THE COL. ADAMS, etc.

(*District Court, S. D. New York.* March 22, 1884.)

1. SALVAGE—VESSEL AND CARGO.
Where a vessel and cargo, owned by different owners, are libeled for the recovery of salvage, and the different owners file separate answers, claims, and bonds, and one of them claims an apportionment of the salvage, and a sum in gross is agreed upon between the parties, it is the duty of the court to apportion the amount awarded upon the interests of the different owners; it would be error to award a gross sum which might be collected wholly out of the property of either.

2. SAME—APPORTIONMENT.
Where in such a cause all the issues are referred to a commissioner to hear and determine, *held*, such apportionment is a part of the issues referred; and the commissioner's report having been filed without apportionment, it was sent back on exceptions that such apportionment might be made upon the evidence of the respective values of the vessel and cargo.

3. SAME—AVERAGE BOND.
If, as alleged, an average bond has been entered into between the parties, affecting the distribution of the salvage, the apportionment made in this action will be without prejudice to the covenants and obligations of the bond.

In Amiralty.

Jas. K. Hill, Wing & Shoudy, for libelant.

Butler, Stillman & Hubbard and *Wm. Mynderse*, for cargo.

Owen & Gray, for The Col. Adams.

BROWN, J. The libel in this case was filed to recover salvage against the vessel, freight, and cargo, all of which were attached. The vessel and cargo were owned by separate owners, who appeared separately, filed separate claims, and gave separate bonds for their respective interests. The claimants of the cargo, in their answer, demanded that, in the event of the libelant's recovery, the amount of recovery should be apportioned upon the cargo, vessel, and freight. By consent, the action was referred to a commissioner "to hear and determine the whole issue, subject to exceptions upon his report." At the close of the libelant's proofs, the claimants of the cargo and the claimants of the vessel and freight united in an offer of $8,000, which the libelants accepted, and which the commissioner reports as the whole salvage allowed. The claimants of the cargo demanded of the commissioner that he should apportion the amount properly chargeable against the cargo; and to that end they gave evidence of the values of the vessel, freight, and cargo. The claimants of the vessel objected to such apportionment, and the commissioner ruled it not within the issue referred to him. The former, therefore, gave no evidence of the relative values of vessel and cargo, and the report contains no apportionment of the amount of salvage to be paid by either.

Upon the hearing of the exceptions, the claimant of the cargo states that an average bond has been entered into between the owners of the vessel and cargo, and that the apportionment should, therefore, be left to be adjusted under that bond. The bond, however, was not

put in evidence, and the claimant of the cargo insists that the report is defective for want of apportionment. In a suit for salvage, where there are separate owners of the vessel and cargo libeled, who appear separately to defend their separate interests, the action is essentially for a several and separate demand against the property of each owner. It would be error, therefore, in the court to treat these separate interests as joint and consolidated, despite the separate answers and claims demanding the recognition of the separate rights of each, or to render a decree for the whole salvage in such a form as to make it collectible wholly from either. Under such several claims and pleadings the court is bound to make the apportionment upon the respective separate interests. This was long since clearly announced by the supreme court in the case of *Stratton* v. *Jarvis*, 8 Pet. 4, where STORY, J., says, (p. 11:)

"It is true that the salvage service was, in one sense, entire; but it certainly cannot be deemed entire for the purpose of founding a right against all the claimants jointly, so as to make them all jointly responsible for the whole salvage. On the contrary, each claimant is responsible only for the salvage properly due and chargeable on the gross proceeds or sales of his own property, *pro rata*. It would otherwise follow that the property of one claimant might be made chargeable with the payment of the whole salvage, which would be against the clearest principles of law on this subject."

The same question has a direct relation to the right of appeal of the claimants to the supreme court, as dependent upon the amount involved, since this right is to be determined according to the amount chargeable against each severally. *Stratton* v. *Jarvis*, *supra*; *The Connemara*, 103 U. S. 754; *Ex parte Baltimore & O. R. Co.* 106 U. S. 5; S. C. 1 Sup. Ct. Rep. 35, and cases there cited. An apportionment in some form has been the ordinary practice in such cases, and is clearly a substantial right, which it would be error to disregard. *The Minnie Miller*, 6 Ben. 117; *The Cyclone*, 16 FED. REP. 486, 489. The apportionment of the salvage was, therefore, a material part of the issue referred to the commissioner; and as under his ruling the owner of the vessel gave no evidence of value, the case must be sent back that an apportionment may be made upon such proofs as the parties may offer. If an average bond has been entered into between the parties, any apportionment ordered by the court in this action would be without prejudice to the covenants and obligations of such a bond, so far as the subject of salvage is covered by it. An order may be entered in accordance herewith.

THE CURTIS PARK.[1]

(District Court, E. D. New York. February 19, 1884.)

COLLISION ON ERIE CANAL—RULE OF THE ROAD—BURDEN OF PROOF.

A loaded boat, the B., bound east on the Erie canal, towed by a cable-boat, met a light boat, the C. P., while turning a bend where the cable-boat must keep close to the inside of the turn, which was the tow-path side. The C. P. passed the cable-boat on the outside, and then, in accordance with the rule of the canal, attempted to regain the tow-path side by passing between the cable-boat and the B., over the tow-line of the cable-boat, and in so doing was struck by the B. In an action against the C. P. for the damage done the B., *held*, that the C. P., having taken a course in accordance with the rule of the canal, and the B. having done otherwise, the burden was on the B. to excuse her omission to conform to the rule; and that, as the B. failed to do so upon the evidence, her libel must be dismissed.

In Admiralty.

J. M. Mulchahey, for libelant.

E. G. Davis, for claimant.

BENEDICT, J. This is an action to recover for damages done to the canal-boat E. M. Blazier in a collision with the canal-boat Curtis Park, on the Erie canal, at Middleport bend. The Blazier was a loaded boat, bound east, and being towed by a cable-boat, No. 8. The Curtis Park was a light boat, bound west. The Curtis Park met the cable-boat and her tow just as the cable-boat was turning the bend, and when, owing to the position of the cable, the cable-boat must necessarily keep close to the inside side of the turn, which was there the tow-path side of the canal. Accordingly, the Curtis Park passed the cable-boat on the outside, or heel-path side. It was then her right, according to the rule of the canal, to regain the tow-path side by passing between the cable-boat and the Blazier, thus going over the tow-line of the cable-boat, the same being slackened for that purpose. This course was taken by the Curtis Park; but before she reached the tow-path she was struck by the Blazier. The collision would not have occured had not the Blazier, instead of keeping towards the berme bank, hauled in towards the tow-path. Her excuse for doing this is that she supposed the Curtis Park would go outside of her, as she had gone outside of the cable-boat. The Curtis Park having taken a course in accordance with the rule of the canal, and the Blazier having done otherwise, the burden is upon the libelant to excuse her omission to conform to the rule.

The assertion in behalf of the Blazier is that the Curtis Park at first hauled to the berme bank, with the intention of passing on the outside, thereby leading the Blazier to haul towards the tow-path side, and afterwards abandoned this intention by direction of the master of the Curtis Park, who came on deck as the boats were passing and directed his steersman to take the tow-path when it was too late to do

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.