

familiar with the art. By adducing such testimony, the defendants discharged themselves of the burden of proof, which at first rested upon them. They thereby established, at least *prima facie*, the identity of the fabric disclosed by the Booth patent with that of the patent sued on; and, this being so, the absence of any answering evidence on the part of the plaintiff must be regarded as decisive against him. The direction for a decree for the complainant is vacated, and the bill is dismissed, with costs.

THE MIAMI.

HOLMAR v. THE MIAMI.

(District Court, S. D. Alabama. October 26, 1896.)

No. 769.

ADMIRALTY JURISDICTION—SUITS IN REM—ASSAULT BY MASTER.

A libel in rem will not lie to recover damages for intentional and unlawful violence inflicted by the master on a stowaway. The latter being a mere trespasser on board, there is no breach of any contractual or maritime obligation; and the suit is not in the nature of an action on the case, but is for an assault and battery.

This was a libel in rem by A. A. Holmar against the steamship Miami to recover damages on account of personal violence inflicted upon the libelant, a stowaway, by the master. The cause was heard upon exceptions to the libel.

Smith & Gaynor, for libelant.

Pillans, Torrey & Hanaw, for the Miami.

TOULMIN, District Judge. The contention on the part of the libelant is that this suit is in the nature of an action on the case, and it is stated in the libel that it is an action on the case for the breach of a duty by the master and owners of the vessel to the libelant; but the facts of the case, as alleged, fail to show that, from the breach of the duty complained of, any right of action on the case arose. An action on the case is a concurrent remedy with assumpsit for many breaches of contract, whether the breach is nonfeasance or malfeasance; and, when a cause of action is stated in the complaint as arising from a breach of duty growing out of a contract, it is *ex delicto*, and case—an action on the case—will lie. 1 Brick. Ala. Dig. pp. 40, 41, pars. 5, 18. But the libelant sustained no relation to the vessel and owners by contract. All that can be said is that the act complained of happened on board the vessel, but it cannot be held that there was any breach of any maritime duty or obligation on the part of the master of the vessel. The libelant was not rightfully on the vessel. He came aboard clandestinely, and hid away on the vessel. He was, as he calls himself, "a stowaway," and was such wholly without the consent or knowledge of the master. He was a trespasser. There was no contract between any one representing the vessel and the libelant, and there was no duty to the libelant on the part of the officers and crew of the vessel. The *Germania*, Fed. Cas. No. 5,360. When I speak of "duty" here, I

mean maritime duty,—such duty as would grow out of some contractual relation between the libelant and the vessel and owners. There was a duty on the part of the master not to injure or cruelly treat the libelant,—a duty not to allow him to die or suffer from starvation, if he was able to relieve him; but this duty rested upon principles of common humanity, and in no way arose from his duties or obligations as master of the vessel. This is not a suit in the nature of an action on the case. The facts alleged show it to be a case of assault and battery by the master. It appears from them that the master intentionally inflicted unlawful violence upon the libelant. This is assault and battery. The Lord Derby, 17 Fed. 265. This suit cannot be maintained against the vessel. Admiralty Rule 16. The exceptions to the libel are sustained, and the libel is therefore dismissed.

THE CHICAGO.¹

THE ALVENA.

ATLAS S. S. CO. v. THE CHICAGO et al.

PENNSYLVANIA R. CO. v. THE ALVENA.

(District Court, S. D. New York. January 27, 1896.)

COLLISION—FERRYBOAT—TUG AND TOW NEAR THE SLIPS, OBSTRUCTING EGRESS—CONFLICTING TESTIMONY—TUGS LIABLE—TOW DISCHARGED.

As the ferryboat C. was leaving her New York slip near a long covered pier which obstructed the view above, the tug G. having the S. S. Alvena, 275 feet long, in tow astern upon a hawser 175 feet long, suddenly appeared near the mouth of the slip. On very conflicting testimony as to the distance of the collision from the end of the pier: *Held* (1) that the circumstances and the superior position for observation of the witnesses for the ferryboat outweighed the greater number of witnesses opposed, and that the collision was not over 200 feet from the end of the pier: (2) that the tugs were in fault for navigating with an unwieldy tow so near the slip without excuse: (3) that the ferryboat was proceeding along the covered pier at moderate speed, and having reversed as soon as she was aware of the presence of the tow behind the tug was without fault: (4) that the Alvena, though the instrument of the wrong, and though the navigation was for her benefit, yet being in charge of the tugs, was not, under the decisions, to be charged with blame; *sed quere?*

In Admiralty. Collision.

Wheeler & Cortis, for the Alvena.

Robinson, Biddle & Ward, for the Chicago.

Wing, Putnam & Burlingham, for the Wendell Goodwin and the Richard J. Barrett.

BROWN, District Judge. About half past 7 o'clock in the morning of October 28, 1895, the steam ferryboat Chicago, just as she got out of her slip at the foot of Cortlandt street on a trip to Jersey City, came in collision with the steamship Alvena, coming down a short distance outside of the piers in tow of the tugs Goodwin and Barrett. The latter was on the steamer's starboard side, and the tug Goodwin was ahead, towing upon a hawser about 175 feet long. The bow of the ferryboat, very near the center, came

¹ Affirmed in circuit court of appeals. See 78 Fed. 924.