dated September 28, 1896, by virtue of which he claims to be entitled to a preference in payment over petitioner Sciple. Both claims are liens by virtue of the state law, and their respective priorities must be determined by it. The work was done prior to the date of the mortgage, and the lien attached when the work was completed. Betchner, in his answering petition, contends that the Sciple lien was merged in a mortgage upon the vessel, which was registered subsequent to his own. The proofs fail to substantiate this claim. It appears from the evidence that notes were accepted for the greater part of the debt incurred to Sciple, but they were not paid. "The acceptance of notes by persons entitled to maritime lien for repairs does not defeat the lien. There is a presumption that the note is only taken as collateral security." The Ella, 84 Fed. 471. There is no reason why the same principle should not apply where the lien is given by state statute. As between Betchner, the holder of a mortgage given subsequent to the time when the work was done and materials furnished by petitioner Sciple, the latter is entitled to priority of payment.

THE PACTOLAS.

(District Court, S. D. New York. June 21, 1898.)

SEAMEN—SHORT ALLOWANCE—SCURVY—PROOF INSUFFICIENT.

Upon claims for damages for short allowance and alleged consequent scurvy, on a voyage from Shanghai and Manilla to New York, *held* not sufficiently established by the evidence.

George Whitefield Betts, Jr., for libelants.

Wm. M. Ivens, Harrington Putnam, and E. W. Ivens, for respondents.

BROWN, District Judge. Two libels have been filed in this matter by 13 seamen on board the Pactolas on a voyage from Shanghai and Manilla to New York, to recover compensation for short allowance of provisions, and damages for alleged scurvy arising from this cause. The first libel was filed by 11 of the seamen against the Pactolas in rem, and the other by 2 of the crew against the owners in personam. The answer denies all the charges of the libel.

A very considerable amount of evidence has been taken, including also the testimony of various medical experts as respects the disorder from which several of the seamen were suffering on arrival at New York. The clear preponderance of the medical evidence is that the disorder was beriberi and not scurvy, except possibly in the cases of Olsen and Smith, who showed some symptoms of swelling and bleeding gums and loose teeth, if their testimony is to be believed, which might possibly indicate scurvy; but their recovery in two or three days seems hardly consistent with this theory.

As respects the provisions and any complaints by the seamen, the evidence is very contradictory. The master, first officer and carpenter contradict most explicitly all the charges of the seamen as respects any deficiency of provisions, or any substantial complaints in regard

to the food, its quality or amount. There is so much inconsistency also in the testimony of the seamen on this subject, that I find it impossible to base any decree upon their statements, unless corroborated by other circumstances.

The libelants' counsel claims that their story is confirmed by comparing the number of running days on the voyage with the amount of the beef and pork consumed or supplied. The master testifies that the beef and pork were loaded at New York before departure for Shanghai and that no other was taken on board. He testifies to taking about 21 or 22 tierces of beef; but he refers to the store book kept by him, in which the amount of beef in stock on leaving New York is stated to be 20 tierces, and the amount of pork 14 barrels. The run to Shanghai was made in 177 days. After lying about two months there, the ship went to Manilla upon a run of 19 days, and after a delay of several months at Manilla, sailed for New York, making the trip in 131 days. None of the beef or pork was used during the ship's stay in port, and some fresh provisions were taken on at each place. The master's store book further shows, that on leaving Shanghai he had on board 11 tierces of beef and 8 barrels of pork, not counting opened barrels; and on arrival at New York two of each remained unopened. A tierce contains about 300 pounds of beef; a barrel, about 200 pounds of pork. According to this testimony there was the same amount of beef and pork, viz. 3,900 pounds, used during the trips from Shanghai to Manilla and from Manilla to New York, occupying 150 days, that was used in the trip from New York to Shanghai, occupying 177 days; and yet the testimony of the seamen is explicit that there was sufficient beef and pork on the trip to Shanghai, which was 27 days longer than the trip back to New York. This weakens very much the force of their evidence.

The libelants' proctor submits some arithmetical computations as to the amount that should have been supplied to the men, reckoning 1½ pounds per day of either beef or pork for each of the 22 persons on board the ship. Computed on this basis the ship would not have been sufficiently stocked at the start for 327 days at sea. Several deductions however should be made in this computation. At each port there were fresh provisions supplied, lasting for a certain period. Again, 5 of the 22 persons were in the cabin, for which the testimony shows that there was a very considerable supply of miscellaneous canned meats, which would much diminish the use of salt pork and beef in the cabin, and one of the 5 in the cabin moreover was the captain's wife; so that as respects beef and pork it is doubtful whether the cabin should count for more than 2 persons. The data for any exact arithmetical computation are wanting.

If the 150 days from Shanghai be taken with the stock of beef and pork on hand as given by the captain and confirmed by the entry in the store book, which contains nothing on its face tending to discredit it, and allowing 10 days' fresh provisions taken at the two ports, there would appear to be about 28 pounds of beef or pork consumed per day; and this, making some deductions as respects the cabin consumption, as above stated, would indicate very nearly a full supply to the crew. The officers, moreover, testify explicitly that there was

no restriction ever given as respects the amount of pork or beef to be furnished to the crew; and upon arrival in New York there were 1,000 pounds remaining unopened, besides parts of a tierce and barrel unconsumed, making an abundant supply for more than 30 days. It is hardly probable that the crew would have been kept upon a short allowance with so considerable an amount of surplus beef and pork to remain over at the end of the voyage.

As to the articles of vegetable food and lime juice, the libelants' case is certainly not made out.

The libels are dismissed, but without costs.

HAVERON et al. v. GOELET et al.

(District Court, S. D. New York. June 4, 1898.)

SHIPPING MASTERS—SUPPLYING SEAMEN—SEAMEN'S BOARD.

Where seamen for a yacht are procured by shipping agents at the master's request, sign articles, and at the master's request are supplied with board until the master may call for them, but are afterwards discharged, the shipping agent's services and supplies are maritime, and within the jurisdiction of a court of admiralty.

This was a libel in personam by John Haveron and Michael Brennan against Mary R. Goelet and George G. De Witt, as executors of the last will and testament of Ogden Goelet, deceased, to recover for services in procuring a crew for a yacht, and in boarding them at the master's request. The cause was heard on exceptions for want of jurisdiction.

George W. Dease, for libelants.

Theodore De Witt, for respondents.

BROWN, District Judge. In determining the exceptions to the jurisdiction the averments of the libel are to be taken as true; namely, that the libelants at the request of the master of the respondents' yacht obtained the seamen for the contemplated voyage, procured them to sign an agreement in the nature of shipping articles for employment on the vessel on and after February 21, and that at the master's request, the yacht not being ready to receive the crew, the libelants procured board and lodging for them for 30 days, at which time the voyage was abandoned and the seamen discharged, in consequence of negotiations for the sale of the yacht to the United States; and that the libelants have become liable for the board of the men during this time to the amount of about $900, and were further entitled to the customary charge of $3 for each seaman shipped.

I cannot distinguish the present case from that of The Gustavia, Blatchf. & H. 189, Fed. Cas. No. 5,876, in which Judge Betts in 1830 upon almost identical facts held that the services of the libelants were not only maritime but constituted a lien upon the vessel, the ship there being foreign though the seamen never went on board. In the present case, as the yacht is a domestic vessel there is no maritime lien; but the libelants' services were maritime within the decision

in that case; and as The Gustavia seems never to have been overruled, it is my duty to follow that decision. The distinction between that case and various others in which the services are held to be not maritime is that in that case the procuring of seamen was held to be furnishing necessary supplies to the ship, i. e. the means indispensable for the contemplated voyage, and furnished at the express request of the master. It is the same here. By signing the agreement, which in the case of a yacht stands in the place of shipping articles, the seamen were virtually brought by that contract under the control and disposition of the master; and they were at all times in readiness to obey his orders. Their board while the yacht was not ready to receive them, was also at the master's request and was for the benefit of the yacht, inasmuch as from the time they were engaged to be on board, viz. February 21st, the yacht was bound to support them. The seamen were virtually delivered to the yacht and to the master as in the case of any other necessary supplies or goods, which are held to be delivered to the ship, when placed under the control of the master, whether actually on board or not.

The exceptions are therefore overruled.

On subsequent hearing of the cause the right to commission was established, but the claim for board of the seamen was disallowed, no shipping articles having been signed by the master, and otherwise no authority existing to bind the owners.

THE FLORENCE.

(District Court, N. D. New York. July 6, 1898.)

1. TOWAGE—INJURY TO TOW—LIABILITY OF TUG.
   A tug is liable for injuries happening to a boat in its tow through any want of proper knowledge by the master of the difficulty of navigation in the waters which are the theater of the tug's operations, or from so making up the tow that it cannot safely pass between a known obstruction and the shore.
2. SAME—EVIDENCE—UNKNOWN OBSTRUCTIONS.
   Positive evidence of persons on different boats in a tug's tow that one of the boats therein struck upon the bottom, and that they heard a grating noise, is not to be overcome, as evidence of negligent towage, by mere negative evidence, such as that other tugs with similar tows passed the same place without striking; and such evidence is not to be accepted as proof that the boat struck an unknown obstruction, so as to relieve the tug from liability.

Libel by Franklin Allen, master of the canal boat J. W. Whitney, against the steam tug Florence, to recover damages for negligent towing of the canal boat on the 31st day of August, 1897, at a point on the Hudson river about opposite the arsenal wharf at Watervliet, N. Y.

The libel alleges that the Florence agreed to tow the Whitney, having a cargo of corn, from Troy to Albany for an agreed price. The Whitney was placed by the tug in the forward tier of the tow, there being two tiers and three canal boats abreast in each tier, the Whitney occupying the port side. The Florence had entire charge of the fleet and did the steering. This was

customary and proper. After proceeding about a mile and a half down the middle of the river the tug passed over to the easterly side, and attempted to tow the fleet between a dredge anchored in the river and the easterly shore and negligently ran the Whitney aground, causing the injuries complained of. The faults imputed to the tug are that she was negligent in arranging the boats three abreast in view of the position of the dredge, in attempting to pass the dredge with the boats so arranged and in towing the Whitney into the shallow water on the east side of the river. The answer denies all negligence on the part of the tug, and alleges that when the Whitney reached West Troy on the previous day she was in a damaged and leaky condition and that whatever damages were suffered by her were occasioned by reason of her own negligence in not being in a seaworthy condition.

Ingram & Mitchell and John W. Ingram, for libelant.
Harris & Rudd and Worthington Frothingham, for respondents.

COXE, District Judge (after stating the facts). On the 31st day of August, 1897, the libelant's canal boat Whitney, while being towed by the respondents' tug Florence down the Hudson river from Troy to Albany, sprung a leak of so serious a nature that it became necessary to beach her on Beverwyck island, at the northerly limits of the city of Albany. The theory of the libelant is that the damage thus produced was due to the negligence of the tug in not properly making up the tow and in going too near the shoals on the easterly side of the river. The theory of the defense is that if a collision occurred at all it was with a hidden obstruction unknown to experienced rivermen. No negligence is imputed to the canal boat. The duty imposed upon the master of a tug in such circumstances is to use the caution and skill which belongs to prudent navigators. He is required to exercise ordinary diligence and see to it that the tow is properly made up and that the lines are strong and securely fastened. He must know the condition of the river, the width of the channel and the tow and the effect of the tide. He must determine whether canal boats when lashed together can pass safely between the edge of the channel and any obstructions which may be in the river. He is the pilot of the voyage and responsible for the navigation of both vessels. If accident results from the want of proper knowledge on his part of the difficulties of navigation in the waters which are the theater of his tug's operations, the owners of the tug are liable. The Margaret, 94 U. S. 494; The Niagara, 20 Fed. 152; The M. J. Cummings, 18 Fed. 178, and cases cited. Although the master of the tug is bound to know of snags, sand bars, sunken barges and other dangers of navigation, he is not responsible for a loss occasioned by striking an unknown rock. The Angelina Corning, 1 Ben. 112, Fed. Cas. No. 384; The Mary N. Hogan, 30 Fed. 927; The Robert H. Burnett, Id. 214; The Pierrepont, 42 Fed. 687.

The evidence is overwhelming that the Whitney was in a seaworthy condition at the time she was taken in tow by the Florence. The respondents offered some evidence of admissions by the Whitney's master that, on her journey from Buffalo, she struck upon sharp rocks at a point where blasting was going on and received injuries which caused her to leak. This is denied by the master and every member of the crew testified that nothing of the kind occurred. Admissions

are most unsatisfactory proof of facts and should not be accepted against positive proof to the contrary. Assuming, then, that when taken in tow the Whitney was in the ordinary condition of canal boats of her class, the inference is plain that something must have occurred on the way down the river to cause the sudden and dangerous leaking. She was then wholly in charge of the tug. There is some evidence that there were eight boats in the tow. Assuming, however, that there were but six, three in each tier, the tow was some 54 feet broad by 200 feet long with no propelling force or steering power of its own. The "stone crusher" was anchored about the middle of the channel and the evidence is clear, both from the testimony of witnesses and the chart introduced by the respondents, that the channel was deeper upon the west side than upon the east side of the crusher. There is no dispute that the tow proceeded down the river upon the east side of the crusher, and several witnesses upon the Whitney and upon other boats of the tow testify positively that she struck bottom when about opposite the crusher. Several heard a grating noise and one witness testifies that he saw the bow of the Whitney rise when she came in contact with the bottom. It also appears that after the Whitney was placed on the dry dock a long scar, apparently made by a hard, sharp instrument and extending from the bow backward for 60 feet, was discovered. This might have been made by a rock or by the anchor of the crusher. To meet this testimony the respondents offered a large amount of testimony of a negative character. It is said, that if the tow had come in contact with any obstruction it would immediately have been telegraphed to the engine and would have retarded or stopped the tug. And, again, it is proved by a number of river pilots that they proceeded up and down the river in safety upon the day in question and upon the previous day with tows similarly made up. Of course this latter evidence is of little value, unless the draught of the tows, the condition of the tide and the position of the crusher are shown to be similar to the conditions at the time of the accident. The presumption is that something occurred while the tow was in charge of the Florence to cause the leak. The testimony of the libelant's witnesses is positive and conclusive that this was occasioned by the negligent towing of the Florence. Such testimony cannot be overthrown by mere inference drawn from negative testimony of the character mentioned. Upon the whole case the court is satisfied that the injury in question was occasioned by lack of prudence upon the part of the Florence.

The theory that the Whitney may have struck an unknown rock or other obstruction in the channel cannot be maintained. It is based wholly on conjecture. There is absolutely no proof of such an obstruction. It would require unusually strong evidence to convince the court that such an obstruction could exist in a channel only about 250 feet in width and traversed daily by a multitude of boats. There should be a decree for the libelant with a reference to compute the amount due.

SCOW NO. 15.

(District Court, S. D. New York. April 4, 1898.)

WHARFAGE—STATUTORY RATES—SCOWS.

Under the classification of vessels by the New York statute prescribing different rates for wharfage, *held*, that scows should be classed with "barges," and charged at the same graded rates.

Alexander & Ash, for libelant.
Peter S. Carter, for claimant.

BROWN, District Judge. The libel was filed to recover statutory compensation for wharfage for 26 days in September and October, 1896, under the New York statute of 1882 (Consolidation Act, § 798). The scow was of 302 tons measurement, and was engaged in carrying stone from 134th street, North river, to Glen Cove, Long Island Sound. The libelant claims wharfage at the rate of two cents per ton for the first 200 tons, and half a cent per ton for 102 tons above 200, in accordance with the first clause of section 798. The claimant contends that this clause is not applicable to the scow in question, and also that the libelant as lessee of the wharf covenanted to observe all rules and regulations prescribed by the dock department, as respects rates of wharfage, which it was alleged allowed but 50 cents a day for such boats.

On the trial, though there was evidence of a practice to some extent on the part of the city to charge such boats only 50 cents a day, no evidence could be produced or found of any rule or regulation of that kind. The libelant is, therefore, entitled to charge statutory rates.

Section 798 does not provide any rate to be charged for the wharfage of scows, under that specific name. Section 799 relates only to vessels engaged in the clam or oyster trade; and section 800, to canal boats or vessels engaged in freighting brick on the Hudson river. Neither of the latter sections has any application to this case. Returning, therefore, to section 798, it will be observed that it makes provision for three groups or classes of vessels:

(1) "Every vessel of 200 tons burden and under, two cents per ton; and for every vessel over 200 tons burden, two cents per ton for each of the first 200 tons and one-half of one cent for every additional ton"; except

(2) "Vessels known as North River barges, market boats and barges, sloops employed upon the rivers and waters of this state, and schooners exclusively employed upon the rivers and waters of this state," which are charged a graded rate; the rate for vessels of between 300 and 350 tons is $1.25 per day.

(3) "Every vessel or floating structure other than those above named or used for transportation of freight or passengers, double the first above rates, except floating grain elevators, which shall pay one-half the first above rate."

Looking at the various provisions of this section, as well as the two following sections, I am of the opinion that the scow in question should be classed with the second group. It does not belong to the third group, for the reason that the scow was used for the transportation of freight; and not to the first group, for the reason that that class seems designed to embrace the ordinary vessels engaged in com-