

The circumstances, are, not, I think, sufficient to charge the ferryboat with fault in attempting to enter her slip instead of waiting outside until the canal boats should have been withdrawn. Until the ferryboat had approached within 100 feet of the slip, she had no reason to suppose that there was any material obstruction to her entrance. Coming around from the west side of Governor's island, the ferryboat had seen the lights of the tug moving in the slip, had sounded an alarm signal, and slowed when at a considerable distance; and then the tug was observed to back out of the way. The position and height of the bows of the tug were such as to hide the much lower lights of the canal boats in front of the pier until the ferryboat was within 100 feet of the slip; and even had those lights been visible and seen before, their position would not have been such as to show clearly in the nighttime that the canal boats were encroaching upon the entrance to the slip. The tug herself was able to go further back at any moment. When the canal boats' lights were seen, I am satisfied that a worse collision would have happened had the ferryboat reversed. Under the circumstances I think she did what was wisest and safest; namely, to go on under a jingle bell to make the straightest possible entrance into the slip.

Even had the canal boats been seen earlier projecting some 30 feet across the mouth of the slip, but leaving about 112 feet space for the ferryboat's entrance, I am not prepared to hold that the ferryboat would be bound to wait outside until the canal boats should be withdrawn. In such cases, where a reasonable space is left, and where the danger from collision is only such comparatively small injuries as may arise from the sagging of boats against each other in the entrance of slips, it might, I think, well be held that boats which unlawfully obstruct the entrance take all the risks of the sagging arising from variable currents, provided the ferryboat so entering uses reasonable skill; and that where so much space is still left, the ferry boat should not be held chargeable with either negligence or fault for attempting to enter at all. See *The Express*, 1 U. S. App. 109, 49 Fed. Rep. 764. Without passing, however, upon the latter point, I am satisfied that the libel should be dismissed upon the grounds previously stated, with costs.

THE T. B. VAN HOUTEN.

CENTRAL RAILROAD OF NEW JERSEY v. THE T. B. VAN HOUTEN.

(District Court, S. D. New York. April 23, 1892.)

1. COLLISION—STEAM VESSELS CROSSING—STARBOARD HAND—SIGNALS—REVERSING.

A steam tug was going up the North river with a car float alongside. A ferryboat started from New York to Communipaw, the courses of the vessels thus being crosswise courses, with the ferryboat on the starboard hand of the tug. The ferryboat slowed about one third of the way across the river to allow a raft to pass. She then started up, and a half minute after gave one whistle to the tug, when the

latter was 500 or 600 feet below her in the river. The tug gave no signal, and the float shortly afterwards struck the ferryboat. *Held*, both in fault,—the tug, (1) for not going to the right, (2) for not signaling her direction to the ferryboat, (3) for not reversing in a situation that involved risk of collision; the ferryboat, for not giving the signal indicating her intention to pass ahead of the tow until it was too late to be of any use.

2. SAME—TIMELY SIGNALS—INSPECTOR'S RULES.

"The giving of timely signals, in obedience to the inspector's rules, is among the cumulative means provided by law for avoiding collisions, is necessary in harbor navigation, and the failure to observe this rule is one of the most prolific causes of disaster."

In Admiralty. Libel for collision.

Carpenter & Mosher, for libelant.

Wilcox, Adams & Green, for claimants.

BROWN, District Judge. Before light on the morning of January 28, 1891, as the ferryboat *Elizabeth* was making one of her regular trips from Liberty street, New York, to Communipaw ferry, Jersey City, she was run into in about mid river by a car float going up river in tow on the starboard side of the steam tug *T. B. Van Houten*, and received damages to her wheelhouse and machinery, to recover which the above libel was filed.

The tide was ebb; the weather clear, but dark, and good for seeing lights. The *Van Houten* had come around the Battery and was bound for the *Pavonia* ferry, Jersey City, and was heading about N. N. W. The ferryboat, after getting about a third of the way across from the New York shore, had been obliged to stop her engines to allow a steam tug with a raft of logs, in all about 300 to 400 feet long, to pass down ahead of her with the tide. The ferryboat did not, however, wholly lose her headway; and as soon as the raft was clear, she started her engines ahead, her course being directed nearly straight across the river, but a little upwards. The *Van Houten* was then probably about 100 or 150 yards further out in the river than the *Elizabeth*. Soon after starting up, probably about a half a minute after, the *Elizabeth* gave one whistle, and heard a whistle from the *Van Houten*, which, as several witnesses testify, was understood as a reply. The pilot of the *Van Houten* testifies that he heard no whistle from the *Elizabeth* and gave none to her; but that he gave an answer of one whistle about the same time to a signal of one whistle that was received from another tug, the *Beach*, which was going down river to the westward of both. The pilot of the *Elizabeth* and other witnesses testify that when the *Elizabeth* started up after the raft had cleared, the *Van Houten* was a quarter of a mile below him. Several witnesses for the *Van Houten*, including the pilot, make the *Van Houten* at that time only from 500 to 600 feet below; and such I think is the weight of the testimony and of the circumstantial evidence.

I have no doubt that the primary fault in this collision was the *Van Houten's*. She had the ferryboat on her starboard hand; she saw and recognized the *Elizabeth* at an abundant distance, and knew that the checking of her speed for the raft was but temporary, and that the *Elizabeth* had the right of way. When she started up on clearing the raft,

that was plainly visible, had a proper lookout been maintained. Yet according to the pilot's own story, he continued on across her course without giving her any signal whatsoever, and without reversing until the Beach's whistle was heard, a half minute after the ferryboat had started up, when it was too late to be of any use. He thus violated three of the express rules; namely, (1) in not going to the right in that situation; (2) in not signaling the Elizabeth to indicate the direction he intended to take; (3) in not reversing in time in a situation that involved evident risk of collision.

I think the ferryboat is also in fault for not giving a timely signal to the Van Houten. The two boats were on crossing courses, and risk of collision was plain, if both kept on. The time when the raft cleared and the ferryboat started up, was the extreme limit at which she could be excused for delaying her signal. When she gave her signal about half a minute afterwards, it was too late. The Van Houten, being incumbered, could not then go astern; and she reversed at once, but could not avoid collision. It is probable that this signal was given at the same time the signal of the Beach was given, as only one signal was heard by the Van Houten, and the Elizabeth did not hear the signal of the Beach. In my judgment the ferryboat's signal should have been given before the raft had passed; for the ferryboat had way on; the Van Houten was seen to be much nearer than half a mile, and was in fact less than one-eighth of a mile distant; and the fact that the way of the Elizabeth had been checked by the raft when she was so near the Van Houten, made it specially appropriate that her purpose to go ahead of the latter should be signaled to the Van Houten as required by the inspector's rules, since without any signal the latter might possibly suppose the ferryboat would wait till the Van Houten had passed. The Van Houten indeed had no right to count upon it; and it was, therefore, no legal excuse to her for omitting the proper signal on her own part, or for not proceeding as the rules required.

It is true also that the Elizabeth had a right to expect that the Van Houten would keep out of her way; but that was no excuse for the Elizabeth in omitting to give a timely signal in obedience to the inspector's rules indicative of her intent to increase her speed and go ahead. The rules as to signals being authorized by law (Rev. St. § 4412) have the same force as the statutory rules when not in conflict with the latter. *The B. B. Saunders*, 23 Blatchf. 378, 387, 25 Fed. Rep. 727; *The Dentz*, 29 Fed. Rep. 528; *U. S. v. Miller*, 26 Fed. Rep. 97. They are among the cumulative means provided by law for avoiding collision. Their usefulness and absolute necessity in harbor navigation are attested by daily experience; and the failure to observe them in time is one of the most prolific causes of disaster to property and life. Had a timely signal been given by the ferryboat, as late even as when she started up, there is no reason to suppose the Van Houten would not have heard it and gone astern accordingly. For these reasons the damages and costs must be divided; and the libellant is entitled to recover for only one half its loss.

STATE v. SULLIVAN *et al.*

(Circuit Court, W. D. North Carolina. April 20, 1892.)

1. REMOVAL OF CAUSES—PROSECUTION OF REVENUE OFFICER—DEPUTY CLERK—REV. ST. § 643.

The removal of a prosecution against a United States revenue officer from a state to a federal court is effected, and complete jurisdiction acquired, immediately upon the filing of a proper petition therefor in the clerk's office of the federal court; and the subsequent issuance of a writ of *certiorari* or *habeas corpus cum causa* is but the use of auxiliary process, and the performance of a ministerial duty. When, therefore, such petition is filed during vacation, and in the absence of the clerk, the proper writ may be issued by his deputy, and it need not show upon its face that the clerk has held the petition to be sufficient.

2. SAME—CERTIORARI TO STATE COURT.

The statute provides in such case that when suit is commenced in the state court by summons or other process, except *capias*, the clerk shall issue a writ of *certiorari*, but that when it is commenced by *capias*, or any other similar form of proceeding, "by which an arrest is ordered," the clerk shall issue a writ of *habeas corpus cum causa*. Held, that the statute must be liberally construed as part of the revenue system, and that a writ of *certiorari* was therefore properly issued when the officer had been released on bail, and had made no application for the writ of *habeas corpus cum causa*.

3. SAME.

In such case a writ of *certiorari* addressed to the marshal of the district, instead of to the state court, commanding the marshal to make known to the clerk of the state court the removal of the cause, and that such court is required to send a transcript of the record to the circuit court, is a sufficient compliance with the statute.

4. SAME—WAIVER—DEFENSE IN STATE COURT.

Where a state court proceeds with a prosecution against a United States marshal after he has effected a removal to a federal court, he does not lose his right of trial in the latter court by defending in the former.

At Law. A motion to proceed with the trial of this case, removed from the state court, the state court having declined to recognize the right of removal, and tried the case.

Benjamin F. Long, for plaintiff.

R. Z. Linney and *M. S. Mott*, for defendants.

DICK, District Judge. Many state and federal courts of the highest authority have heard argument and carefully considered questions of law arising under section 643 of the Revised Statutes of the United States,¹

¹Rev. St. § 643: "When any civil suit or criminal prosecution is commenced in any court of a state against any officer appointed under or acting by authority of any revenue law of the United States, now or hereafter enacted, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, or is commenced against any person holding property or estate by title derived from any such officer, and affects the validity of any such revenue law, or is commenced against any officer of the United States, or other person, on account of any act done under the provisions of title 26, 'the elective franchise,' or on account of any right, title, or authority claimed by such officer or other person under any of the said provisions, the said suit or prosecution may, at any time before the trial or final hearing thereof, be removed for trial into the circuit court next to be holden in the district where the same is pending, upon the petition of such defendant to said circuit court, and in the following manner: Said petition shall set forth the nature of the suit or prosecution, and be verified by affidavit; and, together with a certificate signed by an attorney or counselor at law of some court of record of the state where such suit or prosecution is commenced, or of the United States, stating that, as counsel for the petitioner, he has examined the proceedings against him, and carefully