

swing out of the way of the Townsend and Kelley,—in all of which respects the Sunrise was at fault and negligent; that the Townsend, in coming down the river, occupied the usual channel or roadstead at the point where the Sunrise was anchored and located; that it had proper lights and a proper watch at the proper places; that the lights of the Sunrise, being so dim at the time, were not seen by the Townsend far enough away to have avoided the collision, although proper diligence was used for that purpose; that when the lights were seen, being close upon the Sunrise, the master of the Townsend used proper seamanship in trying to avoid the collision; and that, therefore, the Townsend was not guilty of negligence or carelessness in causing the injury; that the Kelley, being the tow, was guilty of no negligence, and therefore not liable for the injury to the Sunrise.

The claim of the Kelley in the cross-libel not being pressed by counsel, the cross-libel is dismissed. Decree dismissing libel at libelant's costs. Appeal allowed.

THE ARCTURUS.

(*District Court, N. D. Ohio, E. D. April Term, 1883.*)

LIBEL FOR WAGES OF MASTER.

The master of a vessel has no lien on the cargo of the vessel for his wages beyond the amount of the freight thereof, and where, for any reason, he does not unload the cargo, he is only entitled to a lien upon such of the freight as the vessel has actually earned, that being the freight less what it costs to unload.

In Admiralty.

Mix, Noble & White, for libelant.

Goulder & Weh, for the Arcturus.

WELKER, J. The libelant was the master of the Arcturus, and had wages due him as such master from the owners of the vessel about the month of November, 1882. At that time he had on board the vessel a quantity of telegraph poles, owned by A. A. Colby, which had been carried on board the Arcturus, and were to be delivered at the port of Sandusky, upon which the said Colby was to pay freight in the usual way. Before the telegraph poles were unloaded at Sandusky the vessel was seized by the United States marshal under a libel filed by W. H. Wolf *et al.* against the Arcturus, so that the master could not, and did not, unload the poles at Sandusky, and Colby, the owner, was compelled to pay \$70 to procure the poles to be unloaded, and before he was allowed to do so he paid the whole freight money into the registry of the court which would have been earned by the Arcturus if the contract of affreightment had been ful-

filled by the delivery of the poles. The libellant, Jones, the master, claims the whole freight should be applied on his unpaid wages, and also a lien on the poles, the cargo, for the amount due him for services as master.

The court finds that the libellant had no lien on the cargo for the wages beyond the amount of the freight thereof; that in this proceeding he is only entitled to the freight actually earned by the vessel, that being the freight less what it costs to unload it at Sandusky; that the libellant is entitled to a decree for that part of the freight so actually earned, to be applied on his wages as such master; that Colby is entitled to repayment out of the registry of the amount he paid for the unloading of the cargo, being the sum of \$70.

Decree accordingly.

See *The De Smet*, 10 FED. REP. 483, and note, 496.

THE MONTAUK.

(*District Court, N. D. Ohio, E. D. April Term, 1883.*)

PERSONAL INJURIES TO SEAMAN.

A seaman cannot recover for injuries resulting from his own carelessness in executing a proper order of the master.

In Admiralty. Libel for damages for personal injury.

Willey, Sherman & Hoyt, for libellant.

Goulder & Weh, for respondent.

WELKER, J. The libellant was the wheelsman on the Montauk, and while in the Sault Ste. Marie river the schooner, on the fourth of August, 1881, in tow of a tug, ran aground, and the libellant, then at the wheel executing an order of the master, was injured by the wheel spinning around and striking him. The libellant claims that the master gave him an improper order, and that, while executing it, he was injured without his fault. This is denied, and it is alleged the libellant was injured through his own carelessness. The court finds that the order given the wheelsman, from the weight of the evidence, was a proper one; that the libellant, in executing the order, was himself guilty of carelessness, which produced the injury, and therefore not entitled to recover. The libel is dismissed, with costs, and the appeal allowed.

MILLER v. CHICAGO, B. & Q. R. Co.

(Circuit Court, D. Iowa. October, 1881.)

REMOVAL OF CAUSE—LOCAL PREJUDICE ACT—CITIZENSHIP.

Under subdivision 3 of section 639 of the Revised Statutes it is not necessary, in order to the removal of a cause, that it should appear from the record that the parties were citizens of different states at the time the suit was commenced.

Motion to Set Aside Order Remanding Cause.

MCCRAY, J. This suit was removed to this court from the state court under what is known as the "local prejudice act" of 1867, now embodied in the third subdivision of section 639 of the Revised Statutes of the United States. At the last term there was an order remanding the case to the state court. After said order was entered, the counsel for the defendant moved that it be set aside, and thereupon the court suspended its execution until that motion could be heard before the full bench. The question is whether, under the said third subdivision of section 639 of the Revised Statutes, it is necessary, in order to the removal of a cause, that it should appear from the record that the parties were citizens of different states at the time the suit was commenced. It was held in the case of *Ins. Co. v. Pechner*, 95 U. S. 183, that, under the twelfth section of the judiciary act of 1789, this was necessary. In the case of *Kaeiser v. Railroad Co.*, recently decided in this court, and reported in 6 FED. REP. 1, it was held that the same rule prevails under the act of March 3, 1875. In *Johnson v. Monell*, 1 Woolw. 390, it was held by Mr. Justice MILLER, while holding the circuit court, that under the local prejudice act, now embodied in the third subdivision of section 639, it was sufficient to show the citizenship of the parties at the time of the filing of the petition for removal. If, therefore, the last-named decision is not to be regarded as overruled by the two more recent decisions above cited, in both of which Mr. Justice MILLER concurred, the present motion must be sustained, and this court must retain jurisdiction of the case.

In view of these facts, and considering the importance of the question of practice involved, I have thought proper, with the concurrence of Judge LOVE, to submit the question to Mr. Justice MILLER for his opinion and advice, which he has very kindly furnished to us, as follows:

"I think it may be taken for granted now that the act of March 3, 1875, did not repeal the third clause of section 639 of the Revised Statutes. That clause, in describing the class of cases in which it authorizes a removal from a state to a federal court, begins by saying: 'When a suit is between a citizen of the state in which it is brought and a citizen of another state,' etc., it may be removed on account of prejudice or local influence. If the language here used is to be construed literally, undoubtedly such a suit is pending when