worthy and unfit condition. The openings in the deck were covered by loose planks. There were hatch covers and tarpaulins aboard the barge to cover the openings, and there was nothing unusual in the weather. It was cloudy, with a southeast wind, but with no special indications at the time of tempestuous weather, or of anything to excite apprehension for the safety of the tow in the contemplated voyage.

We find no error in the decree of the district court, and it is affirmed, with costs to the appellees.

SULLIVAN et al. v. LAKE SUPERIOR ELEVATOR CO.

(District Court, D. Minnesota. June 19, 1893.)

WHARVES—DANGEROUS PREMISES—INJURY TO SHIP.

A vessel moored at defendant's wharf was ordered to drop down below the elevator alongside which she lay, and did so, mooring abreast of a trestle maintained by defendant. This trestle was known to both parties to be unsafe, and it blew down, and injured the vessel. When the captain was notified of its condition, the vessel's machinery was undergoing repairs, so that she could not have been moved by her own steam in time to avoid the accident, as the wind was then blowing strongly. It was perfectly practicable to move her by hand lines with the force then on board, but, instead of doing so, the captain started for a tug office, a mile distant, for assistance, and before he returned the mischief was done. *Held*, that the vessel was in fault as well as defendant, and the damages should be divided.

In Admiralty. Libel by L. S. Sullivan and others against the Lake Superior Elevator Company for injuries to a vessel. Decree for half damages.

H. R. Spencer, for libelants.

Walter Ayers, for respondent.

NELSON, District Judge. The steamer Rust was injured while tied up alongside of a private dock owned by the defendant company, and erected on navigable waters at Duluth, upon which were located the company's elevators. The vessel had been ordered to drop down below the first elevator, to allow another steamer, having a prior right, to load therefrom. The captain of the Rust obeyed the order, and tied up opposite a trestlework built between two of the elevators, upon the top of which a covered passageway was constructed for carrying grain. While moored to the dock at this place the trestle was blown over, and fell upon the deck of the vessel, injuring her, and this admiralty suit in personam is brought to recover damages for the injury sustained.

No question is raised as to the jurisdiction of the court, which appears to be clear under the doctrine announced in The Plymouth, 3 Wall. 20, that the substance and consummation of the wrong and injury complained of took place upon navigable waters. The trestlework owned and built by this defendant company, and erected near the side of the dock where the Rust was moored, was structurally in an unsafe condition, and known to be so by

the owners. The defendant company was legally in fault in permitting boats to moor at the place where the Rust was dropped down, under the circumstances, and the only controverted question in the case is, were the persons in command of the vessel in fault, and should the damages be equally divided?

Where both parties are in fault, the admiralty courts, according to the principles of justice and equity, apportion the damages; and in this case the rule laid down in Atlee v. Packet Co., 21 Wall. 395, that the entire damages should be equally divided between the parties, is equitable. The evidence satisfies me that before the trestle fell the persons in charge of the Rust were notified that it was weakened by the force of the wind blowing in the direction of the vessel, and that danger was imminent. The engineer was repairing the machinery, and there was not sufficient time, after notice of the unsafety of the trestle, to put it together and get up steam, and move her in that way to a place of safety; but the proof is clear that by the exercise of the experience and skill which those in command of her are presumed to possess she could have been moved by the hand lines. The danger was imminent, and, instead of increasing the number of bow lines and letting go the stern lines, so that the vessel would swing out, or dropping her down or moving her up, the captain started for a tug office, located at least a mile from the dock, to procure assistance. The vessel had large hawsers aboard, and a crew of 15 men, and the snubbing posts were strong. The wind was fresh, but not blowing a gale. The vessel was provided with ample appliances for moving her by hand. The slip in the harbor protected her to some extent, and the maneuver of swinging her out might have been accomplished by the exercise of ordinary care. This would have been a prudent course to adopt, or she could have been moved up or dropped down with safety. There was nothing in the existing conditions, shown by the evidence, to prevent successful action on the part of those in charge of the vessel. They were in fault, and contributed to the injury sustained.

The damages must be equally divided. A reference is usually ordered to ascertain the amount, but, as proof was offered pro and con on the trial, and received, I shall determine the amount of damages. The amount claimed and proved as the damage to the vessel, tackle, and apparel I find to be $1,501.17. One-half of this sum is $750.58. The rule suggested by the proctor for defendant by which to measure damages is not correct. The vessel must have a smokestack, and the old one could not be repaired. She must have new ropes, and they were purchased, and their value proved. A decree is ordered in favor of the libelants for $750.58 and costs.

LACKAWANNA COAL & IRON CO v. BATES.

(Circuit Court, W. D. Missouri, W. D. June 5, 1893.)

REMOVAL OF CAUSES—SUITS AGAINST CORPORATIONS—EXECUTION AGAINST STOCKHOLDERS.

Rev. St. Mo. 1889, § 2517, provides that after the return nulla bona of an execution against a corporation the judgment creditor may, on motion, and after notice in writing to the person to be charged, have an execution against any stockholder therein for the amount of his unpaid stock. *Held*, that this proceeding to charge the stockholder is not merely auxiliary to and dependent upon the suit against the corporation, but is itself a "suit," within the meaning of the removal of causes acts, and may be removed by the stockholder to a federal court when the requisite diversity of citizenship exists. Webber v. Humphreys, 5 Dill. 223, overruled.

At Law. On motion to remand to the state court. Denied.

Statement by the court:

The case arose out of the following state of facts: The plaintiff recovered judgment in the state court against the North Side Construction Company and others for the sum of $26,250 and costs. The defendant company is a corporation under the laws of the state of Missouri. Execution issued on said judgment, and was returned nulla bona. Thereupon the plaintiff filed its motion in said state court for an execution against Theodore C. Bates, as a stockholder in said defendant company, for unpaid stock. This proceeding is predicated of section 2517, Rev. St. Mo. 1889, which provides, in substance, that if any execution be issued against any corporation, and there cannot be found any property or effects whereon to levy the same, execution may be issued against any stockholder to the extent of the amount of the unpaid balance of such stock by him owned: "provided, always, that no execution shall issue against any stockholder except upon an order of the court in which the action, suit, or other proceedings shall have been brought or instituted, made upon motion in open court, after sufficient notice in writing to the person sought to be charged; and upon such motion such court may order execution to issue accordingly: and provided, further, that no stockholder shall be individually liable in any amount over and above the amount of stock owned." Said Bates was and is a citizen of the state of Massachusetts. Being found here, service of notice was had upon him, and on his appearance to the proceeding in the state court he filed petition for the removal of the cause into this court, on the ground of his being a citizen of another state, Accordingly the proceeding was removed into this court. The plaintiff thereupon filed its motion to remand the case on the ground that the same was not removable under the act of congress.

Johnson & Lucas, for plaintiff.

Lathrop, Morrow & Fox and Kenneth McC. De Weese, for defendant.

PHILIPS, District Judge. The question to be decided is whether or not this proceeding is a suit, within the meaning of the judiciary act, and, as such, removable from the state court to the United States circuit court, under the second section of the act of congress of March 3, 1887, as amended August 13, 1888. The contention of plaintiff is that the proceeding under the state statute is merely ancillary, in aid of the writ of execution, and, as such, is to be regarded as a continuation of the proceeding on the judgment; and that, as the principal cannot be removed hither, neither can this, its mere incident. Without undertaking to review the