

commerce. *Mobile v. Kimball*, 102 U. S. 702. While it is true that her voyages were short, and in the vicinity of Pittsburgh, still that does not affect her character, or the jurisdiction of the court of admiralty over her. *U. S. v. Ferry Co.*, 21 Fed. Rep. 331; *Murray v. The F. B. Nimick*, 2 Fed. Rep. 86. The questions of enrollment, license, and inspection raised by the testimony have no materiality in the determination of the question of jurisdiction or the character of the boat. *The General Cass, supra*. The City of Pittsburgh was a vessel, within the meaning of the term as used in the Pennsylvania statutes and maritime law. The court has jurisdiction to enforce the lien of the libellant under the state laws by this proceeding *in rem*, and the libellant is entitled to a decree for the amount claimed, with interest as claimed, and costs.

THE F. & P. M. NO. 1.

PLATHNER *et al.* v. THE F. & P. M. NO. 1.

(District Court, E. D. Wisconsin. April 13, 1891)

COLLISION—VESSEL AT PIER.

A propeller passing between two other propellers, which were aground, and near a schooner moored to a pier, was caused to sheer and collide with the latter by the current created by the propeller of one of the grounded vessels, which was suddenly started. Although neither the grounded propellers, nor the tugs which were assisting them, were at work as the moving vessel approached, still the appearance of the water indicated that they had just stopped working, and there was every reason to believe that the efforts would be presently renewed. *Held*, that the sudden movement of the grounded vessel should have been anticipated, and the propeller was in fault in passing so near as to be affected by it.

In Admiralty.

M. C. Krause, for libelants.

F. M. Hoytt, for respondent.

JENKINS, J. This cause involves the question of fault in a collision between the schooner Odd-Fellow and the propeller F. & P. M. No. 1. The schooner at about 8 A. M. of the 30th of August, 1889, arrived off the port of Milwaukee with a cargo of tan-bark. Failing to obtain a tug outside, she sailed in between the piers of the government straight-cut harbor, and was made fast to the south pier at a distance of about 250 feet from the west or inner end of the pier, and there awaited a tug to tow her up the river. At that time there were two propellers, the Helena and the Massachusetts, aground in the river, heading south-westerly. They were lying parallel to each other, their sterns being about 200 feet from the north dock of the river, and the nearest boat being about 150 feet distant from the westerly end of the south pier. There were several tugs rendering assistance to these propellers, but work had been suspended some 15 or 20 minutes before the collision. The F. & P. M.

No. 1 left her dock at 8:05 A. M. upon her usual voyage to Ludington; passed through the draws of three bridges without detention; and, when her bow was abreast the knuckle of the north pier, her helm was put hard a-starboard, to swing her around the bend, and she passed the sterns of the grounded propellers at a distance of from 30 to 35 feet therefrom. Her bow swung well over to port; then suddenly sheered to starboard towards the Odd-Fellow. Her engine was at once reversed and backed, but before her headway could be stopped she collided with the schooner, striking her on the starboard bow. As the midships of the No. 1 passed the stern of the Helena, the latter vessel set her propeller in motion, thereby causing the current to strike the stern of the No. 1, and inducing the sheer to starboard, resulting in the collision. I am persuaded by the evidence that the No. 1 was proceeding at a speed of not to exceed four miles an hour. The evidence is, as usual, with respect to a question of speed, conflicting. It, however, satisfactorily appears that she left her dock at 8:05, and she passed the light-house at the outer end of the pier, a fraction over a mile from the point of starting, at 8:30. She was detained by the collision not to exceed 10 minutes. Such facts, in the conflict of opinion, are controlling.

It was the duty of the propeller to keep out of the way of the Odd-Fellow. The presumption of fault is with the propeller. She can only be relieved from responsibility by showing affirmatively that the collision could not have been avoided by adopting practicable precautions. *The Louisiana*, 3 Wall. 164; *The Virginia Ehrman*, 97 U. S. 309. The situation of the grounded propellers was known to the master of the No. 1. The tugs and the propellers were not at work as he approached them. He knew, however, from the appearance of the water that they had but just stopped working. He testifies that it looked as if everything around them was in confusion and commotion. He saw that the efforts had not been successful to relieve the grounded vessels. He had every reason to believe such efforts would be presently renewed. He saw the Odd-Fellow moored to the pier. He knew that, if the propeller of the grounded vessel was started as he passed, it would cause his boat to sheer towards the schooner. He knew, for he so testifies, that in such event he could not bring his vessel, having a headway of four miles an hour, to a stop within 300 feet. He should have anticipated the movement by the grounded propellers, and either by checking his speed, or by keeping further away, by a sufficient margin for safety, have rendered certain his ability to avoid collision. Such action would possibly have proved inconvenient in the navigation of his vessel, in swinging her around the bend; but he had no right to avoid such inconvenience to the injury of another. He had no right to come into probable dangerous proximity. He had no right to take any chance whereby the property of others would be endangered. *The Rockaway*, 25 Fed. Rep. 775. A decree will be entered for the libellants.

BENNETT v. DEVINE.

(Circuit Court, S. D. Iowa, W. D. April 22, 1891.)

1. REMOVAL OF CAUSES—JURISDICTIONAL AMOUNT—COUNTER-CLAIM.

Where the amount claimed in a petition is not sufficient to allow the cause to be removed to a federal court, damages claimed in a counter-claim cannot be added thereto, so as to make out the jurisdictional amount.

2. SAME.

Though the amount of the counter-claim is of itself equal to the jurisdictional amount, defendant, having as to such claim voluntarily invoked the jurisdiction of the state court, cannot claim the right of removal.

Motion to Remand.

P. P. Kelly and F. W. Miller, for plaintiff.

Flickinger Bros. and Shirley Gilliland, for defendant.

SHIRAS, J. The plaintiff, a citizen of Iowa, brought this action in the district court of Mills county, Iowa, to recover damages in the sum of \$1,950 against the defendant, a citizen of the state of Ohio. The defendant, appearing in the action, filed a counter-claim, seeking to recover damages against the plaintiff in the sum of \$3,000, and then filed a petition in this court, asking a removal of the cause on the ground of local prejudice, the petition averring on its face that the amount in controversy was the sum of \$4,950. The order of removal was granted, and, the transcript having been filed, the plaintiff moves for an order remanding the cause. From the transcript it now appears that the averments in the petition for removal, that the amount involved in the controversy was \$4,950, can only be sustained by adding the sums claimed in the original petition and in the counter-claim. When the action was first brought it was based upon a cause of action for \$1,950. This controversy has not been changed, and it still remains a controversy involving only \$1,950, and no more; and hence this court cannot take jurisdiction thereof. Defendant has an independent and distinct cause of action, and the damages therein claimed cannot be added to the amount involved in the cause of action declared on by plaintiff in order to make out the jurisdictional amount. The case cannot, therefore, be properly removed by reason of the controversy presented in the action as it stood when the original petition was filed. So far as the counter-claim is concerned, the party seeking the removal is the plaintiff therein, and the right of removal does not exist in favor of a plaintiff or party who has voluntarily invoked the jurisdiction of the state court. The case is remanded at the costs of the defendant.

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