, if the accommodations are sufficient, unless there is a proper excuse for refusal.*

If there are reasonable objections to a proposed passenger, the carrier is not required to take him. In this case, Duane could have been well refused a passage when he first came on board the boat, if the circumstances of his banishment would, in the opinion of the master, have tended to promote further difficulty, should he be returned to a city where lawless violence was supreme.

But this refusal should have preceded the sailing of the ship. After the ship had got to sea, it was too late to take exceptions to the character of a passenger, or to his peculiar position, provided he violated no inflexible rule of the boat in getting on board. This was not done, and the defence that Duane was a "stowaway," and therefore subject to expulsion at any time, is a mere pretence, for the evidence is clear that he made no attempt to secrete himself until advised of his intended transfer to the Sonora. Although a railroad or steamboat company can properly refuse to transport a drunken or insane man, or one whose character is bad, they cannot expel him, after having admitted him as a passenger, and received his fare, unless he misbehaves during the journey.† Duane conducted himself properly on the

* Jencks *v.* Coleman, 2 Sumner, 221; Bennett *v.* Dutton, 10 New Hampshire, 486.

† Coppin *v.* Braithwaite, 8 Jurist, 875; Prendergast *v.* Compton, 8 Carrington and Payne, 462.

boat until his expulsion was determined, and when his fare was *tendered* to the purser, he was entitled to the same rights as other passengers. The refusal to carry him was contrary to law, although the reason for it was a humane one. The apprehended danger mitigates the act, but affords no legal justification for it.

But, the sum of four thousand dollars awarded as damages, in this case, is excessive, bearing no proportion to the injury received. Duane is entitled to compensation for the injury done him by being put on board the Sonora, so far as that injury arose from the act of Pearson in putting him there. But the outrages which he suffered at the hands of the Vigilance Committee, his forcible abduction from California and transportation to Acapulco, the difficulties experienced in getting to New York, and his inability to procure a passage from either Acapulco or Panama to San Francisco, cannot be compensated in this action. The obstructions he met with in returning to California were wholly due to the circumstances surrounding him, and were not caused by Pearson. Every one, doubtless, to whom he applied for passage, knew the power of the Vigilance Committee, and were afraid to encounter it, by returning an exile, against whom the sentence of death had been pronounced.

Pearson had no malice or ill-will towards Duane; and, as the evidence clearly shows, excluded him from his boat, in the fear that, if returned to San Francisco, he would be put to death. It was sheer madness for Duane to seek to go back there. Common prudence required that he should wait until the violence of the storm blew over, and law and order were restored.

This course he finally pursued, and he did not return to California until February, 1860. If he believed, when expelled from the Stevens, that Pearson had done him a great wrong, he certainly did not when he filed the libel in this case, for the 12th article is as follows:

"That when libellant was so banished from the State of California, as aforesaid, by the said Vigilance Committee, he was threatened with the penalty of death should he ever

return to said State; that libellant was aware that said committee had caused to be executed a number of persons, without color or warrant of law or right, and that the said committee had the power and ability to put in execution their threats, and libellant believed and had reason to believe from the conduct of said R. H. Pearson as aforesaid, and the treatment he received from the hands of said Vigilance Committee, and their threats as aforesaid, which were well known to said Pearson, that should he return to said State, his return, if attempted or if successful, would be impeded and resisted, and his life put in peril and jeopardy, which belief existed up to the time of his departure from New York to California."

This is the sworn statement of Duane, that his life was in peril if he returned to California at an earlier day, for the conduct of Pearson, to which he refers, was predicated on a corresponding belief.

It is true, this article in the libel was introduced, by way of excuse, for not having sooner brought the suit, but the admissions in it are proper evidence for all purposes. If so, it is clear that the legal injury which Duane suffered at the hands of Pearson, can be compensated by a small amount of money. On a review of the whole case, we are of opinion that the damages should be reduced to fifty dollars.

It is ordered that this cause be remitted to the Circuit Court for the District of California, with directions to enter a decree in favor of the appellee for fifty dollars. It is further ordered that each party pay his own costs in this court.

ORDER ACCORDINGLY.

WARE v. UNITED STATES.

1. Where—on a suit by the United States against a deputy postmaster for damages in not paying over moneys which came to his hands during the six months next preceding the discontinuance (March 13th, 1862) of the office to which he was appointed—the defendant's rejoinder (demurred to), by its whole context, and by its introductory allegations