

thereof, as the plaintiff says in said first count, and as the defendant is advised and believes, then it appears by said first count, and by the terms of the policy set forth therein, that the plaintiff is not legally liable for such constructive total loss of the cargo insured, or otherwise; and also for that it appears by the policy set forth in said first count that the plaintiff is entitled to recover thereunder only for an actual total loss and destruction of all the goods insured, or for the actual total loss and destruction of a part of said goods, and neither such actual total loss and destruction of the whole, nor such actual total loss and destruction of a part, is properly averred in said first count.

And, demurring to the second count in said declaration, the defendant says that the same is not sufficient in law, for that the interest claimed in said second count is due only upon the obligation declared on in said first count and is wholly dependent thereon; wherefore, unless the said first count is sustained, the second falls with it.

Wherefore, for want of a sufficient declaration, the defendant prays judgment.

Eugene P. Carver, for plaintiff.

Lowell, Stimson & Lowell, for defendant.

PUTNAM, Circuit Judge. The court has scrutinized this record anxiously, hoping to be able to dispose of the point which the defendant has sought to raise, but it is unable to do so. The causes of demurrer assigned are that certain portions of the declaration are double, repugnant, ambiguous, and multifarious. The difficulty the court finds is that the parts to which the demurrer relates are merely inconsequential and immaterial, and therefore cannot, in the view of the law, result in duplicity, repugnancy, ambiguity, or multifariousness. The declaration alleges that the cargo of wire became a total loss, by the perils insured against, and also that the plaintiff is entitled to recover for a total loss. The latter allegation has a proper relation to the first. Interjected between these is one that the cargo was abandoned, and also an allegation as follows: "That the loss of the said cargo, by perils insured against, amounted to more than one-half of the whole value of said cargo, as declared in said policy." If, in lieu of this, it had been alleged that the loss amounted to more than one-half of, but less than, the whole value; that there had been an abandonment; and that, therefore, the plaintiff was entitled to recover a total loss, under the policy, —the case might have been other than it is. As there has been no cause of demurrer assigned for mere immateriality, the demurrer cannot be sustained. Any views which the court might now express touching the claim that, under the allegation of a total loss, the plaintiff cannot recover for a constructive total loss, would not relate to any issue now before us, and would not, therefore, be binding at the trial on the judge who may preside at that time. Therefore, while, according to the rules of the common law, under a declaration for a total loss a claim for a constructive total loss can be recovered, the court would not be justified in now passing on the question, as it arises under the statutes of Massachusetts. So far as the demurrer is concerned, the second count follows the first.

It may be that by a special answer, or otherwise, the defendant can compel the plaintiff to meet the issue which it seeks to raise in advance of the trial of the facts; but the court cannot take cog-

nizance of the attempt to do so, as the case now stands. Demurrer overruled; defendant to answer on or before the 11th day of March next; costs to abide the result.

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THE BRINTON.

FISHER et al. v. PENNSYLVANIA R. CO.

(Circuit Court of Appeals, Second Circuit. January 9, 1895.)

No. 39.

SHIPPING—LIABILITY FOR TORT—DRAGGING SUNKEN VESSEL.

After the sinking of a sloop by collision with a tug in a narrow channel, the tug, having rescued and landed the crew of the sloop, and returned to the place of collision, seeing the broken mast, boom, and sails of the sloop floating, made fast to them, and towed them several hundred feet, not intending to move the hull; but it also was dragged along the bottom by the wire shrouds, and thereby badly broken. *Held*, that the tug was liable for the damage thus done, her removal of the sloop not being justifiable as the abatement of a public nuisance, or for the protection of the sloop herself, or for the safety of navigation generally.

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

This was a libel by Peter Fisher and A. W. Stinemire, owners of the sloop Marietta, against the tug Brinton (the Pennsylvania Railroad Company, claimant), for damages to the sloop. The district court dismissed the libel. Libelants appeal.

For decision on libel against the tug for damages for collision with the sloop, see 59 Fed. 714.

Wing, Shoudy & Putnam and Charles C. Burlingame, for appellants.

Robinson, Biddle & Ward and Henry Galbraith Ward, for appellee.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. The libel in this cause was filed to recover damages for injuries occasioned to the sloop Marietta, the property of the libelants, in consequence of being dragged upon the bottom of the Arthur Kill by the tug Brinton, under the following circumstances: About half-past 11 on the night of September 5, 1893, the sloop, while bound up the Arthur Kill, was run into and sunk by the Brinton. The channel there was about 600 feet wide, and the sloop sunk on the New Jersey side of the channel, in about 18 feet of water. The Brinton rescued those on board the sloop, and landed them at Erastina, Staten Island. She then returned to meet a tow of loaded boats belonging to her owner, the Pennsylvania Railroad Company. When the Brinton reached the place of collision, those in charge of her saw the broken mast of the sloop, with the boom and sails, floating in the water. Thereupon, they fastened the Brinton's line to the broken mast, and towed the sloop a distance of several hundred feet, dragging the hull on the bottom of the channel. The Brinton's master did not intend to move the sloop,