

It is, doubtless, essential to the interests of the shipper that the carrier's contract shall be strictly construed in regard to the transshipment of goods, according to the provisions of the bill of lading. The shipper has a right to rely upon these provisions, in effecting insurance upon his goods; and any change of vessel contrary to the provisions of the bill of lading will, ordinarily, invalidate policies of insurance effected under it. But these considerations are not applicable to bills of lading in which the substitution of other vessels is clearly provided for, and still less in circumstances where the known usages of trade also demand a transfer to some other vessel, for the purpose of expediting the delivery of the goods. In such cases, the shipper has full notice of the liability to a change of vessel; he contracts in reference to it, and he must therefore protect his insurable interests accordingly. *Red Wing Mills v. Mercantile Ins. Co.* 19 FED. REP. 115; *Crosswell v. Mercantile Mut. Ins. Co.* 19 FED. REP. 24.

The libel should therefore be dismissed, with costs.

SNYDER v. A FLOATING DRY-DOCK, etc.

(District Court, D. New Jersey. December 19, 1884.)

ADMIRALTY JURISDICTION—ACTION TO RECOVER POSSESSION OF DRY-DOCK.

A suit to recover the possession and delivery of a floating dry-dock with a floating pump, which is not a vessel, or constructed or used in navigation or commerce, cannot be maintained in admiralty.

In Admiralty. Libel *in rem*.

J. A. Hyland, for libelant.

Anson B. Stewart, for respondent.

NIXON, J. This suit is *in rem*, and is in the nature of a possessory action to recover the possession and delivery to the libelant of a floating dry-dock and floating pump, alleged in the libel to be her property. Her right of ownership is not denied in the answer, but the respondent, Thomas W. Mabb, claims that he has a lien upon the structure for wharfage, and has the right to retain the possession until his demand is paid. The answer also raises the question of jurisdiction, and denies the right of the libelant to maintain such a suit in the admiralty. It must be conceded that the thing libeled is not a vessel constructed or used for the business of navigation or commerce. It is called a dry-dock, and is a structure capable of being elevated or depressed in the water by pumping out or pumping in water, and is used by being sunk under vessels, and then pumped out whereby the inclosed vessel is raised to a position where it can be inspected and repaired, thus saving the necessity of running the vessel on land by a marine railway, as is usually done for such purposes.

The proctor for the libellant mainly relied upon the case of *The Steam-tug M. R. Brazis*, 10 Ben. 437, in support of the jurisdiction. It was there held that the test of jurisdiction in respect to torts is whether the place of the alleged injury is upon the water. Numerous cases affirm that proposition, but it is not applicable to the present case. If this were an action *in rem* against the dry-dock, alleging damage from a maritime tort, as, for instance, from a collision, the suit would be maintainable, for the reason that the tort was upon the water and the dry-dock was the offender, but a petitory suit, *i. e.*, one involving mere title to property, and a possessory suit,—one which seeks to restore to the owner the possession of which he has been unjustly deprived,—are quite different matters. For a long time the admiralty courts declined jurisdiction over the former, and in England, since the Restoration, it was never exercised until the statute of 3 & 4 Vict. c. 65, § 4, restored to the admiralty the jurisdiction which it had lost through the jealousy of the common-law courts. Judge STORY, in the well-considered case of *The Tilton*, 5 Mason, 465, refused to follow the English courts in what Lord STOWELL called their habitual “abstemiousness” from exercising their undoubted powers, and in this he was afterwards sustained by the supreme court in *Ward v. Peck*, 18 How. 267. But a careful examination of these cases will show that actions of this sort are not appropriate where questions are in controversy which respect only the ownership or possession of vessels engaged in commerce or navigation. I am not aware of any respectable authority which holds that they will lie against hulks or structures that are not thus engaged. The cases of *Tome v. Four Cribs of Lumber*, Taney, C. C. 533, and *The Hendrick Hudson*, 3 Ben. 419, sustain this view. In the former Chief Justice TANEY says:

The result of this opinion is that rafts anchored in the stream, although it be a public navigable river, are not the subject-matter for admiralty jurisdiction in cases where the right of property or possession is alone concerned. They are not vehicles intended for the navigation of the sea, nor are they recognized as instruments of commerce or navigation by any act of congress.

The latter was a libel *in rem* against a floating steam-boat which had been dismantled and stripped of her boiler, engine, and paddle-wheels, and fitted up as a saloon and hotel. It was capable of being towed from place to place on the river. Whilst being thus towed she sank, and the libellants were applied to for the use of their propeller for pumping out the hulk to give it more floating power. The service was rendered, and the libel was filed to recover as for a salvage service. It was set up in defense that the boat was without motive power, was not used in commerce, and that the court had no jurisdiction to proceed *in rem* against her. The learned Judge BLATCHFORD, waiving the question whether the structure would or would not be liable *in rem* in the admiralty for a tort or injury committed by it on navigable waters, held that the libel must be dis-

missed for the reason that the hulk was not in any proper sense engaged in commerce. "A floating house of religious worship," he says, "or a floating swimming bath, or a floating residence, could be towed, and, in such a sense, navigated;" but such a structure would not be engaged in navigation in such a sense as to be liable *in rem* in the admiralty for a service like the present one. The fact that the structure has the shape of a vessel, or had been once used as a vessel, or could, by proper appliances, be again used as such, cannot affect the question. The test is the actual *status* of the structure as being fairly engaged in commerce or navigation.

The libel must be dismissed for want of jurisdiction, and hence no order respecting costs can be made.

THE ROSLYN, etc.

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

COLLISION—TUG AND FERRY-BOAT—SIGNALS.

A ferry-boat, in approaching her slip on the New York shore of the Hudson river, observed a steam-tug lying nearly at rest in her way, and whistled to her, but no answer was given, and she continued on her course, but did not check her speed in time to prevent a collision. The steam-tug had been temporarily disabled by the breaking of her rudder chain, but had nearly repaired it. Had the tug observed the ferry-boat coming she might have moved forward somewhat out of her way and avoided the collision. *Held*, that both were in fault; the tug, for neither answering the ferry-boat's signals, nor giving any signals of danger, and for not keeping a lookout and not moving somewhat, as she might have done; the ferry-boat, for unnecessarily running upon the tug, there being plenty of room to avoid her.

In Admiralty.

E. D. McCarthy, for libellant.

Alexander & Green, for claimants.

Brown, J. On the sixteenth of March, 1883, as the ferry-boat Roslyn, from Hoboken to Forty-second street, was near to her slip, she collided along her port side with the stern of the steam-tug E. A. Packer. The latter, a short time previous, had backed out of the slip at Forty-sixth street, and, when a few hundred feet beyond the pier, had broken her rudder chain; whereupon, her engines were stopped, and she drifted slowly down stream with the slack ebb-tide. Some 15 or 20 minutes were occupied in repairing her rudder chain, during which time the tug was, in the main, unmanageable. The repairs had not been quite completed when the ferry-boat came along, and collided with her, as above stated. The ferry-boat, shortly after leaving her dock on the opposite side of the river, had observed the tug near the line of her course, and at different times gave whistles and signals, none of which were answered by the tug; nor were any

signals given by the tug, nor any attention paid to the coming of the ferry-boat. The collision was between Forty-second and Forty-third streets, a short distance only beyond the end of the piers. As the Roslyn approached the tug, her engine was first slowed. When very near, she stopped and backed, but not in season to avoid the collision. There is no sufficient excuse for the ferry-boat in not having checked her speed in time, for she could have come to a full stop in going some 200 or 300 feet. Her pilot saw long before that the tug was drifting; and the fact that none of his signals were answered ought to have led him to the inference that something was the matter with the tug. There was plenty of room for him to have kept out of the way, and there was no obstruction. No steamer, whether ferry-boat or otherwise, has any right to imperil the property or the lives of others by running upon other water-craft unnecessarily, whether the latter are in fault or not. *The Warren*, 18 FED. REP. 559. They must avoid collisions, at all events, so far as they have means in their power to avoid them, either by a change of their own course or by stopping in time; and there was no difficulty in the ferry-boat's doing either in this case. She must, therefore, be held in fault.

I cannot, however, acquit the tug. She was in the usual track of the ferry-boat, and near the slip. The testimony is to the effect that it was not unusual for boats to be in the way of ferry-boats, and upon signals given to move out of the track of the ferry-boat to permit entrance to the slip. Some of the whistles given by the ferry-boat were heard upon the tug. The tug was not completely at rest. Though drifting, she had had some motion of her own from the previous backing, though this was probably mostly lost at the time of the collision. But she was not moored or at anchor. The inspector's rules required some answer to the signals given her. The proper signals in reply were signals of danger, to indicate her disabled and comparatively helpless condition. Had these been given, it would have served as a direct warning to the ferry-boat, and I doubt not would have led to the avoidance of the collision. Where the situation is one which involves some doubt, such as arises from tugs that are in the track of ferry-boats, but may reasonably be supposed to be designing to move out of the way on signals, it must be held a neglect of reasonable precaution, as well as a violation of the rule, not to answer signals received, and not to give any warning of difficulty by means of danger signals. The Packer, moreover, was not wholly helpless or disabled, but only very slightly so. At the last moment a forward turn or two was given to her engines. Had this been done earlier, which might have been done on very brief notice, the collision would have been avoided. For these reasons the Packer must also be held chargeable with fault, and her recovery limited to one-half the damages. *The James M. Thompson*, 12 FED. REP. 189.

FLASH and others v. WILKERSON and others.

(Circuit Court, W. D. Tennessee. January 12, 1885.)

1. EQUITY PRACTICE — CREDITORS' BILL — PRIORITY—TENNESSEE CODE, §§ 4288, 4290.

A plaintiff filing a bill in behalf of himself and other creditors, to set aside a fraudulent conveyance, under sections 4288 and 4290 of the Tennessee Code, is entitled to priority of satisfaction, unless the other creditors become parties to the suit before the final decree, by giving the bond required; and they will not be admitted, as under the general equity practice of the federal courts, to share in the fund at any time before the final distribution.

2. SAME — STATE AND FEDERAL PRACTICE — REMOVAL OF CAUSES — ENLARGED REMEDY.

Where a cause begun in the state court to enforce an enlarged equitable remedy in favor of general creditors having no judgments and *nulla bona* returns is removed to the federal court, a statutory rule of state practice, which operates as a condition attached to the right given by the statute, will be enforced after the removal, in order to preserve the liens of the creditors as they are fixed by the statute.

3. INSOLVENT DEBTOR—GENERAL ASSIGNMENT—TENNESSEE ACT, 1881, CH. 121—ATTACHMENT LIEN—PREFERENCES.

A statute, enumerating certain conveyances and judgments, which are to be avoided by a general assignment of an insolvent debtor as preferences, will not be extended to include preferences not of the character of those enumerated. Therefore, the Tennessee Act of April 6, 1881, c. 121, does not affect the lien of a bill, the attachment or judgment of a creditor proceeding under the Tennessee Code, § 4288, to set aside a fraudulent conveyance, which has been followed by a general assignment by the debtor of all his property for the benefit of all his creditors.

In Equity.

McCorry & Bond, for plaintiffs.

A. J. McGehee, for creditors.

HAMMOND, J. When this case was formerly heard, there was a decree for the plaintiffs setting aside a fraudulent conveyance, and a reference to the master to report the amount of the fund, and the parties entitled thereto, preparatory to its proper distribution. *Flash v. Wilkerson*, 20 FED. REP. 257. The bill was filed by certain creditors "in behalf of themselves and all other creditors of defendant J. R. Wilkerson who might make themselves parties, and bear their proportion of the expenses." It was filed in the state chancery court, where attachments issued, and a receiver was appointed, but was subsequently removed to this court. There were two funds in the hands of the receiver,—the principal one being that realized by the sale of the stock of goods which the debtor had fraudulently conveyed, and which was attached in the hands of the vendee; and the other, that realized from outside assets which had never been fraudulently conveyed, but had passed by a general assignment made a few days after the fraudulent sale to Hopper. The decree rendered at the hearing gave certain specific directions as to the disposition of the principal fund; among others, that it should be "applied to the debts of complainants, and such other creditors of J. R. Wilkerson as may be en-