

to the harvester were subsequently improved. We think that Fowler's invention was probably in the Appleby machine as and when it was tried in June, 1876; but it is unnecessary to analyze the testimony with the closest care, and to decide the question of the priority of two inventions, the patents upon which have now expired, for the case of the complainant is so defective by reason of the laches of himself and his co-owners that the decree of the circuit court must be affirmed, with costs.

NEALL v. CURRAN et al.

(District Court, D. Massachusetts. April 21, 1899.)

No. 966.

ADMIRALTY PLEADING — DISCRETION OF COURT — MULTIFARIOUSNESS AND MISJOINDER.

There is no rule of admiralty pleading which renders a libel by a vessel owner to recover freight earned subject to exception for multifariousness and misjoinder because it joins the charterer and another, to whom the bill of lading had been transferred, and asks recovery in the alternative against one or the other, alleging that, by reason of certain facts set out, the libelant is unable to say which is liable; and the court has discretion to permit such joinder, where it will conduce to its own convenience in the trial of the claims, and will result in no injustice to the parties.

In Admiralty. On exception to libel.

Carver & Blodgett, for libelant.

Henry M. Rogers, for respondents.

LOWELL, District Judge. The libel in this case was brought by the owner of the barge *Felix* against Curran & Burton and the Delaware Insurance Company. It sets out that the *Felix* was chartered to Curran & Burton to carry a cargo of coal; that she was loaded, and a bill of lading given to her master, in which Curran & Burton were designated as consignees; that she was wrecked while on her voyage, was raised, and a large part of her cargo delivered according to the terms of the charter and the bill of lading; that the insurance company had issued a policy of insurance to Curran & Burton on the cargo, had paid to them a total loss, had received the bill of lading, duly indorsed by Curran & Burton to the insurance company, and had become subrogated to the rights of Curran & Burton, and subject to their liabilities as consignees and shippers; that the cargo was received by Curran & Burton, on behalf of the insurance company, without notice to the libelant; that freight was earned thereon, and was demanded both from Curran & Burton and from the insurance company, and that each of the claimants alleged that the said freight should be paid by the other; "that the said freight as aforesaid is due to your libelant from the said Curran & Burton, as the persons making the contract of charter and the receivers of the same, and is also due from the said Delaware Insurance Company, as the holders of the bill of lading, and persons receiving the property, they afterwards having sold it." The claimants duly excepted upon the

ground of multifariousness and misjoinder, and because the allegations of the libel were contradictory, conflicting, irreconcilable, and incompatible, and because the libelant was bound to elect which of the defendants he would seek to hold liable, and to discontinue as against the other.

As the libelant's case was presented in the libel and at the argument, it is a claim for freight arising out of a given charter party, which claim, he alleges, is valid against both the claimants, or, at the least, against one of them; but, if against only one, then, by reason of a doubt concerning law or fact, he is ignorant which defendant is liable. The libelant, in substance, says: "As the result of a certain transaction, A. and B. are liable to me,—one or both,—I do not know which; and therefore I proceed against both of them in the same suit, seeking to recover against one or both according as my right shall appear." It should be added that the libelant has disclosed the circumstances of his claim as fully as he can, and that the claimants do not contend that he has concealed anything, or that they will be taken by surprise. If this were a declaration at common law, it would be demurrable, and so it would very possibly be if it were a bill in equity. No case has been pointed out in which a plaintiff was permitted to sue A. and B. in one action, alleging that one of the two was liable,—he did not know which. This is a libel in admiralty, and the libelant contends that in admiralty the rule is different. There is no doubt that the rules of pleading in admiralty are more liberal than at law or in equity. Multifariousness and misjoinder are to some extent technical defenses. Their validity as defenses is largely determined by historical considerations and by early precedents in pleading. The substantial reason why two controversies closely related to each other may not, in a given case, be determined in one action, is that from their joinder and from their trial together there would result either inconvenience to the court or injustice to a party. In the case at bar the convenience of the court makes for joinder and a trial of the plaintiff's claims at the same time, and such a trial will do no injustice to either of the claimants. If the facts in this case were to be investigated by a jury, the claimants might well be prejudiced by a joint trial of the claims against them, as the jury might hastily infer that one of the two claimants must be liable, but before a judge no harm will ensue. With rules of pleading so elastic as those in admiralty, much must be left to the discretion of the court; and it may be that, in some cases in admiralty, claims against two parties in the alternative, arising out of the same transaction, cannot properly be joined and tried together. In this case I think justice and convenience unite to make a single action and a single trial advisable. Exceptions overruled.

THE BELLE.

(Circuit Court of Appeals, Second Circuit. April 4, 1899.)

No. 125.

TUG AND TOW—LIABILITY OF TUG FOR INJURY TO TOW.

Where the presence of a number of vessels, moored alongside of each other in Harlem river, made it necessary for tugs with a tow, in passing down, to keep well to the opposite side of the channel, but they kept within the limits where the water was of sufficient depth, as shown by the government charts, they cannot be held liable for an injury to the tow caused by her striking a sunken rock, which was not shown on the charts or known to navigators.

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

This cause comes here upon appeal from a decree of the district court, Southern district of New York, dismissing the libel. 89 Fed. 879. The suit was brought to recover damages alleged to have been caused by the said tugs in negligently towing the libellant's barge, Joseph H. Rose, upon a rock in the Harlem river, on September 4, 1897.

George B. Adams, for appellant.

Peter Alexander, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The barge was being towed from the entrance of Spuyten Duyvil creek, down the Harlem river, bound for 138th street. She drew $8\frac{1}{2}$ feet, the rock was about $5\frac{1}{2}$ feet under water at low tide, and the ordinary rise and fall of the tide was about 5 feet. The tide had been flood for about an hour and a half in the Hudson river when the tow started. The flood tide flows from the Hudson river down the Harlem. There seems to be no dispute, upon the evidence, that the existence of the rock was not known to navigators. Upon the charts of soundings made by the government, incident to the improvements being made on the Harlem river, its presence was not indicated. These improvements had effected changes in the channel, but the dredging had not been continued quite as far down the river. It stopped about 15 feet short of the rock. As the tow approached Morris' dock, it was found that a number of boats were made fast there, alongside of each other, so as to occupy 150 feet of the channel,—a most reprehensible practice in such a restricted water way. In order to pass it was necessary to keep the tow well over to the westward.

There is a sharp conflict of evidence as to the precise location of the rock. Claimant's witnesses place it nearly opposite Morris' Dock. The libellant's witness, Taylor, a civil engineer of 20 years' experience, and who had been employed for 11 years by the government as engineer in charge of the work on Harlem river, places it a little below the line of the dock, and further to the westward. He located the rock by actual survey with a sextant, using the triangulation stations already fixed as part of the survey work done by the government