

We are of opinion that this decree must be reversed. We think the evidence is very clear that the Foster went to Escanaba late in November, at the request of the libelant, on the statement of its agent that when she got to Escanaba she would be loaded. She arrived at Escanaba on the 26th of November. Had the libelant then loaded her, she could have made the eighth trip that season, because her consort, the steamer Tuttle, who towed her to Escanaba, did load and take a cargo down to Lake Erie. The libelant was bound by contract to load the Foster in four days. It did not do so. This was a breach of contract on its part for which it is no excuse now to say that performance was prevented by act of God. The agent of libelant knew, or ought to have known, that the ore was so frozen at Escanaba at the time he directed the Foster to go there that she could not load. Upon this point the evidence is clear. The libelant is, therefore, clearly estopped, having induced the Foster to go to Escanaba with the promise that she should have a load, to rely on the frozen condition of the ore as an excuse. The failure to make the eighth trip must be charged to the fault, not of the respondents, but of libelant. We do not think there is any sufficiently definite proof of damage caused by the laying up of the Foster at Escanaba during the winter to warrant a decree in favor of the respondents on their cross bill.

The judgment will be reversed, with instructions to dismiss both the libel and the cross libel, at the costs of the libelant.

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THE PERCY BIRDSALL v. THE INVERTROSSACKS AND THE JAMES  
McCAULLEY.

THE INVERTROSSACKS v. THE JAMES McCAULLEY.

(District Court, E. D. Pennsylvania. May 5, 1893.)

Nos. 5 and 10.

1. COLLISION—VESSEL AT ANCHOR—TUG AND TOW—NEGLIGENCE.

A schooner lay at anchor, well over to the western side of the Delaware river, where the channel was over a mile wide, with her sails taken in, her bow pointing down the river, and her anchor light properly set. A tug with a large and heavy iron ship in tow, at the end of a long hawser, came up the western side of the channel. The tug passed the schooner a short distance off the port side, but the ship collided with the schooner's starboard bows, and inflicted considerable injury. *Held*, that both the tug and the ship were at fault,—the tug, in running with her unwieldy tow so far westward in the channel, and in approaching so near the schooner before turning off; and the ship, in failing to change her course and follow the tug until collision was inevitable.

2. SAME—DUTY OF TUG AND TOW.

The fact that the ship was heavy, and the tug's control of her at the end of a long hawser very imperfect, imposed on both unusual vigilance, and rendered imperative the duty of keeping well to the eastward.

3. LIBEL IN REM—DEFENSES—RELEASE ON BOND—LOSS OF LIBELED VESSEL—LIMITATION OF LIABILITY.

The fact that a ship, against which an action in rem is pending, after her release on bond, is lost in a subsequent venture, and that a petition for limitation of liability was afterwards filed, is not a defense to the libel.

In Admiralty. These were two libels in rem for collision,—one brought in behalf of the schooner Percy Birdsall against the ship Invertrossacks and the tug James McCaulley; and the other, in behalf of the owners of the Invertrossacks against the James McCaulley. Decree in the former for libelants against both the ship and the tug; and in the latter, in favor of the ship, for half damages.

Curtis Tilton, for the schooner.

J. Rodman Paul and Horace L. Cheyney, for the ship.

John F. Lewis, for the tug.

BUTLER, District Judge. The schooner was at anchor on the night of January 10, 1892, in the river Delaware, well over to the western side, off Bombay hook, where the channel is a mile or more, in width. Her sails were taken in, and an anchor light properly set. The Invertrossacks, a very large and heavy iron ship, in tow of the McCaulley, at the end of a long hawser, was coming up on the western side of the channel. The tug passed the schooner a short distance off on the port side, while the ship came into collision with her bows (which pointed downwards) on the starboard side, inflicting considerable injury.

I do not find anything to justify a belief that the schooner was in fault. She was properly anchored in a suitable place, and all usual and necessary precautions were observed to warn approaching vessels of her position. Furthermore she was plainly seen from both the tug and ship at sufficient distance to enable them to keep off. No additional precautions (if any could have been taken) would have been of service.

I find both the tug and ship to have been negligent; the former in running with her unwieldy tow so far westward in the channel, and in approaching so near the schooner before turning off; and the ship in failing to change her course and follow the tug until collision was inevitable. The evidence fully justifies a belief that the latter was negligently handled. The warning of her lookout was not promptly heeded. She seems to have virtually committed herself to the guidance of the tug, and to have paid little attention to the latter's movements. The fact that the ship was very heavy and the tug's control of her, at the end of a long hawser, very imperfect, imposed on both unusual vigilance, and rendered the duty of keeping well over to the eastward, the more imperative. I will not discuss the evidence; it is sufficient to indicate my reasons for the conclusions reached.

A decree in favor of the schooner must be entered against both; and in favor of the ship against the tug for half damages.

The defense based on the fact that the ship after her release on bond, was lost in a subsequent venture, and that a petition for limitation of liability was afterwards filed has not been overlooked; but it cannot be sustained. The authorities cited are inapplicable to such a state of facts as exists here. It would be most unreasonable to subject the libellant to the consequences of such loss, after the vessel had been taken from her control, or from under her

attachment, and risked in another venture in which she had no interest or concern. The owners' prayer for limitation came too late; and came only for the purpose of shifting from their own shoulders a loss, (which arose exclusively from their own subsequent venture, and which they should consequently bear) to the shoulders of the libellant, who had no connection with it.

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THE CHARLES L. JEFFREY.

CARLETON et al. v. THE CHARLES L. JEFFREY.

(Circuit Court of Appeals, First Circuit. April 28, 1893.)

No. 29.

COLLISION—SCHOONERS—CROSSING COURSES—LIGHTS.

On a clear, cold night in March, with a fresh wind from the N. N. W., a collision occurred between the schooners Carleton and Jeffrey, the latter striking the former at right angles, just forward of the mainmast, on the starboard side, and sinking her. The Carleton was headed W. S. W., or nearly so, on the starboard tack, and making about nine knots, while the Jeffrey was on the port tack, heading about the opposite course, and running from seven to eight knots. The vessels sighted each other from one and a half to two miles apart. The Jeffrey was properly manned, and had a competent lookout. Her witnesses testified that they first saw the Carleton's red light nearly ahead, and the Jeffrey was kept off some three or four points under a port helm; that the red light disappeared, and the Carleton was then discovered about four points on their port bow, and crossing it, whereupon the Jeffrey's helm was put hard a-port, and in a short time she struck the Carleton. None of the witnesses saw any green light on the Carleton. The Carleton was manned by the captain at the wheel and the cook on lookout. They testified that they first saw the Jeffrey's green light about half a point on their weather bow, and that it continued to draw to windward until it was three points on their starboard hand. The cook admitted that after he went on lookout he spent some 10 or 15 minutes in trimming the sails, and that he also went below for a muffler. *Held*, that the Carleton was in fault for not having a sufficient green light, while the Jeffrey was free from blame, inasmuch as the Carleton's red light probably intersected to starboard, and misled her into the supposition that the Carleton was crossing to windward, when in fact she was drifting or sailing to leeward.

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

This was a libel in admiralty by Philander J. Carleton and others, owners of the schooner Joe Carleton, against the schooner Charles L. Jeffrey, Frank Harrington, claimant, for the loss of the former vessel by collision. The libel was dismissed, and libellants appeal. Affirmed.

Eugene P. Carver, (Edward E. Blodgett, on the brief,) for appellants.

Edward S. Dodge, for appellee.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.