

coming down the Kills to the eastward, and close in upon the piers. When the Little Nellie had emerged but a short distance from the slip she was struck on her starboard side by the R. H. Williams, and sunk. The question of liability turns upon the question whether the Little Nellie blew a long blast of her whistle as she drew near to the end of the pier, while passing out of the slip. If she did blow such a whistle, and the same was not heard by those directing the Williams, it must have been owing to inattention on their part; and inattention in such a particular, under the circumstances, was great negligence, for the Williams was running rapidly across the mouths of the slips, by no means as far out as she would have it believed, but very near to the ends of the piers. If, on the other hand, the whistle of the Little Nellie was heard by those directing the Williams, she was in fault for not stopping and staying out into the stream. The proof is that the Williams kept up her speed until the Little Nellie appeared outside of the ends of the pier; and the man at her wheel says he heard no long whistle from the Little Nellie. As to the fact of a long whistle having been blown by the Little Nellie as she passed up the slip nearing the end of the pier, it is proved by the great weight of the evidence, and that it could have been heard by the Williams with ordinary attention. The libellant is therefore entitled to a decree with an order of reference to ascertain the amount of the damage.

THE ROBERT BURNETT.¹

THE DASORI.

OWL TRANSPORTATION Co. v. THE MAYOR, ETC., OF CITY OF NEW YORK,
AND THE ROBERT BURNETT.

(District Court, S. D. New York. May 6, 1891.)

COLLISION—TWO TOWS PASSING—LEEWAY—INATTENTION.

A tow of four boats on a 200-foot hawser astern of the tug B. met a tow consisting of the tug D., with two scows on a hawser. A heavy north-west gale was blowing at the time, and though the tugs passed each other at what would have been a sufficient distance in ordinary weather, the wind caused the tow of the B. to make as much leeway as headway, so that one of the boats on her tow struck one of the scows, and was sunk. The evidence showed that neither tug paid much attention to the tows after the tugs had passed each other. *Held*, that for such lack of attention to their tows, both tugs were responsible for libellant's damage.

In Admiralty. Suit to recover damage caused by collision.

Wilcox, Macklin & Adams, for libellant.

James M. Ward, Asst. Corp. Counsel, for mayor.

Carpenter & Mosher, for the Burnett.

¹Reported by Edward G. Benedict, Esq., of the New York bar.

BROWN, J. On the 22d of November, 1890, the libelant's canal-boat Maggie P. was in tow of the tug Robert Burnett, coming from Port Johnson to the East river, and was the starboard boat in a tier of 4 boats upon a hawser from the Burnett about 200 feet long. When nearly up to Governor's island, the Maggie P. came into collision with the second of two scows that were in tow of the steam-tug Dasori, bound down the bay to the dumping-ground outside of Sandy Hook, and was so damaged that she soon after filled and sank. The Dasori's hawser to the first scow was about 60 fathoms long, and the hawser from the first scow to the second about 30 fathoms. The Dasori was proceeding upon a course S. S. W., and, as the witnesses for both tugs say, passed the Burnett at a distance of 400 or 500 feet to the eastward, a little below Governor's island. Neither anticipated any collision; but in going about 1,000 feet the boats in tow approached each other so rapidly that the starboard bow of the hindmost scow struck the libelant's boat on the starboard side, as above stated. The witnesses for the Burnett ascribe the collision to a strong sheer by the scow, through alleged inattention to her steering and bad management. The Dasori's witnesses deny this, and ascribe the collision to an alleged change of course by the Burnett to the eastward after she had passed the scows. There was at the time a strong north-west gale, so that the Burnett with her tow made but slight headway,—not more than a mile and a half per hour; and her captain testifies that they made about as much leeway as headway, and that at the time of passing the Dasori, and up to the collision, he was heading up the North river and did not haul to the eastward.

I have found it impossible to satisfy myself that the collision could have occurred in the way that the witnesses for either of the tugs have supposed in their testimony, if the two tugs were 400 or 500 feet apart on passing, or anywhere near that distance. I have no doubt, however, they were at a distance quite sufficient in ordinary weather, and that neither anticipated collision. Looking at all the circumstances, I am constrained to find that the collision arose primarily from the great leeway made by the Burnett's tow in the heavy north-west wind, and that sufficient allowance for this was not made by either tug. I think the weight of testimony is to the effect that there was some sheer by the second scow to starboard, but by no means sufficient alone to account for the collision; nor is it probable that considerable sheer in such a wind was avoidable. Both scows had bridle hawsers, and I am quite satisfied that in this respect they were managed with ordinary care. The evidence shows that neither tug paid much attention to their tows behind them after passing each other. Had they done so, it would have been plain, from their rapid approach, that it was their duty to haul off from each other. Neither did so, and, as this duty belonged to both alike, it follows that the damage must be shared alike by both. Decree for libelant against both defendants, with costs.

JOHNSON *et al.* v. BUNKER HILL & S. M. & C. Co.

(Circuit Court, D. Idaho. April 29, 1891.)

1. REMOVAL OF CAUSES—ADMISSION OF TERRITORY.

The Idaho admission act, providing for transfer, from territorial to national courts, of such causes as might have been commenced in the latter courts, had they existed when the actions were instituted, does not give to such national courts a greater or different jurisdiction from that granted to other United States courts, nor to the citizens of Idaho different privileges from those enjoyed by the citizens of other territories.

2. SAME—CITIZENS OF TERRITORIES—PARTIES TO ACTION.

The constitution of the United States, providing for jurisdiction of United States courts in actions between citizens of different states, has no application to actions between citizens of territories and states; hence an action in which the parties on one side were citizens of Idaho territory at time action was commenced cannot be transferred to United States courts.

3. SAME—CAUSES PENDING IN TERRITORIAL SUPREME COURT AT ADMISSION.

The right to transfer such to United States circuit courts, except that class of cases in which the circuit court has appellate jurisdiction from the United States district court, questioned, but not determined.

Motion to Remand to State Court.

John R. McBride, F. Ganahl, and Wm. H. Clagett, for defendant.

W. B. Heyburn, for plaintiff.

Before SAWYER, Circuit Judge, and BEATTY, District Judge.

SAWYER, J., (*orally.*) This case was commenced under the territorial government, before the territory of Idaho was admitted into the Union as a state. The last affidavit filed, which, for the purposes of the decision, we shall assume was regularly filed, shows what the record does not, that one of the parties to this suit, was a citizen of the territory of Idaho, at the time the suit was commenced, and the other a citizen of a state; and, consequently that the case would not, at that time, have been within the jurisdiction of any circuit court of the United States, on the ground of diversity of citizenship. Unless the act of admission has changed the rights of the parties, since the commencement of the suit, this court has no jurisdiction and the case should have gone to the state court; and it has been improperly sent here. There is nothing in the record that shows, that the cause arises under the laws of the United States, in such sense as to give this court jurisdiction. We, therefore, must determine the question of jurisdiction on the point of diversity of citizenship of the parties. It is sent here under the idea that the law provides that the case shall come into this court, and this court shall have jurisdiction, notwithstanding the fact, that the circuit court of the United States would not have had jurisdiction at the time the action was commenced, and the point is, whether that position is correct or not. Two decisions of the court in the district of South Dakota, (*Herman v. McKinney*, and *Dorne v. Silver Min. Co.*, 43 Fed. Rep. 689, 691, decided by Judges EDGERTON and SHIRAS,) maintain that view. Another decision in the district of Montana by Judge KNOWLES, (*Strasburger v. Beecher*, 44 Fed. Rep. 209, and one by Judge HANFORD in the district of Washington, (*Nickerson v. Crook*, 45 Fed. Rep. 658,) maintain