the usual manner, went to sleep in the cabin, and was roused only a few minutes before the boat sank.

For the defense it is claimed that the boat lay somewhat away from the bulkhead, and did not take in water from the sewer; that she came alongside loaded in an unseaworthy manner, and that she must have sunk from her own leaky condition, or the very unequal loading by the stern, after the previous removal of about 33 tons of coal at Hunter's point. On this branch of the case I am disposed to accept the captain's testimony, as the more credible and probable. The respondent must, therefore, be held to answer for the damage. The canal boat went to the wharf in the usual course of business to deliver coal, in pursuance of the arrangements for its delivery there made between the respondent and the shippers. The libelant's captain, on coming there for the first time, was entitled to notice of the concealed danger either specifically, or by some general notice to the public, giving reasonable caution against the concealed danger. Heissenbuttel v. Mayor, 30 Fed. Rep. 456; Smith v. Havemeyer, 36 Fed. Rep. 927, affirming 32 Fed. Rep. 844. There was no negligence on his part in mooring at the bulkhead in the usual way or in going to his cabin; and he had no knowledge of the sinking condition of his boat until too late to prevent it.

Decree for the libelant, with an order of reference to compute the damages.

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## BRITISH & FOREIGN MARINE INS. CO. v. SOUTHERN PAC. CO.[1]

(District Court, S. D. New York. March 31, 1893.)

CARRIERS—FREIGHT—PRO RATA—DAMAGED GOODS—GOODS DESTROYED.

While a quantity of cotton was in course of transportation from southern ports to Liverpool, by various connecting carriers, but under through bills of lading, certain bales were destroyed and others damaged by a fire on the pier of the respondent,—one of the carriers. The damaged bales were sold, with the knowledge of the insurer, to whom the owner had abandoned, and the proceeds were turned over to such insurer; respondent retaining its pro rata freight on all the cotton destroyed and damaged. Suit was brought by the insurer to compel payment over of such money retained, on the ground that no freight was earned because the cotton was never delivered at the stipulated place of delivery. *Held*, that the insurer, by standing in the place of the owner, and practically receiving the damaged cotton, acquiescing in its sale, and receiving the proceeds, and because, by the terms of the bill of lading, the respondent's contract of carriage was for the most part completely performed, became thereby liable to pay pro rata freight on the damaged cotton sold and accounted for; but, as there was no delivery of the cotton destroyed by the fire, no freight ever became due on that part, and respondent was not entitled to withhold any freight for that part from the insurer.

In Admiralty. Libel by the British & Foreign Marine Insurance Company against the Southern Pacific Company to recover freight withheld by respondent. Decree for libelant as to part of its demand.

[1]Reported by E. G. Benedict, Esq., of the New York bar.

Butler, Stillman & Hubbard, for libelant.
Benedict & Benedict, for respondent.

BROWN, District Judge. The controversy in this case turns upon the question of the right of the carriers to pro rata freight on 52 bales of cotton, part of which was destroyed and the rest damaged, by a fire on the pier of the Morgan Line in this city, on February 28, 1887. These 52 bales were parts of much larger quantities of cotton, which had been shipped partly from interior points in Texas, on the Houston & Texas Railroad, and partly from Galveston and New Orleans. All the cotton was covered by bills of lading, somewhat different in form, but all providing for the transportation to New York by the Morgan Line of steamers, and thence to Liverpool and to other European ports by steamer from New York. By the bills of lading, none of the different carriers were to be responsible for any damage except such as occurred on its own part of the route. The course of dealing was that each succeeding carrier advanced to the preceding carrier the charges of the latter for its proportion of the transportation; while the freight specified in the bill of lading was at a certain rate per pound, or per 100 pounds, for the transportation as an entirety, and was payable on delivery at the place of final destination.

Most of the cotton covered by the various bills of lading was delivered at the place of destination. But so much as was damaged by the fire and was not in fit condition to be forwarded was sold, and the proceeds thereof was paid to the defendant, the proprietor of the Morgan Line. The libelants were the insurers of the cotton, to whom an abandonment was made of what was damaged by the fire; and the proceedings for the care, reparation and sale of the damaged cotton were made, as the evidence shows, with the concurrence and approbation of the libelants. Out of the proceeds of the cotton sold, the defendants claim to retain a pro rata freight to New York, both upon the cotton damaged and sold, and also upon the cotton that was totally destroyed by the fire; i. e. the amount of freight which the respondent had advanced thereon to preceding carriers, and its own pro rata charges for the transportation to New York. The libelants deny that the respondent has any right to retain any freight charges at all on the cotton destroyed, or sold here, for the reason that no freight was earned thereon, in consequence of the failure to deliver this part of the cotton at the stipulated place of delivery, so that no freight thereon ever became due.

The case is not one of a complete failure to perform the contract. It is the case of a complete performance of a part of what was embraced in the bills of lading, and of a failure to perform the residue through perils for which the carrier was not responsible. The libelant, as insurer, accepting an abandonment, as regards the damaged cotton, stands in the situation of the shipper and owner. The disposition of the damaged cotton was made for the best interest of all concerned, viz.: the carrier, the owner and the insurer, and though the disposition of the cotton was through the hands

of the respondent, this was practically, as it seems to me from the evidence, the joint act of both the parties to this libel; and all the proceeds, save the amount covered by this dispute as to freight, has been turned over to the libelants. The disposition of the damaged cotton was, therefore, equivalent to an arrangement for the acceptance and disposal of it by both for their joint account and benefit.

From the earliest times the rule of the maritime law has been different from that of the common law in respect to payment of pro rata freight; the rule being that where the ship, through accident or major force, has been prevented from completing her voyage, the owner, on receiving his goods, must pay ratable freight. Macl. Shipp. 478; Roccus, 81; Consolato, 151; and see other authorities cited in The Spartan, 25 Fed. Rep. 44, 57. Upon this ground I must allow to the carrier in the present case a pro rata freight upon the damaged cotton, the proceeds of which were received by the libelant as the owners' representative. The present is a stronger case for a pro rata freight from the fact that the bills of lading contemplated in several respects the divisibility of the contract; and because the contract contained in the bills of lading was for the most part completely performed.

The method of dividing the entire freight was a matter of private arrangement between the different carriers, to which neither the owners of the cotton, nor the libelants, as insurers, were parties. If any question is made as to the equity of this division, the libelants are entitled, and will be allowed, to take further proof concerning it.

As respects the cotton destroyed, on which the pro rata freight retained by the defendant amounts to a net balance, as I understand from the evidence, of $614.75 over all average deductions for salvage, etc., I do not see any ground on which the respondents can prevail. No benefit has ever accrued either to the owners or to the insurer from the cotton destroyed. So much of the cotton is gone, and the freight is gone with it. The ground of the allowance of a pro rata freight is the meritorious service on the part of the ship in the delivery of the goods to the owner, (Macl. Shipp. 478,) though not at the place originally contemplated. The meritorious services exist in this case as to the damaged cotton delivered, or, what is the same thing, sold by mutual arrangement, and accounted for. But as to the cotton destroyed, this consideration wholly fails; and the freight being payable by the pound, there is no legal or equitable ground, on the destruction of a part, for holding the residue for the freight on the cotton destroyed. No deduction, therefore, should be made for what was destroyed, and the libelants are entitled to a decree for the amount withheld on that account; and they may give further proof as respects a fair pro rata on the residue, if the division made is not acceptable.

## THE J. & J. McCARTHY.

### STYFFE v. THE J. & J. McCARTHY.[1]

(District Court, S. D. New York. April 1, 1893.)

SHIPPING—PERSONAL INJURIES—SHIFTING HAWSER OF TOW—LIABILITY OF TUG. Libelant, master of a canal boat in tow of defendant tug, lost two fingers by getting them caught in the loop of his hawser while shifting it from the port cleat to the forward bitts. On conflicting evidence the court found that the shifting of the hawser by libelant was in response to an authorized hail from the tug, and that the accident was due to the premature starting up of the tug. *Held*, that the tug was liable; but as the evidence also indicated that the libelant carelessly and unnecessarily exposed his fingers in the loop of the hawser while pushing it down on the bitts, *held*, that libelant was also negligent, but should recover $450. The Max Morris, 11 Sup. Ct. Rep. 29, 137 U. S. 1.

In Admiralty. Libel by Wm. T. Styffe against the steam tug J. & J. McCarthy for personal injuries. Decree for libelant.

Hyland & Zabriskie, for libelant.
McCarthy & Berier, for respondent.

BROWN, District Judge. On the 19th of July, 1892, between 2 and 3 o'clock in the afternoon, the libelant, who was the captain in charge of the canal boat Fred Fassbender, which was going around the Battery in tow of the tug J. & J. McCarthy on a hawser about 40 or 50 feet long, lost two of the fingers of his right hand by getting them smashed in changing the hawser from the port cleat to the forward bitts. The tow had been taken from the Wallabout by two hawsers running to the port and starboard sides. Off pier 5 or 6, East river, the starboard hawser either slipped or parted, and the canal boat, being held by the port line only, began to take a sheer to starboard. The libelant was at that time near the stern of his boat. Seeing the sheer, he ran forward, saw that the starboard hawser was gone, and, according to his testimony, was hailed by one of the men on the stern of the tug, who told him to shift the hawser from the port cleat, and put it over the bitts near the stem; that he attempted to do so; and that while putting the loop which formed the end of the port hawser over the bitts, the tug started up, and that his fingers were thereby caught between the hawser and one of the bitts about six inches from its top. The libelant was but 21 years of age, and had been on board the canal boat as captain for only a short time.

The witnesses for the tug all testified that no order was given from the tug to the libelant to change the port hawser. The pilot and engineer testified that the tug did not start up. The deck hand and the cook, who were on the stern of the tug, contradicted each other about the starboard hawser; while the cook says the tug did start up, and he agrees with the libelant in assigning that as the reason why his fingers got caught.

[1]Reported by E. G. Benedict, Esq., of the New York bar.

Upon the contradicting testimony I must find in accordance with the reasonable probabilities of the case. The libelant had no business to change the hawser, except on orders from the tug; and there is not the least probability that he would do so. I have no doubt that he did receive a hail to change the hawser, as he testifies; and that this hail was in some way either directed by the pilot of the tug, or was known and acquiesced in by him. It was the proper and natural thing to do; while the pilot's account of what he was doing, or rather was not doing, seems to me wholly improbable. I cannot give full credence to the testimony of the witnesses on the McCarthy as to what was done or not done, on account of the contradictions between them, as well as the improbabilities arising from the situation. The pilot says that for a considerable period, namely, while the libelant ran forward, got off the port hawser and got hurt, he was not looking aft, and did not see what was going on; though he knew the starboard hawser was gone and that the canal boat was sheering to starboard; but he says he was waiting for the boats to come towards each other. He says he ordered the starboard hawser hauled in; while both deck hands deny any such order.

I am persuaded that the truth of the matter is that the port hawser was shifted on the authorized hail from the tug by the pilot's direction; that the pilot knew what was doing, and started up a little sooner than he should have done.

I cannot wholly acquit the libelant, however, of some negligence or want of reasonable precaution. The loop or eye of the hawser was some three feet in circumference. There would have been no difficulty in throwing it over the bitts, but for the weight of what was hanging over in the water. I have no doubt the hawser was slackened by stopping the engines, as the pilot and engineer testify. The libelant says that he was pushing the hawser down the bitts when his fingers were caught. Allowing for some probable difficulty in getting the hawser over the bitts, arising from the drag of the hawser, which necessitated some pulling back all the time, still I cannot conceive how his fingers could be caught in the way he describes, except by a careless and unnecessary exposure of his fingers in the loop of the hawser; since by the use of both hands in pulling back, he could easily have kept his fingers away from the bitts. The tug, however, had no right to start up, under such circumstances, until a signal was given that all was ready for the start, and no such signal is claimed to have been given. Under these circumstances I award him but $450. The Max Morris, 137 U. S. 1, 11 Sup. Ct. Rep. 29.

## UNION ICE CO. v. CROWELL et al.

## CROWELL et al. v. UNION ICE CO.

(Circuit Court of Appeals, First Circuit. March 22, 1893.)

Nos. 4 and 5.

1. SHIPPING—UNSAFE BERTH—DAMAGES—LIABILITY.
   Libelant's schooner was berthed alongside respondent's wharf to load ice, and after the cargo was nearly all in she began to leak badly, showing signs of a severe strain by hanging up at the ends. It was shown that there was a greater depth of water under her amidships than at either bow or stern, and she was aground at the ends. At the bow there was a bed of sawdust, edgings, etc., of whose existence both her captain and the respondent were aware, but neither took any steps to investigate its extent or character, assuming that it was soft enough for the schooner to cut into it. Respondent had, however, examined the bottom for rocks, logs, or other hard substances, and removed such as were found. *Held*, that both the respondent and the vessel were in fault as to the unsafe berth, and libelants' damages should be divided.
2. SAME—PROXIMATE CAUSE.
   A survey was had, and the surveyors recommended that the schooner be beached, and repaired temporarily, which was done without taking the ice out of her. The ice, softened by the water she had taken, suddenly shifted in the hold, and strained the vessel much worse than before. *Held*, that the unsafe berth was nevertheless the proximate cause of this injury, and damages therefor are recoverable.
3. SAME—MEASURE OF DAMAGES.
   The measure of damages in such case is the cost of repairing the schooner, and not the difference betwen her value before and her value after the injury.
4. SAME—COSTS.
   In admiralty the costs are under the control of the court, and do not necessarily follow the rule in cases at law or in equity. They may be denied in whole or in part to the prevailing party, or even allowed to the losing party, as, in view of all the facts, seems proper.

Appeals from the District Court of the United States for the District of Maine.

In Admiralty. Libel by Samuel R. Crowell and others against the Union Ice Company for damages to the schooner "Weybosset." The district court entered a decree for divided damages, and subsequently overruled respondent's exceptions to the assessor's report, at the same time sustaining in part and overruling in part the exceptions of the libelants. Both parties appeal. Affirmed.

The opinions of the court below, by WEBB, District Judge, referred to by the circuit court of appeals, are as follows:

(April 16, 1890.)

The owners of the schooner Weybosset prosecute this libel to recover for injury and damage to their vessel, caused, as they aver, by the unsuitable and dangerous condition of the bottom at the berth provided for loading vessels with ice from the respondent's ice houses on the bank of Penobscot river. The case shows that the Union Ice Company, proprietor of ice houses and a loading pier, contracted ice to be loaded at their pier, from their houses, and that the Weybosset, under a charter, proceeded thither to take a cargo. This brought her lawfully at the berth, and was such an invitation to come there as imposed on the owners of the pier the duty to employ reasonable diligence to have the place safe and proper for the vessel to lie. The Moorcock,