question whether the Devereaux, in departing from the statutory rule of passing the Folsom on the port side, took the risk of her ability to pass safely on the starboard hand, as was held in *The Titan*, 49 Fed. Rep. 479, 480, 1 C. C. A. 324. What we decide in this case is that the libelants have failed to establish, by any fair and satisfactory preponderance of proof, as the burden was on them to do, that the Devereaux's sheering, and the collision resulting therefrom, was caused by any fault of either the Folsom or Mitchell or both. We have reached this conclusion without considering the new testimony taken by the appellants since the appeal, as we entertain some doubt whether, after an appeal in admiralty to this court, new testimony can be taken, under existing provisions of law.

The decree of the district court condemning the Folsom and Mitchell is erroneous, and is accordingly reversed, and the cause is remanded to said court, with direction to dismiss the libel at libelants' costs.

THE BALIZE.

In re SURPLUS PROCEEDS OF TUG BALIZE.

(*Circuit Court, E. D. Michigan.* October 8, 1887.)

MARITIME LIENS—ENFORCEMENT—DISPOSITION OF SURPLUS—JURISDICTION OF DISTRICT COURT.

A tug was sold to satisfy certain maritime liens, after the discharge of which there remained in court a surplus, which was claimed by both the former owner and his creditors. The creditors who petitioned that the fund be paid to them were of two classes,—those claiming for supplies furnished to boats other than the tug, and for which suits *in personam* were pending; and those claiming for services rendered as master of the tug and of other boats, and for which judgments *in personam* had been obtained and executions returned *nulla bona*. *Held*, that the suits and judgments *in personam* conferred no vested right on the master of the tug or other petitioning creditors to a specific interest in the surplus, such as the forty-third admiralty rule contemplates, and that, therefore, the district court had no jurisdiction in admiralty to create liens on the surplus as against the former owner.

In Admiralty. On appeal from district court. Modified and affirmed.

Jared W. Finney, *James J. Atkinson*, *Henry H. Swan*, and *Moore & Canfield*, proctors for the several claimants.

JACKSON, Circuit Judge. Under admiralty proceedings in the United States district court at Detroit the steam tug Balize was sold to satisfy certain maritime liens. After paying off and discharging these liens, there remains in the registry of the court surplus proceeds arising from said sale to the amount of thirteen or fourteen hundred dollars, and the question now presented for decision relates to the proper disposition to

be made of this surplus, which is claimed by the Detroit Tug & Transit Company, as the owner of the Balize before its sale, and by several of said company's creditors, who have filed petitions praying that the fund may be paid over to them, rather than to the former owner of the tug. The petitioning creditors consist of two classes, viz.: *First*, those having claims against the Detroit Tug & Transit Company for supplies of coal, etc., furnished boats of said company other than the Balize, and for which suits *in personam* are now pending; and, *secondly*, those having claims for services rendered as master of the Balize and of other boats of said Detroit Tug & Transit Company. This latter class of petitioners have severally obtained judgments *in personam* against the Detroit Tug & Transit Company, on which executions have been issued to the marshal, and by him returned *nulla bona*. The district court ordered and decreed that Hiram Ames, master of the tug Balize, should be paid in full out of said surplus, and that the remainder of said fund should be turned over to the Detroit Tug & Transit Company as the owner thereof. The other petitioning creditors were held not to be entitled to payment out of said surplus, and their petitions were dismissed. From this decree all the claimants of said surplus have appealed to this court.

After a careful examination of the questions presented by the appeal, I am satisfied, contrary to my first impressions, that the action of the district court in allowing and directing the debt of Ames, the master of the Balize, to be paid out of this surplus, is erroneous. This allowance was no doubt made upon the authority of *The Santa Anna*, Blatchf. & H. 80, 81, where it was held that the master, as against the owner, was entitled to payment out of a surplus remaining in court. But that case has been practically overruled by the supreme court of the United States in the case of *The Lottawanna*, 20 Wall. 221, 21 Wall. 559, which held that surplus proceeds, in such cases as the present, must be paid over to the owner, unless claimed by a creditor having a specific lien thereon either by contract or statute. "The proceeds arising from such a sale, [by order of the admiralty court,] if the title of the owner is unincumbered, and not subject to any maritime lien of any kind, belong to the owner, as admiralty courts are not courts of bankruptcy or insolvency. Nor are they invested with any jurisdiction to distribute such property of the owner, any more than any other property belonging to him, among his creditors." 20 Wall. 221. The cases relied on by the petitioning creditors, viz., *The Guiding Star*, 18 Fed. Rep. 263, and *The E. V. Mundy*, 22 Fed. Rep. 173, decided by Mr. Justice MATTHEWS, do not conflict with the principle announced in *The Lottawanna Case*. In both these cases the learned judge awarded the surplus fund to lien creditors,—creditors who held prior liens on the property or its proceeds, either by contract or by statute. Neither the master of the Balize nor any of the other petitioning creditors had any specific lien upon the Balize or its proceeds, either by statute or by contract. The district court, as an admiralty court, has no jurisdiction to create liens on this surplus as against the owner. It can only assert and enforce against the owner

prior specific liens which the owner or the law have previously created or established. The judgments which the several masters have obtained against the Detroit Tug & Transit Company *in personam*, the issuance of executions, and returns of *nulla bona* thereon, created no lien on said surplus. The suits and judgments *in personam* conferred no vested right to a specific interest in said surplus, such as the forty-third admiralty rule contemplates. The creditor who claims satisfaction out of surplus proceeds in such cases must come into court with an existing specific lien. He cannot invoke the aid of a court of admiralty to create such lien by attaching or impounding the fund. The admiralty court can only enforce or give effect to subsisting liens created by statute or contract as against the owner of surplus proceeds. It may be, and doubtless is, inequitable for the owner to assert its right to this surplus, and leave *bona fide* debts unpaid, but a court of admiralty has no such equitable jurisdiction as will enable it to correct such a wrong. The claim of the master of the Balize cannot be distinguished from that of the other creditors, and the decree of the district court allowing and directing its payment is reversed. In all other respects the decree of the district court is affirmed. The entire surplus will be paid over to the owner, the Detroit Tug & Transit Company, and the creditor petitions will be dismissed, with costs. The costs incident to the petition of the Detroit Tug & Transit Company will be retained out of the fund in the registry of the court, and the balance of said fund will then be paid over to said Detroit Tug & Transit Company or to its proctor of record.

TOMS v. OWEN.

(*Circuit Court, E. D. Michigan. June 6, 1891.*)

No. 3,237.

1. CIRCUIT COURTS—JURISDICTION—CONSTRUCTION OF WILL.
Where the necessary diversity of citizenship exists, the circuit court has jurisdiction of a suit for the construction of a will, the execution, validity, and probate of which are recognized, there having been no construction of the will, and no adjudication of complainant's rights thereunder, either by the probate court in which the settlement of the estate is pending, or by any other tribunal having jurisdiction of the subject and the parties. *Colton* v. *Colton*, 8 Sup. Ct. Rep. 1164, 127 U. S. 301, 308, followed. *Broderick's Will*, 21 Wall. 503, distinguished.

2. DEED—DELIVERY—EVIDENCE.
A husband used moneys of his wife in settling his own debts, and thereafter had the use of her funds, without ever accounting. He subsequently conveyed to her all of the property then possessed by him by a deed, reciting a consideration of $50,000, and reserving a life use of the property. The deed, executed with all due formalities, was found after his death in his office safe, in an envelope containing other valuable papers which belonged to his wife, and of which he had charge; and in a will made shortly before his death he formally declared that he had "executed and delivered" to his wife such a conveyance. *Held*, that these facts were sufficient to establish the delivery of the deed.

3. WILLS—CONSTRUCTION—CREATION OF TRUST—INTENT OF TESTATOR.
By the second clause of his will, the husband, after stating that his reasons for making the will were to avoid all questions that might arise about the previous deed to his wife, and to express his wishes as to the use and disposition of the property conveyed to her, devised and bequeathed to her all the real and personal property of which he died seised or possessed; and by the fifth clause he expressed his desire that his wife "should make free use of all the property so conveyed and devised to her for her own use or for charitable purposes, knowing that, in case any of my immediate relatives or her sister should, by misfortune or otherwise, need any assistance, she would generously share with them; and therefore I feel no hesitation in leaving with my wife the power to carry out the wishes as expressed herein." *Held*, that no enforceable trust was created, for the desire of the testator was not imperative, as it left with the wife the power to judge both when aid was needed and the amount thereof.

4. SAME.
By the sixth clause testator provided that "it is my wish that such property as my wife may have remaining undisposed of at her death that she should previously will the same to her sister, and to my brothers and sisters, in equal proportions, leaving it entirely with her to make such disposition of her property by will as her judgment shall dictate, merely expressing my desire in the premises; and, should she prefer to retain or dispose of the property so conveyed and devised to her in a manner different from my wishes as herein expressed, she is at full liberty to do so, without having her right or motives for so doing called in question." *Held*, that no trust was created in favor of the brothers and sisters of testator enforceable against the estate of the wife, who died intestate, as the power given to her was discretionary.

In Equity. Bill by Joel P. Toms against Julia Frances Owen for a construction of the will of Robert P. Toms, deceased. Bill dismissed.

C. I. Walker, (*Charles A. Kent*, of counsel,) for complainant.

Wm. J. Gray, (*Otto Kirchner*, of counsel,) for defendant.

JACKSON, Circuit Judge. The complainant seeks by his bill to obtain a construction of the will of his brother, Robert P. Toms, deceased, and to set up and have declared in his favor a trust in and to such property as was devised to the wife of the testator, and remained undisposed of at her death. The defendant, as the heir at law of Mrs. Sarah Caroline