

was perfected within a year after starting up the Clay Street Hill road, in San Francisco. According to the evidence, the said Clay Street Hill road was started about the last of August or the 1st of September, 1873. Hallidie made his application for the patent in question March 24, 1876. It was then about seven months after the starting of said road before said application was made. As it appears that when started the grip car was not perfected, and that for some time its use was experimental, I cannot say that the grip car was perfected, and in public use, for two years prior to said application. The burden of proof was upon respondent to show that the patented device was in public use for that time, and I think it has failed.

Some of the legal questions involved in this case, it would appear, must have been presented in a case tried by the circuit court of this circuit, sitting at San Francisco, entitled Traction Railway Co. v. Sutter Street Railroad Co. The judgment roll in that case was introduced in evidence in this case. So far as the court can see that the points of law necessarily involved in that case are the same as those involved in this, it will and has been treated as persuasive authority.

It will be seen that I have found all the issues presented in this case in favor of complainant. It is therefore ordered that complainant have a decree as prayed for in its bill.

THE COLUMBIA.

THE ELLEN HERON.

SULLIVAN v. THE COLUMBIA et al.

(District Court, E. D. Pennsylvania. May 9, 1893.)

1. SHIPPING—STEAMERS—INJURIES TO BARGES—SWELLS—EVIDENCE.

The barge E., loaded with brick, in tow with three other barges, going down the Delaware river in the customary course, well eastward of the channel, met the steamer C. at a narrow part of the channel, during ebb tide, going at full speed, and creating swells, the effect of which was to sink the E. by bringing her in contact with the barge in front. *Held*, that the steamer having failed to slow down, as was her custom when meeting these tows on their daily trips, was liable for the injury.

2. SAME—EVIDENCE.

The "swells" and violent commotion of the water, together with the positive testimony of libellant's witnesses, sufficed to overthrow the steamer's contention that she slowed down in time.

3. SAME—CONTRIBUTORY FAULT—EVIDENCE.

The steamer's claim of contributory fault on the part of the barge in being overloaded, in not having a longer hawser, and in the failure of her tug to sound a signal, could not be sustained; it appearing that the load was no more than usual, that a lighter load would have increased the danger from swells, and a longer hawser would have exposed her to other dangers; and, in respect to the signal, that the tug had every reason to believe, being in plain view, that the steamer would slow down as usual.

4. SAME—EVIDENCE.

The fact that another steamer passed down the stream to the eastward of the tow immediately after the C. had passed to westward was

unimportant, the former having taken an unusual course merely because the tow was in front, and having produced little disturbance of the water, in consequence of going down with the current.

In Admiralty. Libel by John J. Sullivan, master of the barge or lighter Ellen Heron, against the steamboat Columbia and Frank G. Edwards, master, for injuries from swells. Decree for libellant.

Henry R. Edmunds, for the Ellen Heron.

Alfred Driver and J. Warren Coulston, for the Columbia.

BUTLER, District Judge. On September 14, 1891, as the libellant, in tow of the tug John Wear, with three other barges, was passing down the Delaware river, laden with brick, (when nearly opposite Jack's island, three-fourths of a mile above Torresdale,) she met the steamboat Columbia, passing up; and in consequence of the commotion produced in the water by the latter vessel, was brought into violent contact with the barge in her front, whereby she was injured and sunk. The tide was ebb, and the customary channel narrow at that point. The tow was made up in the method usual for the voyage on which it was bound; and she was on the customary course down—well eastward of the channel. The Columbia was on the usual course up—one which she traversed daily—near the western side. She very frequently met such tows coming down in that vicinity; and theretofore had always slacked up so as to pass without endangering their safety. In consequence of the narrowness of the channel, and shallowness of the water with the tide down, the Columbia in passing up at full speed would necessarily create great commotion, sending chopping swells eastward, and creating "suction" westward, and thus endanger tows and other small craft passing down. This is not controverted; nor is it denied that she should have slowed down on this occasion as she had previously. She asserts that she did so; and thus is raised the principal question in the case. The evidence respecting it is conflicting; but its weight is clearly against the respondent. Indeed the very unusual commotion made in the water would, of itself, seem to leave no room for doubt. The commotion was made by the Columbia; there was nothing else to make it; and witnesses aboard the tow observed and mentioned this consequence of her passage at the time. It is not suggested that the tow created it, nor is any attempt made to account for its existence otherwise. I have no doubt the Columbia failed to slow down in time. The libellant's witnesses say her speed was not slackened until nearly abreast of them.

The respondent thinks the barges were overloaded, and the tow improperly constructed. The evidence does not sustain either allegation. The libellant was heavily loaded, but not more so than is usual with such vessels, passing between the points involved. And besides a lighter load would have rendered her more liable to mount the forward barge, as she did. The several vessels were carrying their customary daily loads, and but for the extraordinary commotion created in the channel would have encountered no

danger. The loading had no influence on the result. The tow as before suggested was constructed according to uniform custom for the voyage. What is a proper construction for towage upon one water and voyage may not be upon another. Experience has demonstrated that the method adopted here was proper for this voyage, so clearly that a material departure from it might possibly be considered unjustifiable. If the hawsers of the rear barges had been longer, as it is urged they should have been, it is possible the danger of libellant's mounting the barge in front would have been less; but it is probable that she would thus have been exposed to other dangers quite as serious. Being less under control of the tug, she would have been more likely to sheer and collide with other vessels, or to swamp or capsize in such water as she encountered.

Possibly the tug should have sounded some signal as the Columbia approached, but up to the last moment she had every reason to believe that the latter would slow down, as she had previously done. The consequences of her failure to do so could not be appreciated until after she had passed. The consequences were not realized until she was some distance away. She cannot complain of the absence of such signal,—having seen the tow in ample time; and if she could, the libellant would not probably be responsible for the failure to give it. It is urged that the tug should have gone further eastward. But it is at least doubtful whether she could have done so with safety. An attempt to do it in the emergency would probably have increased her danger from the waves, by placing her in a less favorable position to meet their force. She was in her customary and proper course, and had no reason to apprehend danger until too late to avoid it.

The circumstance that the Edwin Forrest passed down eastward of the tow directly after the Columbia passed up, does not seem important. It is not doubted that there was sufficient water where she passed, but it was outside the channel, was an unusual course for vessels bound in that direction, and the Forrest took it only because the tow was in front, and she could not properly pass to westward. Going down with the current she did not materially disturb the water and her passage had no influence in producing the accident.

The proofs do not justify the allegation that the libellant's anchor was hanging over her bow, and thus caused her injury. The opinions of the respondent's witnesses is successfully met, not only by the opinions of others equally reliable, but also by the positive testimony of persons who knew the anchor was elsewhere. A decree must therefore be entered sustaining the libel.

CENTRAL TRUST CO. OF NEW YORK v. VIRGINIA, T. & C. STEEL & IRON CO.

(Circuit Court, W. D. Virginia. May 11, 1893.)

1. CONSOLIDATION OF CAUSES—SUITS FOR APPOINTMENT OF RECEIVERS—DEPENDENT CORPORATIONS.

The C. Trust Co. filed a bill in the circuit court alleging the insolvency of the V. Iron Co., as evidenced by a judgment by confession on which execution had been returned nulla bona. By consent, a receiver was appointed. On the same day two other bills were filed,—one by the C. Trust Co. against the S. A. Railroad Co.; and the other by the V. Iron Co. against the B. Land Co.,—alleging the insolvency of the defendant companies, as evidenced by judgments by confession and executions returned nulla bona. By consent, receivers were appointed. Afterwards a petition by stockholders of the Iron Co. and one B., who claimed to be the "valid receiver" of the three corporations under an order of a state court, was filed, asking that they be made parties to the suits in the federal courts, and that the several causes be consolidated, and heard together. The petition alleged that the Iron Co. was the main corporation; that the S. A. Railroad Co. and the Land Co. were branches created by a diversion of the property of the Iron Co.; that practically they were all one corporation; that the judgments were confessed without authority, and were fraudulent and collusive; that the appointment of receivers by the federal courts was obtained by misrepresentation, fraud, and collusion. The allegations of the petition were denied under oath by the Trust Co., the insolvent corporations, and the receivers. *Held*, that the causes could not properly be consolidated, the interests involved in the several suits having reference to distinct corporations, so far as appeared on the face of the record.

2. JURISDICTION—DIVERSITY OF CITIZENSHIP—RESIDENCE OF CORPORATION.

A bill was filed in the circuit court for the western district of Virginia, alleging that complainant was a corporation created by the laws of New York, and that the defendant was a corporation created by the laws of New Jersey, and a citizen and resident of that state, having a principal place of business at Bristol, Va., in said district. *Held*, that the court had not jurisdiction of the suit by reason of the diversity of citizenship of the parties, neither of them being a resident of the district, as required by the acts of congress of March 3, 1887, and August 13, 1888.

3. SAME—CONSENT—WAIVER OF OBJECTION.

The requirement that one of the parties shall be a citizen of the state in which the suit is brought (Acts March 3, 1887, and August 13, 1888) cannot be waived by consent, or by appearing and pleading to the merits, although the parties are corporations organized under the laws of different states, and one of them has its principal place of business in the state and district where suit is brought.

In Equity.

Statement by PAUL, District Judge:

This is a suit in equity, brought by the complainant company, the Central Trust Company of New York, a corporation created by and existing under the laws of the state of New York, and a citizen and resident of said state of New York, against the defendant company, the Virginia, Tennessee & Carolina Steel & Iron Company, a corporation created by and existing under the laws of the state of New Jersey, and a citizen and resident of said state of New Jersey.

On the 8th day of August, 1892, the complainant company presented its bill to Hon. Hugh L. Bond, circuit judge of this court, praying for the appointment of a receiver to take charge of the lands and all other assets of the defendant company. It alleged the insolvency of the defendant company, as evidenced by a judgment obtained against it on the same day in this court,