before this engagement, but never seriously sick. On the other hand, it is evident that when he engaged his service he had, unknown perhaps to himself, a disease, progressive and fatal in its character. It not only disabled him from service during the whole voyage, it also kept him in hospital during the whole stay of the schooner in this port,—four weeks. Indeed he is still in hospital, not cured of this disease. It seems clear that there is a breach of warranty in this case, and the libel is dismissed.

THE PHOENIX.

CORNWELL v. ROGERS et al.

(Circuit Court of Appeals, Second Circuit. November 17, 1893.)

COLLISION BETWEEN STEAMERS CROSSING COURSES.

A steam barge in a fog heard the fog signals of a tug with tows on her starboard hand. Both vessels were proceeding slowly, and neither could be seen from the other at a greater distance than 400 feet. *Held*, that for the collision which ensued between the barge and one of the tows the tug was not in fault, she having reversed, in obedience to rule 21, when she saw the steam barge kept coming towards her on a course involving the risk of collision; but that the steam barge, on which rested the duty of avoidance, must be held in fault, on the finding of the trial court on conflicting evidence that she did not reverse promptly on discovering the tug.

Appeal from the District Court of the United States for the Southern District of New York.

In Admiralty. Libel by William L. Rogers, master and owner of the canal boat Bartholomew Brewing Company, against the steam barge Phoenix (Charles C. Cromwell, claimant) and the steam tug Atlanta, for damages from collision of the canal boat, while in tow of the Atlanta, with the Phoenix. The district court held the Phoenix solely in fault for the collision, and entered a decree for libelants against the Phoenix, dismissing the libel as against the Atlanta. The claimant of the Phoenix appeals. Affirmed.

Treadwell Cleveland, (Gherardi Davis, on the brief,) for appellant.

W. W. Goodrich, for the Atlanta, appellee.

Wilhelmus Mynderse, (Butler, Stillman & Hubbard, on the brief,) for libelant, appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. This is an appeal from a decree of the district court in the southern district of New York in favor of the libelant, as owner of the canal boat Bartholomew Brewing Company, against the steam barge Phoenix, and dismissing the libel as against the steam tug Atlanta.

The canal boat was the outer of two boats on the port side of the Atlanta, which had another boat on her starboard side. The

fleet was bound from the Morris Canal basin, Jersey City, to the Atlantic basin, Brooklyn. There was a fog, which had lifted a little before they started, but soon shut down again, somewhat thick near the water. While thus proceeding on their way, the fleet encountered the Phoenix, which was on her way from pier 1, North river, to Communipaw. The latter vessel came into collision with the libelant's boat, striking her a little forward of midships, nearly at right angles.

The testimony is conflicting. It is, however, conceded that when the fog signals of the Atlanta were first heard on the Phoenix, the former was on the latter's starboard hand. The duty of avoidance, therefore, was plainly on the latter. We are satisfied from the proof that the fog was so dense that neither vessel could see the other at a greater distance than 400 feet. Both vessels, after the fog shut down, proceeded slowly.

We agree with the district judge in holding that there "was no such clear case as required the Atlanta to disregard the twenty-first rule," which provides that steam vessels, when approaching another vessel, so as to involve risk of collision, shall slacken, and, if necessary, stop and reverse; and, as the evidence supports the conclusion that the Atlanta did reverse when she saw that the Phoenix kept coming towards her on a course involving risk of collision, she must be held free from fault. Were we further satisfied that the Phoenix also reversed promptly as soon as she saw the Atlanta, we would be strongly inclined, disregarding any minor faults of navigation or errors perpetrated in the brief space after collision seemed unavoidable, to hold the catastrophe to be an accident without fault. But the testimony is in conflict upon the question of fact whether or not the master of the Phoenix delayed reversing, and, as the district judge in this case saw the witnesses, we accept his conclusion, since there is not a clear preponderance of proof the other way.

Decree affirmed, with interest to libelant, and costs to the Atlanta against the Phoenix.

PENNSYLVANIA R. CO. v. NATIONAL DOCKS & N. J. J. C. RY. CO.

(Circuit Court, D. New Jersey. December 16, 1893.)

No. 13.

1. FEDERAL AND STATE COURTS—RES JUDICATA.
   The decision of a New Jersey circuit court that, on an appeal in a proceeding wherein one railroad company has condemned a right of way across the tracks of another, it has power, under the state statute, to allow an amendment altering the plan of crossing, is, while unreversed, binding on the federal courts, and they cannot interfere on the ground that the state court was without jurisdiction to allow the amendment.
2. SAME—INJUNCTION BY FEDERAL COURTS—CONDEMNATION PROCEEDINGS.
   A federal court has no authority, pending the determination of an appeal in condemnation proceedings in the state courts, to preserve by injunction the status quo between two railroad companies in respect to a crossing by one under the tracks of the other, when the condemning company has paid into the state court the assessed compensation, which, by the express terms of a state statute, whose constitutionality has been finally affirmed by the state courts, gives it a right to immediately proceed with the work. Erhardt v. Boaro, 5 Sup. Ct. 565, 113 U. S. 537, and Great Western R. Co. v. Birmingham, etc., R. Co., 22 Eng. Ch. 597, distinguished.

In Equity. Bill by the Pennsylvania Railroad Company against the National Docks & New Jersey Junction Connecting Railway Company for an injunction to restrain the condemnation by defendant of a right of way for its road through the yard of the complainant company in Jersey City. Injunctions were denied in prior stages of the condemnation proceedings. 51 Fed. 858, and 56 Fed. 697. Motion is now made for a preliminary injunction to preserve the status quo pending final disposition of the condemnation proceedings on appeal. Denied.

James B. Vredenburgh, Joseph D. Bedle, and Samuel H. Grey, for complainant.

Dickinson, Thompson & McMaster, J. R. Emery, and C. L. Corbin, for defendant.

ACHESON, Circuit Judge. The complainant invokes the equitable jurisdiction of this court to restrain the defendant corporation from entry upon the complainant's lands,—its terminal yard and premises in Jersey City,—and from constructing its railroad across the same, under condemnation proceedings, pending litigation upon a writ of error from the supreme court of New Jersey to the circuit court of Hudson county, which the complainant and its lessor have obtained, and also until the final determination of any writ of error from the court of errors and appeals, to the judgment of the supreme court which may be sued out by either side hereafter.

It appears that, upon appeal by both sides from the report of the commissioners appointed under the condemnation petition, the circuit court of Hudson county directed an issue, afterwards amended by the allowance of the court, which was tried by a jury, resulting in a verdict finding the value of the land taken, and the damages sustained, to be $95,000. Thereupon, an application