THE PAOLI.

(Circuit Court of Appeals, Second Circuit. March 1, 1899.)

No. 67.

COLLISION—BOTH VESSELS AT FAULT—DAMAGES—DIVISION.

Where the evidence in an action for collision showed that both vessels were in fault, a decree dividing the damages between them was proper.

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

H. Galbraith Ward, for libelants.

Charles C. Burlingham, for claimant.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. This is an appeal by both parties from a decree of the district court for the Southern district of New York in a collision case, in which the court held that both vessels were in fault and divided the damages. 92 Fed. 940. The collision occurred off Cape Cod, at about 3 o'clock on the morning of May 9, 1897, between the small schooner, Annie E. Rudolph, laden with a cargo of iron pipe on and under deck, bound to Boston, and sailing nearly due north, and the steam tug Paoli, a powerful vessel, with three barges in tow on long hawsers, bound to South Amboy, and going nearly due south, and provided, as was also each vessel of the tow, with proper lights. The night was dark, with clear starlight, the wind was about W. S. W., and the schooner was on her port tack. She was struck on her starboard side, between her main and mizzen chains, and sank forthwith. The master and the crew, except the wheelsman and the steward, were lost. The libel was filed by the owners of the schooner.

The questions in the case are entirely of fact, and within a narrow compass. The testimony is clearly stated, and is carefully commented upon by the district judge, and need not be repeated here; for we entirely concur in his conclusions, both as to negligence of the tug and of the schooner, although we place less reliance than the district judge apparently did upon the evidence as to the extent of the schooner's luff, which was derived from her heading after she sank. The decree of the district court is affirmed, but, as both parties appealed, without interest or costs of this court.

REJALL v. GREENHOOD et al.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1899.)

No. 433.

1. JUDGMENT AS ADJUDICATION — PARTIES CONCLUDED — JUDGMENT AGAINST TRUSTEE.

In a suit to set aside an assignment for the benefit of creditors, the assignee represents all the beneficiaries of the trust; and a judgment against him is binding upon such beneficiaries, though they were not parties to the suit.

2. EQUITY—EFFECT OF SUSTAINING PLEA IN BAR.

Where a plea in bar meets all the claims made in the bill, and is sustained on issue joined, the defendant is entitled to the benefit of such finding, in a decree dismissing the bill; and the complainant cannot insist that it should have been retained for the purpose of granting him relief not prayed for, and inconsistent with the theory upon which the suit was brought.

Appeal from the Circuit Court of the United States for the District of Montana.

This action was instituted by the appellant against the appellees for an accounting as to certain goods and property alleged to have been wrongfully taken from an assignee, in which goods and property appellant claims to have had an interest or equity. The facts leading to this action were the following: Isaac Greenhood and Ferdinand Bohm, doing business under the firm name of Greenhood, Bohm & Co., in the city of Helena, Mont., and in the city of New York, on the 12th day of February, 1892, executed and delivered a deed of assignment, for the benefit of all their creditors, to one Max Kahn, as assignee (one of the defendants in this action), who accepted the assignment, took possession of the assigned property, and proceeded with the execution of the trust. There were a number of preferred creditors, among whom was the appellant herein. The defendant National Bank of Helena, also a preferred creditor under the assignment, on the 13th day of February, 1892, commenced an action in the district court of Lewis and Clarke county, Mont., against the defendants Greenhood, Bohm & Co., to recover judgment for the sum of about $35,000. A writ of attachment was issued, and delivered to the sheriff, who seized and levied upon the property formerly assigned to Kahn. On April 8, 1892, the defendant bank recovered a judgment for the amount of its claim; and on the 18th day of April, 1892, execution was issued upon this judgment, and delivered to the sheriff, who then had in his possession the stock of goods and property before attached. The sheriff returned the execution unsatisfied; stating that he could find no property in Lewis and Clarke county out of which to satisfy said execution, except the property attached, and which was included in the assignment to the defendant Kahn. On the 21st day of April, 1892, the defendant bank commenced an action in equity in the same court against Isaac Greenhood, Ferdinand Bohm, and Max Kahn for the purpose of setting aside the assignment of Greenhood, Bohm & Co. to Kahn, on the following grounds: (1) Want of sufficient description of the property pretended to be conveyed; (2) because said pretended assignment was made and executed with the intent and for the purpose of hindering, delaying, and defrauding the plaintiff herein, and the other creditors of the firm of Greenhood, Bohm & Co.; (3) because said pretended assignment was not executed by all the members of the firm of Greenhood, Bohm & Co., and all the owners of the property thereby pretended to be conveyed. In its bill of complaint the defendant bank alleged that it sued for the benefit of all creditors, and asked for the appointment of a receiver of all the assets and property described in the said assignment. The court on the 27th day of April, 1892, appointed William Muth receiver of the assets of Greenhood, Bohm & Co., whether in the hands of the sheriff, or of said Kahn, as assignee. Immediately thereafter all of said property was delivered over to the said receiver, and was disposed of by him under the order of the state court. On July 19,