namely, "Dr. Banks being the expert employed by complainants," in the sense in which the word "expert" was used.

(June 20, 1898.)

This case again comes here upon additional proofs taken as suggested in memorandum filed May 6, 1898, the sole question to be determined being whether a certain letter is or is not privileged. There seems to be an entire failure of proof that the witness to whom the letter was addressed is or was the alter ego of the plaintiff corporation, within the terms of that memorandum. It does, however, appear that he has been retained by plaintiffs as an expert to assist them in the presentation of their case. As such the witness would seem to come within the privilege suggested in the former memorandum,—as similar to that of counsel. More careful reflection has still further confirmed the impression that such privilege should be forfeited if the "scientific counsel" assume the role of a witness. The point raised here, however, seems to be a new one, and therefore, if counsel for complainants will consent to strike out all the testimony of the witness Banks, such witness will not be required to produce for inspection the letter received by him from the counsel for complainants. Unless, however, Dr. Banks is thus relegated from the category of witnesses to the category of counsel, such letter must be produced by him.

THE ANACES.

(District Court, E. D. North Carolina. May 12, 1898.)

1. MARITIME LIENS—WHEN EXISTING—INJURY TO STEVEDORE.
   A laborer employed by a stevedore who has contracted to load a vessel has no right to proceed in rem against the vessel for a personal injury received in the course of such employment, where there is no defect in the vessel's machinery, and no negligence on the part of her officers.
2. MASTER AND SERVANT—FELLOW SERVANTS—STEVEDORES.
   A member of a stevedore's gang operating the engine used for hoisting cargo into a vessel is the fellow servant of a member of the same gang engaged in stowing the cargo in the vessel's hold, and the vessel is not liable for an injury to the latter resulting from negligence of the former.[1]

Iredell Mears and Bellamy & Bellamy, for libelant.
George Roundtree and Junius Davis, for the Anaces.

PURNELL, District Judge. Alexander McCullum filed his libel in rem against the British steamship Anaces, and, the cause being regularly called, the proctors for respondent moved to dismiss the libel —First, because the libel does not state facts sufficient to constitute a cause of action; and, second, because, this court having no jurisdiction to hear this libel in rem, no action in rem would lie. For the purposes of the motion, the allegations set forth in the libel must be taken as true. They are as follows:

[1] As to who are fellow servants, generally, see note to Railroad Co. v. Smith, 8 C. C. A. 668, and supplemental note to Railroad Co. v. Johnston, 9 C. C. A. 596.

Alexander McCullum, a laborer, of the city of Wilmington, state of North Carolina, brings this his libel against the British steamship Anaces, hailing from Fleetwood, England, whereof Charles S. Roberson is, or lately was, master, now lying in port at Wilmington, N. C., in the district aforesaid, her tackle, sails, apparel, furniture, boats, engines, boilers, and machinery, and other appurtenances, and all persons intervening for their interest in said vessel, in a cause of damage, civil and maritime; and the said libelant alleges and propounds as follows: First. Libelant is a resident of the state of North Carolina, and of the Eastern district of this honorable court, and is by occupation a laborer and stevedore. Second. The said steamship is, or was at the time of the facts herein set forth, lying in the port at Wilmington, at the wharves of the Wilmington Compress Company, and engaged in loading a cargo of cotton. Third. The said steamship, through its agents or captain, had contracted with one A. J. Walker, a contracting stevedore, to load the said steamship with cotton, and the said A. J. Walker employed your libelant as a laborer in the hold of the said ship, to assist and work in the receiving and stowing of the cotton as the same is hoisted from wharves and lowered into the hold of the ship; that, by and under the custom of the port, the terms of the contract of stevedoring, and the duties and obligations of the said ship, the said steamship furnishes and operates the dummy engine, tackle and ropes, and all apparatus necessary and customarily used in hoisting the cotton from the wharves into the ship; that the said dummy engine is a part of the equipment of the said ship, attached to her, as engines and boilers, and is operated by means of a winch or lever from the deck of the ship, and requires in the operation thereof a man of experience and familiarity with the work; that, while such loading is going on, men are in the hold of the ship, receiving the cotton as it is lowered, and unless the engineer, or man at the lever, operating the engine which is used in hoisting and lowering the cotton, is experienced, there is danger of injury to the men below, in carelessly lowering or letting into the hold bales of cotton; that it is the duty of the officers of the said ship to provide a man of care and experience in operating the said engine. Fourth. That on or about the 5th day of October, 1897, while your libelant, with others, was working in the hold of the said steamship, several bales of cotton were suddenly, carelessly, and negligently dropped into the hold of the said ship, through the careless operation of the dummy engine, falling against your libelant, jammed him against the side of the ship with tremendous force, and caused him a serious and perhaps permanent injury, breaking three of his ribs, utterly rendering him incapable for work for many months, if not for years to come, and causing him great physical injury and pain, and that he is now laid up, under the care of physicians, and by them advised of the serious injuries herewith complained of. Fifth. That the accident here complained of by your libelant was caused immediately and proximately by the gross negligence and incompetence of the man employed by the said officers of the said steamship to operate the said engine; that the said party operating the same at the time of the said accident was not a regular engineer or experienced person, but that the captain of the said ship, after having one of his own crew to operate the same, who was experienced, detailed the said person to other work, and substituted a man not connected with the said ship, and not one of its crew, whose name is unknown to your libelant, who was nothing more than an ordinary laborer, and utterly inexperienced in the work of handling such an engine, in hoisting and loading such cargo, which requires experienced judgment in order to avoid such accidents as this one here complained of. Sixth. That the master or officials of the said ship, in employing an inexperienced man to operate the lever or winch of said dummy engine, were guilty of gross carelessness, negligence, and want of care, and failed to perform or exercise a proper care and prudence, as in duty bound to do, to your libelant, who was engaged in work in the hold below, and that for such act of negligence, done in their official capacity, said steamship is liable for the injuries inflicted upon libelant as aforesaid in consequence thereof. Seventh. That by reason of the said accident here complained of, that the plaintiff has suffered physical pain, mental anguish, and impairment of strength and ability as a laborer, and has been damaged thereby in the sum of two thousand five

hundred dollars. Eighth. That the said accident was through no fault or carelessness, or contributory fault or carelessness, of your libelant. Ninth. That, all and singular, the premises are true, and within the admiralty and maritime jurisdiction of the United States and this honorable court.

For the purposes of the motion, the answer, which traverses many of the allegations in the libel, must be disregarded, and the case considered as upon demurrer ore tenus.

Whether a stevedore's contract is maritime has been much discussed, often doubted, and the decisions are conflicting and confusing. In the case of The Gilbert Knapp (E. D. Wis. 1889) 37 Fed. 209, the conflicting decisions are considered by Jenkins, District Judge; and it is held that such contracts are maritime, within the principles of admiralty jurisdiction, but no lien on the vessel is allowed in admiralty for such services rendered in the home port. In the same year, and the same volume of the report, at page 367, in the case of The Magnolia, Pardee, Circuit Judge, in an appeal from the district court for the Eastern district of Louisiana, held that a contract to stow and load a vessel is not a maritime contract, and not enforceable in admiralty. This decision is based upon the decision of Justice Bradley in the case of The Ilex, 2 Woods, 229, Fed. Cas. No. 10,842. But in The Main (1892) 2 C. C. A. 569, 51 Fed. 954, in the circuit court for the Fifth circuit (Pardee, Circuit Judge, delivering the opinion), it is held that a stevedore rendering services in loading and unloading cargoes in other than the home port has a maritime lien therefor. The case of The Ilex is overruled. This principle is recognized in this district in the case of The William Branfoot, 8 U. S. App. 129, 3 C. C. A. 155, and 52 Fed. 390, and in The Elton, 83 Fed. 519. The stevedore's contract is, under the authorities cited, maritime, and within the admiralty jurisdiction; and, if the injury had resulted from a defect in the machinery of the vessel, there could be no doubt, under these authorities, that defendant would have a lien, and be entitled to proceed in rem to enforce this lien. But how is it under the allegations of the libel? There is no complaint of defects in the machinery furnished by the ship, nor is there any complaint that the parties employed to operate the machinery of the ship were known by the master, the captain, or any other person authorized or empowered to bind the ship, to be negligent or incompetent; but, after having detailed one of the crew who was experienced, some one else, unknown even to the libelant, who was an ordinary laborer, and inexperienced in handling the winch, was temporarily operating the same; and this is alleged to be the proximate cause of the accident complained of, by which libelant was injured. There is no contention that libelant is not entitled to his remedy in personam, or that he has a remedy; but the contention is that the allegations are not sufficient, and a proceeding in rem will not lie for the causes set out in the libel. The admiralty rules, from 12 to 20, were intended, says Justice Brown in The Corsair, 145 U. S. 341, 12 Sup. Ct. 949, "to prescribe a remedy appropriate to each class of cases in admiralty; allowing in certain cases a joinder of ship and freight, or ship and master, or alternative actions against the ship, master, or owner alone. * * * These rules were adopted in pur

suance of an act of congress of August 23, 1842 (5 Stat. 516), * * * and have always been regarded as having the force of law. They are little more than a recognition and formulation of the previous practice of courts of admiralty in this country and in England." But they are always treated by the courts as obligatory. In the case cited (The Corsair) it was held that a proceeding in rem for injuries causing death was properly dismissed, because, though by the local law a right of action survives to the administrator, no lien is expressly created thereby. Lord Campbell's act is discussed at length, and it is held that a United States district court, sitting in admiralty, cannot entertain a libel in rem for damages incurred for loss of life. The local laws of North Carolina do not give a lien for injuries such as those complained of in the case at bar.

Maritime liens are stricti juris, and will not be extended by construction. The Yankee Blade, 19 How. 82. The advocates of the largest measure of admiralty jurisdiction admit that they have not jurisdiction to enforce maritime contracts by proceedings in rem unless the contract, expressly or by implication, creates a lien on the ship. The Draco, 2 Sumn. 180, Fed. Cas. No. 4,057. From whence, and how, did libelant acquire a lien, and a right to proceed in rem? Liens are created by the acts of the parties, or by operation of law. Libelant had no contract with the master of the ship, or any one representing the owner, but was employed by A. J. Walker; and as a subcontractor he had no claim upon the ship, either for his wages or for a tort, for Walker had no authority to bind the ship. He must therefore look to the law, stricti juris, for his right to proceed in rem. The statutes give a lien on the vessel for seamen's wages, bottomry, and to passengers for the violation of the laws of navigation, and for some other causes; but nowhere is it provided in the statute law of the United States that there shall be a lien on even a foreign vessel for accidents such as that of which libelant complains. Nor can it be found in the admiralty rules before quoted (from 12 to 20), intended to prescribe a remedy appropriate for each class of cases in admiralty. Suits by material men (rule 12) may be in rem or in personam. Suits for mariners' wages (rule 13) may be in rem against the ship or freight, or in personam. Suits for pilotage may be in rem or in personam. Rule 14. Suits for damage by collision (rule 15) may be in rem or in personam, or both. Suits for assault and battery can be in personam only. Rule 16. Suits for hypothecation (rule 17) may be in rem or in personam. Suits on bottomry bonds (rule 18) may be in rem under certain circumstances, and in personam under others. Suits for salvage (rule 19) may be in rem against the property saved, or in personam against the party at whose request and for whose benefit the salvage service was performed. Suits between part owners, petitory or possessory suits (rule 20), may be in rem and in personam. So that the right to proceed in rem in an action like that at bar is not conferred by the admiralty rules, and it must be sought elsewhere, if, indeed, these courts derive any authority as to proceedings in admiralty from any source save the statutes of the United States and the rules in admiralty, which "have always been regarded as having the force of a statute, * * * and always treated by

the courts as obligatory." Liens have been given in rem by act of congress, as in sections 4270, 4493, Rev. St., which extend the lien in rem to passengers; but to "other persons" only an action in personam is given, under the latter section. These liens, too, are given for the violations of the navigation laws by passenger vessels, and there is no allegation that the Anaces was a passenger vessel. She was, in fact, a freight vessel,—a tramp. The burden is on the libelant to establish a maritime tort, a lien, and a right to proceed in rem. Bors v. Preston, 111 U. S. 255, 4 Sup. Ct. 675; Grace v. Insurance Co., 109 U. S. 283, 3 Sup. Ct. 207; Robertson v. Cease, 97 U. S. 646. Libelant's proctors have cited no authorities which are at all satisfactory on these points,—in fact, have furnished no authorities, but left the court to work out a conclusion. While it may seem to conflict with some of the decisions cited, and to be a novo impressio in this old branch of the law, I must conclude that the decision would have been different in the cases cited, and others on the same line, if the question now raised had been pressed in those cases, and that the courts would have held that a member of a stevedore's gang has no right to proceed in rem for a personal injury (especially where there is no defect in the ship's machinery, and no negligence on the part of the ship's officers) for an accident caused as described in the libel.

The above, being a new and interesting question, was considered first, though the other question raised by the motion is of equal importance. The negligence complained of was that of a fellow servant; and, in order to recover against the master for the negligent act of a fellow servant, the employé must allege that the fellow servant whose negligence caused the injury was incompetent, and that the master had knowledge of such incompetency, or by the exercise of reasonable care could have known of it. The winchman and libelant were fellow servants, and the vessel is not liable unless there was some negligent act or failure of duty on the part of the owner or his legal representative. Steamship Co. v. Merchant, 133 U. S. 375, 10 Sup. Ct. 397. The winchman was one of the crew, but the man at the winch at the time of the injury was a common laborer, like the libelant. If he was a fellow servant,—even the master himself, or one he had placed there,—the ship would not be liable. The Coleridge, 72 Fed. 676. The libelant could only recover against the vessel or the owner by alleging and proving (a) that the servant operating the winch was incompetent; (b) that such incompetency was known to the master, or by the exercise of reasonable care might have been known to him; (c) that the incompetence—not the occasional carelessness—of the servant directly contributed to, and was the proximate cause of, the accident. It is not sufficient to allege merely that an act was negligently done. There is no presumption of negligence, but the burden is on the libelant. Railroad Co. v. Barrett, 166 U. S. 617, 17 Sup. Ct. 707. For the foregoing reasons the motion of the defendant is allowed, and the libel herein dismissed. Dismissed.

THE LISNACRIEVE.

GRASSO v. THE LISNACRIEVE.

(District Court, E. D. New York. May 2, 1898.)

SHIPPING—MASTER AND SERVANT.

Where the owners of a ship furnish a winchman to assist in unloading, they are liable to an employé of the stevedore, who is unloading the ship under a contract, for injuries caused by the negligence of the winchman, although they were under no contractual obligation to furnish the winchman, and although such winchman is working under the orders of the stevedore.

This was a libel in rem by Mattee Grasso against the steamship Lisnacrieve, to recover damages for personal injuries.

Francis L. Corrao, for libelant.
Convers & Kirlin, for claimant.

THOMAS, District Judge. On the 17th day of August, 1896, the libelant, a longshoreman, was working aboard the steamship Lisnacrieve, under the employment of T. Monaghan, a stevedore, with whom a contract had been made by the charterers to discharge a cargo of asphalt. The ship was lying at the foot of Fifty-Second street, in the city of New York. The asphalt was brought up from the hold of the vessel by means of iron tubs, furnished by the contracting stevedore, hoisted by means of a block and tackle, passing to one of the winches of the vessel, which was run by one of the seamen of the vessel's crew. The libelant, together with other longshoremen, was engaged in the lower part of the cross bunker hold of the steamship, loading asphalt into the tubs, dragging them towards, but not directly under, the hatchway, and fastening the hook attached to the line to the bail of the tub. A gangwayman, with an assistant, employed by the stevedore, was stationed at the mouth of the main deck hatch of the hold, whose duty it was to guide the tubs as they were hoisted out of the hold, so as to prevent them from catching against the coamings or other obstructions, and also to give signals to the winchman of the No. 3 winch when to start and when to stop, these signals being given by means of a whistle, as the winchman was not in sight of the gangwayman. It appears that the casement of the donkey boiler protruded beneath the hatch into the hold of the vessel, and that a man in the employ of the stevedore was stationed upon such casement, to prevent the tub striking the casement in its descent, and to steady the tub, until it reached the top of the casement, and thereafter give it proper direction. When it had been thus steadied, and was in a proper line of the hatch opening, it was allowed to proceed rapidly upon its way out of the hatch. When the tub was ready to be lifted from the bottom of the hold, one sharp whistle was given by the gangwayman on the main deck. This meant that the winchman should start easily and go slowly. When the tub reached the top of the casing, if it was not in proper position, another signal was given, which meant that the winch should be stopped, to allow the person stationed on the casing to adjust the position of the tub to the opening above. This having been done, a long reverberating whistle was

given, which indicated that the winch should go rapidly, to carry the tub onto the main deck. Generally speaking, speed was desirable, as it expedited the fulfillment of the stevedore's contract.

It is claimed on the part of the libelant that he was injured in the following manner: A tub, drawn partially towards, but not directly under, the open hatch, received the hook, and the signal to start and go easily was given. Instead of starting slowly, the winchman started rapidly, causing the tub to swing into the hatch, and oscillate from one side to the other, in a dangerous manner, and so as to strike against the casing about the boiler, or the coamings of the hatch, or both. The gangwayman, seeing this condition, gave a signal to stop, but the winchman did not stop, and thereupon the gangwayman gave three more shrill whistles, indicating, as he says, that the winchman should stop, but the tub was drawn up through the open hatchway. While the tub was making this passage, one or more pieces of asphalt fell from it, striking the libelant, who was in the hold below.

The evidence seems to be preponderating that, in first lifting the tub from the bottom of the hold, the custom was to go slowly, and that previous to this time the winchman had observed that custom. The libelant shows by several witnesses that the winchman lifted the tub in question with an unusually rapid motion, and it appears fairly that the unusual swinging motion was given to the tub by the rapidity of the motion thus imparted. If this evidence is to be believed, the winchman was negligent. And as the claimant produces no satisfactory and competent evidence of due speed, but rather relies upon inferences to be drawn from the previous good work, capacity, and skill of the winchman, the evidence of the libelant in this regard must be accepted. Therefore, as the negligent act of the winchman is a sufficient cause for the injury, the question remains whether the claimant must respond for this negligent act.

It is a rule well settled that, although a person undertakes to do an act gratuitously, yet he is not relieved from using suitable care in so doing. And although the ship in the present case equipped and operated the winch without being constrained thereto by any contractual obligation, yet the undertaking imposed the duty of due care.

It is said that the winchman, although furnished by the shipowners, was not at all under their charge or direction, but for the time was in the service of the contracting stevedore, subject to his orders, and that he thereby became a fellow servant of the libelant, and that if, therefore, the accident happened from the negligence of the winchman, it was the negligence of a fellow servant, for which neither the contracting stevedore nor the shipowners would be liable.

The stevedore made his contract with the charterers, and it does not appear who was to furnish engines for hoisting and men to operate the same. The claimant contends that the stevedore stated that he could not get a man to properly drive the winch, and that thereupon the ship furnished the winchman in question. The day previous to the accident, however, as the winches were otherwise in use, the ship employed a floating engine and an engineer to do the same work, and bore the expense thereof. This would seem to indicate some sense of obligation on the part of the shipowners to

furnish the hoisting power. In any case, the ship did undertake to do a certain portion of the work of unloading. Such an undertaking is not merely loaning a servant to the stevedore. It is a co-operation on the part of the ship in the work of unloading the cargo, precisely to the same extent as if two independent stevedores had contracted for a division of labor in discharging the cargo, one furnishing the tackle and hoisting power, and the other furnishing men and appliances for the remainder of the work. It does not change this relation that the winchman was to run his winch, or stop his winch, or graduate the speed thereof, as the stevedore's servant signaled him to do. Independent contractors and their servants are often called upon to direct and advise each other in movements and acts relating to the common work, and such often is the case between the contractor and the person with whom the contract is made. The fact that the servant of one of the parties regulates his acts by the actions of the servants of the other does not make them co-servants. In the present case the winchman was a general servant of the ship. He was put in charge of the ship's machinery, to perform a duty that the ship had assumed the duty of performing. He went to his post of duty, or left the same, by no command of the stevedore, but simply because his master or his delegated agent so directed him. True, the stevedore gave him a signal, and it was his duty to obey it; but this duty sprang from no contract of hiring made by the winchman with the stevedore, but purely or wholly from the relation of master and servant that existed between the winchman and the shipowners. When the stevedore signaled him to hoist, he was at perfect liberty to disobey this order, so far as the stevedore was concerned, and the stevedore was helpless. Nay, if the stevedore had signaled him to hoist, and his master had directed him not to hoist, is there any doubt to whom he owed and would have rendered obedience? There is no lending of a servant or subhiring of a servant in this case. The master, in effect, said to his servant: "I have undertaken to furnish the power and operators of the power to hoist the cargo from the hold. The stevedore is engaged to do the remaining work. You will take charge of the winch and operate it, co-operating, by means of signals, with the stevedore's servants." The stevedore had not selected the winchman. The shipowners chose him. The stevedore was obliged to take him or no one. The ship alone had knowledge of his competency; had alone investigated or tested it. The ship placed or retained him in charge of the winch. The stevedore could not send him to or from it. The stevedore did not pay him, and could not discharge him.

Assume that a person, not connected with the ship, but having a right to pass along the deck thereof, had, while so doing, been injured by the stevedore's culpably negligent operation of the winch; would it have been an excuse for the ship that it had for a while loaned this winch and winchman to a stevedore? Assume that another of the ship's servants had been injured by the winchman's culpable negligence; could such servant have recovered against the shipowner, upon the ground that the winchman had been borrowed by a stevedore, and that, therefore, the former and general relation

of master and servant was so in abeyance that the doctrine of the negligence of co-servants would not apply?

There has been some diversity of judicial opinion in similar cases; but the difficulty has arisen at times from not sufficiently recognizing that, instead of loaning or subhiring a servant, the master himself has undertaken to perform a portion of the work. Cases may well arise where the servant of one person is engaged to assist another in respect to work in which the master had no interest. In such a case the servant would be temporarily released from his usual employment, and would ally himself to a new master, and recognize obedience to such master. It will be observed that, in such a case, it would be quite within the power of the new master at his will to end the service of the servant. But in the present case the stevedore could not order the winchman to leave the winch. He could not replace him by another operator. In fact, he had no power over him whatever except through the will and direction of the owners of the ship.

It would not be useful to review the authorities. The following decisions support, or tend to support, the conclusion above reached: Johnson v. Navigation Co., 132 N. Y. 576, 30 N. E. 505; Coyle v. Pierrepont, 33 Hun, 311 (see holding on reargument); Higgins v. Telegraph Co., 8 Misc. Rep. 433, 28 N. Y. Supp. 676 (the opinion in this case is instructive); Kilroy v. Canal Co., 121 N. Y. 22, 24 N. E. 192, distinguishing Murray v. Currie, L. R. 6 C. P. 24; The Harold, 21 Fed. 428; Sanford v. Oil Co., 118 N. Y. 571, 24 N. E. 313; Sullivan v. Railroad Co., 112 N. Y. 643, 20 N. E. 569, affirming 44 Hun, 304; Svenson v. Steamship Co., 57 N. Y. 108; King v. Railroad Co., 72 N. Y. 607 (see facts and opinion 66 N. Y. 181); Davi v. Victoria, 69 Fed. 160.

The claimant calls attention to Transport Co. v. Coneys, 28 C. C. A. 388, 82 Fed. 177, which is easily distinguishable from the case at bar; Murray v. Currie, L. R. 6 C. P. 24, distinguished in Kilroy v. Canal Co., supra; Rourke v. Colliery Co., L. R. 1 C. P. Div. 556, on appeal L. R. 2 C. P. Div. 205; Donovan v. Laing [1893] 1 Q. B. 629; Johnson v. City of Boston, 118 Mass. 114; Ewan v. Lippincott, 47 N. J. Law, 192; Railway Co. v. Cox, 21 Ill. 20.

The principles stated in some of these cases are of general application, and some of the cases do not necessarily conflict with the view here adopted, that the master of the offending servant was himself taking a part in the work, and was not merely parting temporarily with the services of a person in his general employment. So far, however, as such cases apparently conflict with the views here expressed, they are deemed also in conflict with the federal decisions and those of the courts of the state of New York. To the cases stated as above by the claimant may be added Rook v. Concentrating Works, 76 Hun, 54, 27 N. Y. Supp. 623.

Pursuant to this opinion, decree should be entered for the libelant for an amount that shall fairly compensate him for his injuries. A suitable examination of the evidence leads to the conclusion that the sum of $750 would be reasonably compensatory, for which let a decree be entered, with costs.

THE ILLINOIS.

BALANO et al. v. THE ILLINOIS.

(Circuit Court of Appeals, Third Circuit. April 27, 1898.)

No. 10.

1. COLLISION—TUG WITH TOW—STARTING FROM DOCK.
A tug starting out into the Delaware river, from behind piers which obstruct her view, with a tow on a hawser, must exercise caution, but is not bound absolutely to ascertain beforehand whether any vessel is approaching; and where she gives the proper signal to enable a vessel actually approaching to avoid the tow by proper and reasonable navigation, she is not to be held liable for a collision between them.

2. SAME—STEAMSHIP IN CHANNEL.
Where a schooner towed by a tug on a hawser was struck in the Delaware river, by a passing steamship, shortly after the tug and steamer had emerged from behind piers that obstructed their view, *held*, that the steamship was solely at fault, in that, while proceeding in a narrow channel, where vessels and tows were likely to be encountered, she failed to perform her duty of running slowly, keeping a careful lookout, and listening attentively for signals.

Appeal from the District Court of the United States for the Eastern District of Pennsylvania.

This was a libel in rem by James W. Balano, master of the schooner Mabel Jordan, against the steamship Illinois, whereof the International Navigation Company was owner, to recover damages caused by a collision. The tug Gladisfen was subsequently made a co-defendant, on the petition of the claimant of the Illinois. The district court, after a final hearing on the merits, found the Illinois solely in fault, and decreed accordingly. 65 Fed. 123; 84 Fed. 697. The claimant thereupon appealed to this court.

N. Dubois Miller, for appellant.
John F. Lewis, for the Mabel Jordan.
Henry R. Edmunds, for the Gladisfen.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

DALLAS, Circuit Judge. The schooner Mabel Jordan was run into and sunk by the steamer Illinois on June 9, 1893; and, upon the latter being libeled for the loss, her owners filed a petition under which the Gladisfen, a steam tug which at the time was engaged in towing the schooner, was made co-respondent. Unquestionably, the collision was occasioned by negligence either of the steamer, or of the tug, or of both. The court below held that it resulted wholly from fault of the former; and it is now insisted that this conclusion was erroneous, because, as is alleged in the petition of the Illinois—

"Those in charge of said steam tug Gladisfen were in fault as follows: (1) In towing said schooner out into the channel, from behind the covered piers, without giving proper and lawful signals to approaching vessels. (2) In towing the schooner into the channel, from behind the covered piers, without ascertaining whether any vessels were approaching. (3) In not keeping a vigilant outlook, and failing to observe the steamship Illinois in time to avoid the collision. (4) In towing the schooner Mabel Jordan into the channel with a hawser of excessive length. (5) In cutting the hawser by which the schooner was being towed. (6) By conducting and managing said towage service so negligently, carelessly, and unskillfully that the collision occurred."