

made to save the machinery, and the boat became practically a total loss. The respondent is nowise responsible for the cessation of the work of salvage following the service of the writ of attachment, and it is clear that with proper effort on part of Capt. Boland, the work of saving the machinery could have been proceeded with notwithstanding the service of the attachment; and the evidence tends strongly to show that with proper effort the larger part of the machinery on the boat could have been saved, and to an amount that would probably have netted the sum of \$1,500 over and above the expense of salvage. Deducting this sum from the value of the boat, leaves a difference of \$4,500 as the amount of the damages to which the libelants are entitled, and a decree in their favor for that amount and costs will therefore be entered against the respondent.

THE JOHN B. DALLAS.

(District Court, D. New Jersey. June 12, 1899.)

1. COLLISION—SUIT FOR DAMAGES—PARTIES.

A purchaser of a vessel, who had made part payment thereon, and was in lawful possession, under a covenant to keep her in good repair and running order, at the time she was injured in a collision, although the legal title remained in the vendor, may maintain a suit in admiralty to recover damages for the injury.

2. SAME—SETTLEMENT WITH THIRD PERSON.

The claimant of a vessel libeled for collision cannot relieve the vessel from liability to the libelant by any settlement made after the suit was commenced with one not a party to the record, and without the libelant's consent.

This was a suit in rem to recover damages for collision.

Hyland & Zabriskie, for libelant.

Deady & Goodrich, for claimant.

KIRKPATRICK, District Judge. The canal boat Hunt while in tow came in collision with the steam tug John B. Dallas, and was seriously injured. It is admitted that the Hunt was in no way responsible for the collision, and that she is entitled to damages. The libel in this case was filed by Joseph D. Lafayette, who at the time was the captain of the Hunt, and in lawful possession of her under a contract of sale which provided for payments to be made from time to time, the title to remain in the vendor until all of the payments had been made. The contract of sale also provided that the said Lafayette was to "keep the said boat in good repair and running order at his own cost and expense." There is some controversy over the amount which had been paid by Lafayette on account of the purchase price of the Hunt at the time of the collision, but it is conceded that it was in excess of the one-half of the purchase price. The legal title of the Hunt was, however, still in the vendor,—one Jesse Billings. The question presented for consideration is whether

the libellant, having an equitable interest in the Hunt, being in lawful possession of her at the time of the accident, under a covenant to keep her in "good repair and running order," has a status in this court to maintain an action in rem for damages resulting from collision. This question, it seems to me, must be answered in the affirmative. The case is, in principle, analogous to *The Minna*, L. R. 2 Adm. & Ecc. 97, in which the plaintiffs had hired a barge upon the terms that she was to be at their risk, and to be returned by them to her owners in as good condition as when delivered to the plaintiffs. The barge was injured in collision while in plaintiffs' care, and, upon suit brought, it was contended that plaintiffs had no right or title to maintain the action. But Philemon, J., said that the court of admiralty should take jurisdiction. With *The Minna* as a precedent, his honor, Judge Acheson, held in *The Venture*, 18 Fed. 463, that he saw no good reason for denying to bailees, who might maintain an action at common law for their damages, the right to recover in admiralty full damages for an injury to property under bailment, whether the suit was in personam or in rem.

But it is contended on behalf of the claimants that the libellant ought not to maintain this suit, because the claimants have made a settlement with the holder of the legal title of the Hunt. That settlement, the record shows, was not made until after suit was begun by the libellant herein for the enforcement of his rights and the protection of his interests. The claimants herein had at that time full knowledge of the equitable interest of Lafayette in the Hunt, and of his contract obligation to keep her in repair. Billings, the holder of the legal title, was not a party to the suit, nor did the claimants take any steps towards making him so. The settlement was made without the intervention of the court, against the protest of the libellant herein, and not until after the claimants herein had received a bond indemnifying them against loss for so doing. Under these circumstances the claimants herein could not by any payment to Billings, not a party to the suit, relieve themselves and the tugboat John B. Dallas from their known liability to Lafayette, compel him to abandon his suit lawfully begun, and remit him, contrary to his will, and perhaps his interests, to an uncertain remedy against a third party. There could not be any settlement of the amount of damages to which the libellant herein was entitled, without his consent. The voluntary payment to Billings will not prevent Lafayette from prosecuting his suit in this court. There should be an interlocutory decree in favor of the libellant, with usual order of reference.

ALABAMA IRON & RAILWAY CO. v. AUSTIN et al.

(Circuit Court of Appeals, Fifth Circuit. May 23, 1899.)

No. 786.

1. EQUITY—JURISDICTION—NATIONAL BANKS—PREFERENCES.

Equity has jurisdiction of a bill by a receiver of a national bank to set aside a transfer of notes made by the bank to prefer a creditor.

2. SAME—PLEADING AND PROOF—VARIANCE.

A bill by the receiver of a bank to set aside a preferential transfer of notes, in violation of Rev. St. § 5242, is not sustained by proof that the notes were put into the transferee's hands for payment by him, and that, instead of paying them, he wrongfully kept them.

3. SAME—EVIDENCE—RES JUDICATA.

Where an order dismissing a law case is pleaded in bar in an equity suit, and no proof is offered except the order itself, defendant cannot show the nature of the law case by affidavit after trial.

Appeal from the Circuit Court of the United States for the Northern District of Alabama.

In April, 1893, R. W. Austin, as receiver of the First National Bank of Sheffield, Ala., filed his bill of complaint in the United States circuit court for the Northern district of Alabama against the Alabama Iron & Railway Company. He alleged that he was duly appointed by the comptroller of the currency to the office of receiver of said bank; that on the 11th day of November, 1889, the First National Bank of Sheffield was indebted to the Sheffield & Birmingham Coal, Iron & Railway Company in the sum of \$10,000; that at that time said First National Bank was largely indebted, and that the amount of its liabilities exceeded the value of its assets; that this fact was known to the president, cashier, and directors of the bank, and it was known and apparent to said officers that said First National Bank would presently be unable to meet its obligations, and that it would soon be obliged to suspend its business; that in contemplation of such insolvency, and with a view of giving preference to Jacob G. Chamberlain, receiver of the Sheffield & Birmingham Coal, Iron & Railway Company, over its other creditors, and also with a view and for the purpose of preventing the application of its assets in the manner prescribed by the laws of the United States, said First National Bank did on the 11th day of November, 1889, transfer, assign, and deliver to said receiver, as collateral to secure its said previous debts, certain seven notes of H. B. Tompkins, aggregating \$8,506.27; that Chamberlain was appointed by said court receiver of said Sheffield & Birmingham Coal, Iron & Railway Company, which was subsequently dissolved and reorganized under the name and style of the Alabama Iron & Railway Company; that said notes were by said receiver, Chamberlain, delivered to the defendant corporation, the Alabama Iron & Railway Company, and that said notes are held by said defendant corporation, and were received by it, with full notice of all the facts above stated; that the defendant corporation also holds and owns the said claim against the said bank; that the defendant corporation now holds the said assets, and claims the right to apply them or the proceeds of their collection to the said debts of said First National Bank to the defendant corporation, and that, if the defendant corporation is allowed to do this, it will be an illegal preference over the other creditors of said First National Bank; that the assets of said bank are insufficient to pay its debts; that the said transfer to the defendant corporation was fraudulent and void; and that the said assets are the property of the orator, Richard W. Austin, to be administered by him as such receiver. The bill of complaint required the defendant corporation to answer, but without oath, the following interrogatories: Whether the defendant corporation, on the 11th of November, 1889, had on account the claim against the First National Bank of Sheffield, and, if so, the amount thereof; whether or not the notes were transferred to the defendant corporation, and, if so, when and on what consideration; whether or not at the time of said transfer the First National Bank of Sheffield was insol-