

THE J. E. POTTS.

HOWARD TOWING ASS'N v. THE J. E. POTTS.

(District Court, N. D. Illinois. February 23, 1893.)

1. SALVAGE—LIEN—WAIVER—BURDEN OF PROOF.

Where a lien for salvage has once attached, and notes are given for the salvage, the burden of proof is upon the party asserting that the notes were intended to detach the lien.

2. SAME—AMOUNT OF COMPENSATION—AGREEMENT.

In the absence of proof to the contrary, the acceptance of such notes shows that the amount of the notes is the proper salvage.

In Admiralty. Libel by the Howard Towing Association against the barge J. E. Potts for salvage. Decree for libelant.

C. E. Kremer, for libelant.

W. H. Condon, for respondent.

GROSSCUP, District Judge. The libel in this case is for services rendered in pulling the barge Potts off the beach at North Fox island, in Lake Michigan. The claim is for \$750, and a number of witnesses have testified that that, under the circumstances, would be a reasonable amount. The defense is that subsequent to the services the owner of the Potts entered into negotiations with the representatives of the libelants, which resulted in the execution of notes amounting to \$600 in full payment of the services. The claim is also made that the delivery and acceptance of these notes operated as a waiver of libelant's lien upon the barge saved. The testimony respecting the execution of these notes, and their purpose, is limited to two witnesses. I can see no reason in their testimony why one should be given greater credence than the other. Where a lien for salvage has once attached, and notes have been given for the services, the burden of proof is upon the party alleging that these notes were intended to detach the lien to show that fact. Under this rule, I am of the opinion that the delivery and acceptance of these notes is not shown to have been intended to detach the lien.

I think, however, that the acceptance of these notes, in the absence of proof to the contrary, shows that the amount agreed upon is the proper salvage, and, accordingly, that the libelant's claim is limited to \$600. The decree, therefore, will be in favor of the libelant for \$600, with a lien upon the barge for its payment.

THE BRIXHAM.

VELASCO TERMINAL RY. CO. v. THE BRIXHAM.

(District Court, E. D. Virginia. March 1, 1893.)

1. SALVAGE—AWARD—RIGHT OF CHARTERER TO SHARE.

A steamer was chartered to carry a cargo to a certain port. The charter party provided that the steamer should "have liberty to tow and to be towed, and to assist vessels in all situations;" and the bill of lading provided that she should "have liberty to tow and assist vessels in dis-

treas, and to deviate for the purpose of saving life or property." The master and crew were in full control and charge of the steamer during the whole voyage, subject to no orders from the charterer, and there was no supercargo aboard. During the voyage she rendered salvage services to another vessel, and was thereby delayed for several days. *Held*, that the charterer was not entitled to any damages for the delay occasioned by the services rendered. The *Persian Monarch*, 23 Fed. Rep. 820, followed.

3. SAME.

Mere inert cargo is not entitled to share in a salvage award, solely because of the risk to which it was subjected. The *Blaireau*, 2 Cranch, 240, distinguished.

In Admiralty. Libel by the Velasco Terminal Railway Company against the steamship *Brixham*. On a petition of the owners of cargo claiming part of a salvage award made by this court in favor of the *Brixham* against the *S. S. Chatfield* for salvage services rendered by the *Brixham* to the *Chatfield*, and claiming damages for delay in delivering cargo in consequence of rendering the salvage service. Dismissed.

A. R. Hanckel, for petitioners.

Whitehurst & Hughes and Convers & Kirlin, for the *Brixham*.

HUGHES, District Judge. During the 27th, 28th, and 29th of December, 1891, the steamer *Brixham* rendered to the steamer *Chatfield* valuable and meritorious salvage service, for which this court made a decree awarding to the *Brixham* for the service and for bounty the sum of \$12,500. 52 Fed. Rep. 479. At the time of rendering the salvage service, the *Brixham* was under charter to the Velasco Terminal Railway Company to carry a cargo of railroad iron and material from Philadelphia to Velasco, Tex., at an agreed freight per ton. The charter was not a demise. The master and crew remained in full control and charge of the *Brixham* from the beginning to the end of the voyage, subject to no orders from the charterer. The charter party contained a clause providing that the steamer should "have liberty to tow and be towed, and to assist vessels in all situations." The bill of lading provided that the steamer should "have liberty to tow and assist vessels in distress, and to deviate for the purpose of saving life or property." The owners of the freight had no supercargo on board, and there was no semblance or pretense of their having or exercising any authority or control over the steamer during the voyage, direct or indirect, actual or virtual.

The *Brixham* sailed from Philadelphia on the 25th of October, 1891. On the 27th, when she was nearly abreast of the Virginia capes, she saw the *Chatfield* flying signals of distress, and deviated from her voyage in order to render assistance. The service she rendered in bringing the *Chatfield* into Hampton Roads was pronounced by this court a meritorious salvage service. It occupied the *Brixham* until the 29th of October. During the progress of this service the *Brixham* sustained damages from the *Chatfield*, which she found it necessary to have repaired before proceeding on her voyage from Hampton Roads to Velasco. The time consumed in obtaining these

repairs was five days; so that the entire detention incurred in consequence of rendering the salvage service was nine days. The Brixham proceeded from Hampton Roads on the 5th of November, and ultimately reached Velasco with all of her cargo, for the delivery of which she obtained full receipts from its consignees.

The petition under consideration claims damages for delay in delivering the railroad material at Velasco, caused by the deviation of the Brixham from her course in saving the Chatfield, and prays that these damages may be paid out of the salvage money awarded to the Brixham by this court, and still under the court's control. It also prefers a claim to share in the salvage award, on account of the risk to which the railroad material was subjected by the Brixham in rendering the salvage service.

In regard to the claim for damages by delay resulting from this salvage service, I agree with the declaration of the court in the case of *The Persian Monarch*, 23 Fed. Rep. 820: "It seems to add a new horror to shipwreck to hold that, when the master of a vessel in distress accepts the services of another vessel for his rescue, he binds his owners to the owners of the cargo of such other vessel to pay them all damages resulting from the rendition of salvage service. Such cannot be the law." It would be a still greater discouragement of salvors if it were held that, in rendering salvage services to vessels in distress, they would be held liable to owners of cargoes on their own ship for damages for the mere delay resulting from such services, such as are claimed in this petition. "Such cannot be the law," and I must disallow the claim.

As to the claim of petitioners in this case to share directly in the salvage award, it is equally inadmissible. Salvage is awarded for actual, daring service, attended by risk to life and property. The mere fact of inert property being at risk does not entitle its owner, who may be safe on land, to share in a salvage award. Actual physical service attended by risk, and, in the case of a steamer or ship, risk or loss of property, are the chief ingredients of salvage service. Insentient, inert cargo cannot of itself participate in a salvage award. There were circumstances in the case of *The Blaireau*, 2 Cranch, 240, where the supercargo, who was also one of the charterers of the saving ship, was on board, in control of ship and cargo, and rendered material personal service in saving the other ship, to justify an award to the charterers. The supercargo was one of six men who left his own ship and went on board the one saved, to take her into port. It was under these circumstances that the supreme court allowed the owners of the cargo—that is to say, the charterers—of the saving ship to share in the salvage award. This case of *The Blaireau* is, I believe, the only one in which the supreme court of the United States has allowed the cargo, as such, to share in salvage awards. As a precedent, therefore, the case is not of value to show that inert, insentient cargo, by reason solely of risk, may be awarded salvage. I do not think it worth while to pass upon the defense, set up in the answer, of *lis alibi pendens*. The prayers of the petition must be denied. I will so decree.

THE LAURENCE.

NEW YORK, P. & N. R. CO. v. THE LAURENCE.

(Circuit Court of Appeals, Fourth Circuit. February 7, 1893.)

No. 37.

COLLISION—STEAMER WITH BARGE AT ANCHOR—FOG—EXCESSIVE SPEED.

A coal barge was anchored for several days in the west side of the channel of the Elizabeth river, Virginia, at a place designated by the harbor master, and customarily used as an anchorage for many years. The channel was 450 yards wide for 18-foot water and 600 yards for 12-foot water, and there was at least 200 yards of sea room east of the barge. During a dense fog the barge was struck by a steamer making a regular run at about her usual speed of 15 miles per hour. The officers of the steamer were aware of the position of the barge, and were on the lookout for her, and those on the barge, on hearing the steamer's approach, gave frequent signals by bell and horn. The steamer was out of her usual course, and out of the part of the channel generally used by passing vessels. *Held*, that the steamer was in fault for maintaining excessive speed in a fog, thus violating Act Aug. 19, 1890, c. 802, art. 16, § 1.

Appeal from the District Court of the United States for the Eastern District of Virginia.

In Admiralty. Cross libels for collision by the New York, Philadelphia & Norfolk Railroad Company against the barge Laurence, and the Thames Towboat Company of New London against the steamer New York. Decree for the Thames Towboat Company. The New York, Philadelphia & Norfolk Railroad Company appeals. Affirmed.

Robert M. Hughes, for appellant.
Samuel Park, for appellee.

Before BOND and GOFF, Circuit Judges, and SIMONTON, District Judge.

GOFF, Circuit Judge. About 8:45 o'clock in the morning of the 9th day of March, 1891, during a dense fog, a collision took place in the Elizabeth river below the Lambert's Point coal piers, the steamer New York running into and sinking the barge Laurence. The steamer was owned by the New York, Philadelphia & Norfolk Railroad Company, and the barge by the Thames Towboat Company of New London. The steamer was bound from Cape Charles to Norfolk, and the barge was at anchor, laden with coal. The steamer was damaged, and the barge and her cargo lost. Cross libels were filed in the district court of the United States for the eastern district of Virginia at Norfolk. They were tried before the judge of that district, who dismissed the libel against the barge Laurence, and passed a decree in favor of the Thames Towboat Company, libellant in the cross bill. From the decree dismissing its libel the New York, Philadelphia & Norfolk Railroad Company appealed.

The claim of the appellant is that the barge was anchored in an improper place and manner, and that proper signals of her presence were not given. The questions involved (mostly questions of fact) are to be determined as we find the weight of the evidence to be