The Blenheim.

Ball *v.* Winslow. (Two Cases.)

(*Circuit Court, D. Massachusetts.* August 20, 1883.)

1. Collision—Evidence—Fault.
   The evidence in this case, upon examination, appears to sustain the judgment of the district court, and it is accordingly affirmed.
   The Blenheim, 14 Fed. Rep. 797, affirmed.
2. Same—Valuation of Vessel—Tort—Time and Place.
   The maxim that damages for a tort are to be assessed as of the time and place at which the tort is committed, must be taken with a good deal of allowance, so far as the place is concerned. If a foreign ship is destroyed in American waters, and if in such a place her market value is low by reason of our navigation laws, the measure of damages for her loss would be her value in the home port.

In Admiralty.

Frank Goodwin, for Ball.

Almon A. Strout, for Winslow.

Lowell, J. The causes of this collision are obscured by the usual conflict of testimony; but, after a careful study of the record, I concur in the conclusions of the district judge in *The Blenheim*, 14 Fed. Rep. 797, that the brigantine is not proved to have contributed to the disaster by a change of course. That her people tried to deaden her way, is proved; but, if that is all, no possible injury can have resulted from their action. I find the preponderance of the evidence to be that whatever they did was done in the last extremity, and was not the cause, in whole or in part, of the collision.

The objection taken to the assessor's report, ably argued as a point of law, is rather one of fact. The valuation of $12,000 for the ship was adopted from the evidence of two persons who were well acquainted with her, one of whom had an interest in the result, and the other not. The experts called on behalf of the claimants, who estimated the ship at about $1,500 less, candidly admitted that they should prefer the opinion of persons who had actual knowledge.

The point that the market value at Demarara should be the measure of damages, because the collision happened within a few miles of a port in that country, is not in the case, because there is no evidence from either side of such value. I will say, however, that the maxim that damages for a tort are to be assessed as of the time and place at which the tort is committed, must be taken with a good deal of allowance, so far as the place is concerned. If a foreign ship is destroyed in American waters, and if in such a place her market value is low by reason of our navigation laws, the measure of damages for her loss would be her value in the home market. However, that point is merely a moot one in this case. The witnesses on both sides have adopted the home market in making their estimates, and the assessor has decided fairly and justly upon the weight of the evidence. Decrees affirmed.

FILER and others *v.* LEVY.[1]

(*Circuit Court, W. D. Louisiana.* 1883.)

1. JURISDICTION—CITIZENSHIP—MOTION TO REMAND.
   The question, whether or not this cause is a suit in which there exists a controversy between citizens of different states, is not an issue which can be raised and judicially determined on the trial of a motion to remand the case to the state court.
2. SAME—PLEA—EQUITY RULE 31.
   When the pleadings show jurisdiction, as in the instant case, the question of citizenship can only be brought to the attention of the court by a plea duly filed and sworn to according to rule 31, Rules of Practice in Equity. *Hoyt* v. *Wright*, 4 FED. REP. 168; 12 Blatchf. 320; 6 Blatchf. 130.
3. SAME—SUIT BY EXECUTOR, LEGATEE, AND PARTNER.
   A suit originally instituted in the state court by an executor, legatee, who also sues as the agent of other legatees, non-residents, claiming a sum of money from a liquidating partner as due to the succession of his deceased partner, is not an action merely incidental to the settlement of the succession of the deceased partner; is not an action which is supplemental to nor auxiliary of any pending proceeding in such succession, nor in any sense an ancillary suit; but is a separate, distinct, and independent suit, purely within the provisions of the federal judiciary act of 1875, and is properly removed to this court on the application of either party litigant.
4. SAME—SUBJECT-MATTER OF SUIT—ACT OF 1875.
   The judiciary act of 1875 does not declare what particular subject-matter shall or shall not enter into the controversy sought to be removed; hence it is not within the province of the state or federal courts to say that a suit in equity, where there is a controversy between parties of different citizenship, cannot be removed because of its peculiar subject-matter.
5. SAME—BONDING IN PROBATE COURT.
   The fact that the liquidating partner gave bond in the probate court of the state, or that he is an officer of such court, might affect this court's jurisdiction *ratione materiæ* to entertain the suit originally, but these facts are of no consequence in considering the motion to remand.
6. SAME—REMOVAL OF PROBATE PROCEEDINGS.
   This court has jurisdiction of *suits* in what are called probate proceedings, when properly removed to it from the state court.
   Suits and *proceedings in rem* defined.

On Motion to Remand.

Alexander & Blanchard, for plaintiff.

Land & Land and *R. I. Looney*, for defendant.

BOARMAN, J. Lazarus Bodenheimer, a member of the commercial partnership of Levy & Bodenheimer, died, leaving a large estate in the partnership. In his will he appointed William Filer and Simon Levy executors, and Simon Levy also qualified, as liquidating partner. Levy having administered the partnership for one year,—the time allowed him for closing up the business,—William Filer, as executor, legatee, and as the agent for other legatees, citizens of New York, sued Levy in the state court. They allege that Levy, having made no final account of his administration of the partnership, has

[1] Reported by Talbot Stillman, Esq., of the Monroe, Louisiana, bar.