

conceivable reason for any such change of course as is attributed to her by the witnesses for the Advance. The improbability that the Advance would have left her position, and run into the jaws of destruction, without good reason, is counterbalanced by the improbability that the Norge would have unnecessarily changed a course deliberately and prudently selected.

It is proper to say that, if we were not of the opinion that the collision should be attributed solely to the fault of the Advance, it would notwithstanding be our duty to affirm the decree of the court below, because, if the collision was not owing to her fault, there certainly is no preponderance of evidence to establish fault on the part of the Norge, and, as the libelants have the burden of proof, they have not made out their case. The decree is affirmed, with costs of the appeal, and the cause is remitted to the district court with instructions to decree accordingly.

THE A. B. VALENTINE.

(District Court, N. D. New York. March 27, 1893.)

COLLISION—STEAMER AND TUG WITH TOW.

A large steambot, while passing upward through the draw of the New York Central Railroad bridge at Albany, noticed a tug which had just disengaged a tow from its berth, or from another boat, about 400 feet above the bridge, and immediately blew a signal of inquiry. Receiving no answer, she ported her helm as far as she could safely do in the narrow channel, and reversed, but, the tug having taken a course directly across the river, a collision ensued, whereby the tow was injured. *Held* that, in view of the steamer's ignorance of the tug's intention, she did all that good seamanship required, and was not in fault.

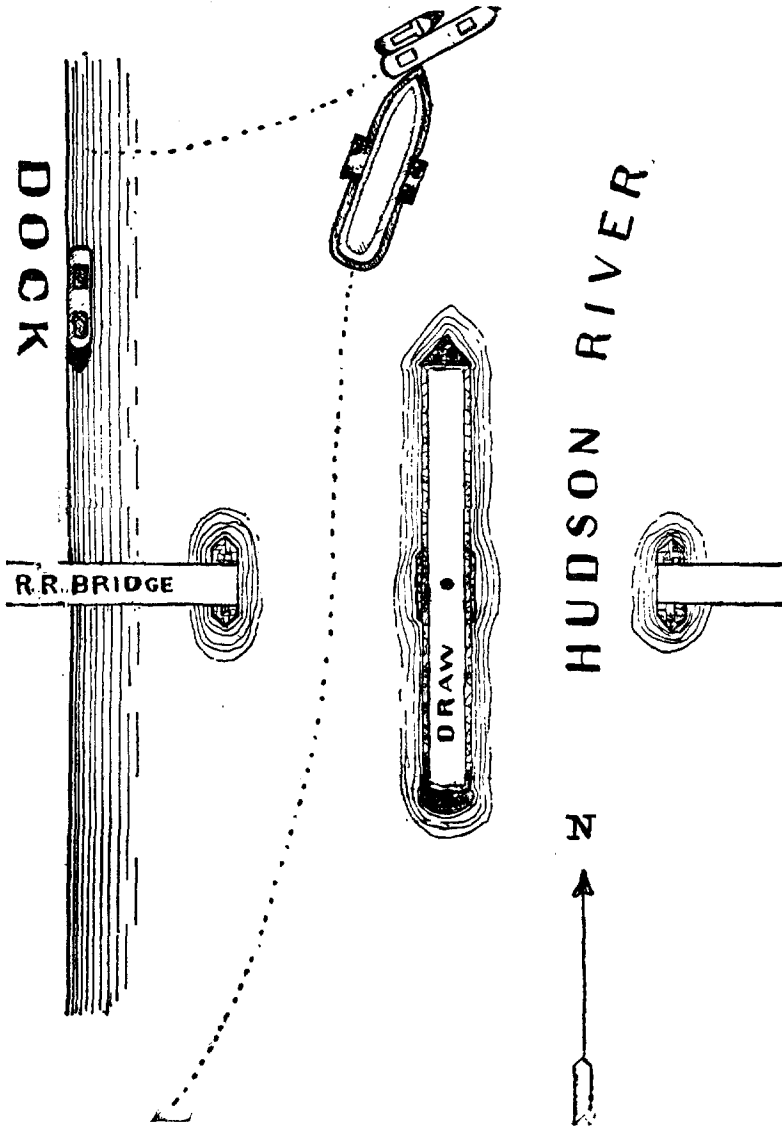
In Admiralty. Libel for collision. Dismissed.

George Clinton, for libelant.

Amos Van Etten, for claimant.

COXE, District Judge. On the morning of the 14th day of September, 1892, the canal boat Harrigan while lashed to the tug Vassar was injured by a collision with the steamboat Valentine. Soon after the accident and before this suit the Vassar was destroyed by fire. The libel is, therefore, against the Valentine alone. The Valentine is a large side-wheel steamboat, 218 feet over all and 62 feet beam. The Vassar is a small river tug. Just before the collision the Valentine, having discharged the tow which she had brought up the river, was lying some six or seven hundred feet below the railroad bridge of the New York Central & Hudson River Railroad at Albany. At the same time the Vassar was at Skinner & Arnold's dock about 400 feet above the bridge, and had swung the canal boat out from the dock preparatory to making a trip up the river. The Valentine having occasion to go to her dock, which was above the bridge, whistled for the draw which was

opened to permit her and two other vessels to pass. The drawbridge is some 400 feet in length. Between the center pier on which the bridge swings and the west pier there is a space of about 185 feet of clear water. The situation can easily be understood by an examination of the following map:



The libellant concedes the negligence of the Vassar. There is no dispute that the Vassar saw the Valentine when the latter was below the bridge and knew that she was coming up the river through the open draw. While the Valentine was in the draw the Vassar started with her tow on a course directly across that of the Valentine. Whether the Vassar steered directly east or was on a rounding course under a starboard helm is immaterial, for either course would have brought her directly across the bows of the Valentine. When the Valentine first saw the Vassar the Valentine was in the draw, and the Vassar had just disengaged the canal boat from the dock or a contiguous boat. Nothing in the tug's actions at that time indicated what her intention was. The Valentine blew a signal of inquiry but got no response. She then reversed and ported her helm as far as she could safely do so in the narrow channel of the draw. The Vassar in the mean time kept directly on her course and the collision followed.

It is manifestly unfair to judge the conduct of the Valentine in the light of subsequent events, and to charge her with a knowledge of all the facts which were developed at the trial. The question is, what did she do or omit to do which careful seamanship required, based upon the situation at the time? If she could have known that the Vassar intended, without signal or warning of any kind and in defiance of every rule of prudence, to keep directly on a course across the river, it is possible that she might have averted the accident. An elaborate and ingenious calculation based upon the supposed positions of the boats, their rate of speed, and distance apart, seems to indicate that the Valentine might, perhaps, have avoided the accident by starboarding and passing to the left under the stern of the Vassar. The difficulty with this reasoning is that it proceeds upon the erroneous hypothesis that the Valentine knew or might have known that the Vassar intended to take the dangerous and erratic course which she did take. The pilot of the Valentine was not endowed with prophetic power; he supposed, as he had a right to suppose, that upon discovering that the large steamboat was coming up the river the tug would not attempt to run across her bows. Believing that the Vassar would stop and reverse, the Valentine did all that prudent seamanship required. She gave the signal to go to the right, and immediately reversed her engines and ported her helm. The only tenable theory to be drawn from the testimony is that the accident was occasioned solely by the reckless course of the Vassar. If her course could have been foreseen it is possible that the accident might have been avoided, but the Valentine could not have foreseen it. It is thought that the absence of a lookout did not in any appreciable degree contribute to produce the collision. It follows that the libel must be dismissed.

LADD v. WEST et al.

(Circuit Court, D. New Hampshire. March 22, 1893.)

1. REMOVAL OF CAUSES—MOTION TO REMAND—SUIT IN AID OF ACTION AT LAW.

Defendants, B. and W., were residents of New York, and as partners operated a brickyard in New Hampshire. In 1889, plaintiff, an adjoining landowner, brought an action at law in a state court against B., the managing partner, alone, alleging that he was unlawfully damaged by smoke and noxious vapors arising from the brick manufactory, in which action there was judgment for the plaintiff. Later plaintiff brought another action at law against the same defendant, alleging a similar grievance at a subsequent period, and still later a proceeding in equity against both partners and B. individually, setting up the former judgment, and the pendency of the later action at law, and praying for consolidation, perpetual injunction, and the assessment and recovery of damages accruing subsequently to the proceedings at law. The defendants filed removal papers in the equity proceeding. *Held*, that the proceeding was not an original bill, but was a proceeding in equity, based upon and in aid of the prior proceedings and judgment at law, and as such was not removable; and that the fact that the plaintiff had brought in a new party defendant, who was a partner in the business sought to be regulated, did not alter the character of the proceeding.

2. SAME.

In such case, it being doubtful whether the court had power, on a motion to remand, to order the pleading recast for the purpose of separating law and equity matter, and compelling the claim for damages to be stated at law, with a view to taking jurisdiction of that part of the controversy only, it would not, on such motion, determine whether the claim for damages was incident to the injunction jurisdiction so as to be cognizable in equity, but the whole case, as presented by the record, would be remanded to the state court.

In Equity. Bill by Daniel W. Ladd against James G. West and William P. Bannigan, partners doing business as the Epping Brick Company, for injunction and other relief. Heard on motion to remand to the state court from which it was removed. Granted.

Streeter, Walker & Chase and Mr. Frink, for plaintiff.
Calvin Page and E. G. Eastman, for defendants.

ALDRICH, District Judge. In 1888 the defendants, who were residents of the state of New York, were operating a brickyard in Epping, N. H., under the name of the Epping Brick Company. In 1889 the plaintiff, who was an adjoining landowner, brought an action at law in the state court against Bannigan, the managing partner, alone, alleging, in substance, that he was unlawfully damaged by smoke and noxious vapors arising from the brick manufactory, in which action there was judgment for the plaintiff. Later the same plaintiff brought another action at law against the same defendant, alleging the same kind of a grievance at a subsequent period, and still later a proceeding in equity against both partners and Bannigan individually, setting up the former judgment, and the pendency of the later action at law, and praying for consolidation, perpetual injunction, and the assessment and recovery of damages accruing subsequent to the proceedings at law, by reason of the wanton and reckless manner of doing business, claimed in the sum of