

8FED.CAS.—43

Case No. 4,464.

THE E. M. MCCHESENEY.

{15 Blatchf. 183.}¹

Circuit Court, S. D. New York.

Aug. 23, 1878.²

ADMIRALTY JURISDICTION—CONTRACT OF AFFREIGHTMENT—PARTIAL PERFORMANCE ON ERIE CANAL—PRIORITY OF LIENS.

1. A cargo of oats was shipped on a canal boat lying in Buffalo creek, a navigable stream flowing into Lake Erie, to be carried to New York by way of the Erie canal and the Hudson river. The master of the boat signed a bill of lading for the cargo. While passing through the Erie canal, a part of the oats was feloniously abstracted from the cargo, with the knowledge and assent of the master. On the arrival of the boat in New York, she was libelled by the consignee, to recover the value of the oats not delivered. A mortgagee of the boat intervened, his mortgage being due, and defendant the action, raising an objection to the jurisdiction, claiming a lien superior to that of the libellant, and claiming that the boat was not liable for the felonious action of the master. *Held*, that the admiralty had jurisdiction of an action to enforce such contract, although part of the service was to be performed on the Erie canal.
2. The admiralty had jurisdiction to enforce such contract against the boat, although she was built to navigate the canal and had no means of locomotion in herself.

[Cited in *The Ella B.*, 24 Fed. 508.]

3. The lien of the claimant, under his mortgage, was subordinate to that of the libellant.
4. The boat was liable for the taking of the oats.

This was an appeal by the claimant from a decree of the district court [of the United States for the Southern District of New York, Case No. 4,463,] in favor of the libellants, in a suit in rem, in admiralty. This court found the following facts: “The canal boat E. M. McChesney was engaged in transporting freight between Buffalo and New York, by the way of Buffalo creek, the Erie canal and the Hudson river. The distance between Buffalo and New York is about 508 miles, and the entire route traversed by the boat on her voyages is within the territorial limits of the state of New York. Buffalo creek and the Hudson river are navigable streams, the one emptying into Lake Erie, and the other into the Atlantic ocean, and the commerce upon them is very large. The Erie canal is an artificial water way, not within the ebb and flow of the tide, of about

363 miles in length, and extending from Lake Erie, at Buffalo, to the Hudson river, at Albany. On the 10th of November, 1873, while the boat was lying in Buffalo creek, she received on board, from the libellants, 15,000 bushels of oats, to be transported to New York, and there delivered to the order of George Ellison, care of O. E. Kent & Co. After the cargo was on board, and while the boat was still in Buffalo creek, a bill of lading was made out, which contained, among others, the following clause: 'All damage caused by the boat or carrier, or deficiency in the cargo from quantity, as herein specified, to be paid for by the carrier, and deducted from the freight; and any excess in the cargo to be paid for to the carrier by the consignee.' The boat proceeded upon her voyage by the usual route, passing through Buffalo creek into the canal, but, before getting out of the canal, was frozen in and detained until the spring of 1874. Upon the opening of navigation, she passed on and arrived in New York May 18th. While frozen in the canal, and within the county of Oneida, the captain of the boat took out a part of the cargo and unlawfully converted it to his own use. After the arrival of the boat in New York, all of her cargo, except 1,559.28 bushels, was delivered to the consignees, in accordance with the terms of the bill of lading. This part of the cargo has never been delivered, although demanded. The damages for the non-delivery are \$827 68. The claimant is the holder and owner of a mortgage upon the boat, executed May 6th, 1873, to secure the payment of \$2,467 50, balance of the purchase money of the boat, which has not been paid. This mortgage was a valid and subsisting lien on the boat, her tackle, &c., when the cargo was taken on board and the bill of lading made out, and when the undelivered portion of the cargo was converted by the captain. By the terms of the mortgage, it was understood and agreed that the boat might be navigated within the waters and harbors of the state of New York, and both the claimant and his assignors consented to her use and employment in general freighting business in such waters. The captain, owners and mortgagee of the boat were, at the time, residents of the state of New York, as were also the libellants."

William W. Goodrich, for libellants.

Franklin A. Wilcox, for claimant.

WAITE, Circuit Justice. The decree of the district court was right. The action was brought to recover for the breach of a contract of affreightment, and not for a marine tort. The well-considered opinion of the district judge, in which I fully concur, makes it unnecessary for me to attempt to add to what he has so well said.

¹ [Reported by Hon. Samuel Blatchford, Circuit Judge, and here reprinted by permission.]

² [Affirming Case No. 4,463.]