

Where both vessels are found in fault, as in this case, the rule for apportioning the damages is this: Each vessel is liable for one-half the damage suffered by the other. Where the losses are even, the one offsets the other, but where they are uneven, the half of the difference between the losses is the sum which the one sustaining the lesser loss must pay to the one sustaining the greater. *The Sapphire*, 18 Wall. 56; *The North Star*, 106 U. S. 18, 1 Sup. Ct. Rep. 41.

The difference between the loss sustained by the C. M. and the Oregon is \$57,949.34, and the one-half of this sum, —\$28,974.67,—with interest amounting to \$31,292.64, must be paid by the Oregon to the C. M., to equalize the loss arising from their mutual fault.

Both vessels having been found in fault, they are equally liable to the intervenors for the whole amount due them, —\$8,419.85. Both vessels being before the court, this sum will be divided between them. The one-half of it, —\$4,209.93,—will be added to the decree against the Oregon, and the other will be paid out of the money made on such decree for the C. M.

No claim is made on behalf of the C. M. that she is not liable, if in fault, for the one-half of the damages sustained by the intervenors. The fault of the C. M. in not being provided with a torch-light on the night of the collision was not the fault of a fellow-servant of the intervenors, but that of her owners, or their *alter ego*, the master; and as to the latter, the matter is left between him and his employers. *The Queen*, 40 Fed. Rep. 694.

A decree will be entered against the Oregon for the sum of \$35,502.57, —together with one-half of the costs of the case, to be taxed; and unless the same is paid within 30 days therefrom an execution may issue therefor against the property of the stipulators.

### THE MEDIA.<sup>1</sup>

#### DALY v. THE MEDIA.

(District Court, S. D. New York. January 22, 1891.)

#### COLLISION—SCHOONER AND TOW—NARROW CHANNEL—DRIFT.

A tug with a long tow, going through the Arthur kills, perceived a schooner near the Jersey shore, and consequently shaped her own course towards Staten island. The wind was light, but the schooner was apparently under way. When the tug had arrived near the schooner it was perceived that she was drifting; it was then too late for the tow to avoid the schooner. By dropping her anchor the schooner could have stopped her drift. *Held*, that no fault was shown in the tug; and, whether the collision was caused by fault of the schooner or by inevitable accident, the result was the same, that the libel must be dismissed.

<sup>1</sup>Reported by Edward G. Benedict, Esq., of the New York bar.

In Admiralty. Suit for damage by collision.

*Hayland & Zabriskie*, for libelant.

*Robinson, Bright, Biddle & Ward*, (Mr. *Hough*, of counsel,) for claimant.

BROWN, J. I do not think the weight of proof in this case convicts the tug of any legal fault. The schooner was small, and easily handled. In the narrow passage of the Arthur kills the tug had a right to assume that the schooner would be managed with prudence. When she was first seen towards the Jersey shore the course of the tug and tow were rightly shaped towards the Staten Island shore, as well with reference to the schooner as to the set of the flood tide towards the Elizabeth docks, and the necessity of keeping the tow away from them and the vessels likely to be there. It is impossible to determine from the testimony just how far apart the schooner and the tug were when the former turned towards the Staten Island shore. The schooner was apparently under way, sailing, and therefore presumably making some headway, and under some control. The tug is entitled to the benefit of this presumption in considering the question of fault in her own navigation. When later the schooner was seen to be drifting, and nearly all headway lost, because the wind had died away, I am satisfied it was too late for the tug to have kept her long tow away from the schooner by going to the westward. The tug could doubtless have passed to the westward herself, but the schooner would have drifted upon the tow. The most obvious course for the schooner was to stop drifting with the tide by dropping anchor. If it be that the question of getting under way in so narrow a channel and in so light a breeze, or the question whether, when thus drifting towards a tow, anchor should be cast, is a fair question of judgment in navigation, and that any mistake in either of these respects ought not to be charged as a fault in the schooner, still that would not convict the tug of fault; and the only result would be to make the accident, under such circumstances, deemed inevitable. In either case, the result would be the same by the failure to establish any faulty navigation in the tug, and the libelant would not be entitled to recover. Giving to the libelant the benefit of any doubt that exists on this point, the dismissal of the libel will be without costs.

## BOWERS v. SUPREME COUNCIL AMERICAN LEGION OF HONOR.

*(Circuit Court, N. D. California. January 26, 1891.)*

## REMOVAL OF CAUSES—TIMELY APPLICATION—REMAND.

Where a petition for removal is not filed at the time or before defendant is required by the state practice to plead to the declaration or complaint, as provided in Act Cong. March 3, 1875, (25 St. at Large, p. 435, § 3,) the case must be remanded to the state court, whether motion to that effect be made or not.

At Law.

*Campbell & Campbell*, for complainant.*Wm. C. Flint*, for defendant.

Before SAWYER, Circuit Judge.

SAWYER, J. This action was commenced in the superior court of the city and county of San Francisco, state of California, by filing a complaint verified October 30, 1889, but it does not appear when the complaint was filed. Notice of appearance was served on plaintiff's attorney, dated November 12, 1889, filed November 14, 1889. On the same day, November 12, 1889, a stipulation was entered into by the parties bearing date November 12, 1889, whereby defendant "may have ten days' additional time from this date in which to appear and plead in the above-entitled action." Stipulation filed November 15, 1889. This gave defendant till November 22d in which to plead, and consequently, November 22d was the day upon which defendant was required to answer in the regular course of proceedings under the laws of California, and on that day an answer was due. On January 4, 1890, defendant filed a demurrer, and on the same day, January 4, 1890, a petition was filed to remove the cause to the United States circuit court. The petition was required by the statute to be filed—

"At the time, or any time before, the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff, for the removal of such suit into the circuit court to be held in the district where such suit is pending." 25 St. at Large, p. 435, § 3.

The answer was due on *November 22d*. The petition not having been filed till January 4, 1890, was, therefore, too late, and the cause was not lawfully removed. *Dixon v. Telegraph Co.*, 14 Sawy. 17, 38 Fed. Rep. 377; *Austin v. Gagan*, 14 Sawy. 151, 39 Fed. Rep. 626.

It must be remanded to the state court, whether motion to that effect be made or not, under the requisites of section 5 of the act of 1875, and it is so ordered.

v.45F.no.2—6