

that the claimant was justified in believing that at the time his services were required at that place. The captain of the tug testifies that he received no notice that they were going to move the scow or dumper towards the dock, although he knew that they were trying to put the bow up against the dock; that neither he nor anybody on the tug gave the claimant any orders about lines; that he did not send the claimant on the dock; that nobody had intimated to him (the captain) that there was any necessity for putting out lines; that he did not get out, and was not thinking about getting out, any lines; that he was waiting for orders; that lines were not needed. He also gave the following evidence:

"Q. What did he [claimant] go down there for? A. That is his place, always used to be, when we were landing,—on the bow deck. Q. You said you were waiting for orders from somebody to get a line? A. Yes, sir. Q. You hadn't given Anderson any orders? A. No, sir. Q. So he didn't go down there for that purpose? A. I suppose he went down to stand by. Q. He didn't do anything without your orders, would he? A. Oh, well, when he would— He knows just as well what to do as for me to tell him. Q. Tell us your place on the barge. A. I am supposed to be all over, but I am usually on the bow. Q. Is it necessary for you both to be on the bow? A. At that time we didn't know exactly what to do until we got orders to put lines out, so I was standing on the bridge. If he had given orders, I would have been ready. Q. So, if this man went down there to take a line, he did it without orders? A. I didn't give him any orders."

It is apparent that the claimant put himself in the position in the expectation that he might be useful in getting out the line, and while, perhaps, he may not be criticised for his zeal and readiness, this does not relieve the case of the fact that the captain of the tug did not intend to use him at the place; nor is it thought that the captain was required to anticipate his presence in close proximity to the edge of the scow. The claimant has suffered a severe and disabling injury, but it did not arise from the breach of any duty on the part of the petitioners. A decree should be entered dismissing the claim, with costs, and for limitation of the petitioners' liability.

THE CINCINNATI.

(District Court, E. D. New York. June 24, 1899.)

1. COLLISION—FERRYBOAT NAVIGATING IN FOG—SPEED—NEW YORK HARBOR.
It is the duty of a double-screw ferryboat, which is unable to steer under slow headway, operating in a fog, when known to be approaching a pier, where the presence of another vessel may reasonably be expected, to be under such control, as to speed, that she can stop in time to avoid a collision after approaching near enough, so that the other vessel, if present, can be seen.
2. SAME—FAULT OF INJURED VESSEL—LYING AT END OF PIER.
The provision of the Greater New York charter making it unlawful for vessels to lie at the outer end of wharves on the North or East river, except at their own risk of injury from vessels entering or leaving any adjacent dock or pier, does not relieve a ferryboat from liability for collision with another vessel tied up at the end of a pier during a fog, where the ferryboat was attempting to find its own slip, which was not adjacent to such pier.

In Admiralty. Libel for collision.

Wilcox, Adams & Green, for libellant.

Robinson, Biddle & Ward, for claimant.

THOMAS, District Judge. At about 8 o'clock a. m., on the 5th day of November, 1898, the libellant's steamboat William Fletcher, after lying at pier 14, North river, overnight, started down the river for the purpose of reporting at the Battery. A dense fog had delayed her departure, but it lifted sufficiently to justify navigation. However, she proceeded down the river to the neighborhood of the slips of the Pennsylvania Railroad Company, when the fog again closed in and compelled the tug to turn about, and, her previous position having been occupied by another vessel, she tied up at the end of pier 13, known as "Starin's Pier." The first slip south from such pier was Starin's slip, while the first and second slips below Starin's slip were those of the Pennsylvania Railroad Company, into which the claimant's ferryboat Cincinnati was seeking to enter when she collided with the Fletcher lying at the end of pier 13, as above stated. The Cincinnati left Jersey City at 7:48 a. m., and, as the fog was exceedingly dense, decreased her speed to about two-thirds of her usual speed. Before sighting the Fletcher the Cincinnati had shut off her steam, and was going through the water under the momentum theretofore acquired. She discovered the Fletcher when about 50 feet away from her, that being the distance at which the lookouts on the vessels could see objects. The Cincinnati had maintained usual and proper signals during her passage. The bow of the Cincinnati struck the end of the shaft of the Fletcher. This indicates that the course of the ferryboat was approximately at right angles to the face of the pier. There is a single doubt concerning the liability of the Cincinnati. She had been going at something over half speed, probably at about two-thirds her usual speed. Her master states that he rang a slow bell, because he "was getting far enough over to New York then to slow in a fog," although he could not see anything. Thereafter he stopped his engines, because, as he states, "it was time to begin to look for the slips and docks in New York." The bell on Starin's pier No. 13 was ringing, and the pilot of the tug heard and was governing himself by it, and thereby he states that he knew that he "was pretty straight on and off" Starin's dock. The tide was slightly ebb, and the master testified:

"On an ebb tide we consider we are pretty close to the slip when we are a little above, and we are apt to work in and find the end of the dock or corner of the dock."

It also appears that the pilot in clear weather sought to leave the lower corner of pier 13, by some 30 or 40 feet, in the condition of tide then existing, and that the pilot of the Cincinnati knew that boats often lay at the end of the pier, and that he might expect to find one at such place. As soon as the ferryboat saw the Fletcher, her engines were reversed and everything possible was done to prevent the accident. The sole question is, was the Cincinnati approaching the New York shore under too great headway? The headway, although

not considerable in itself, was such that the ferryboat could not be stopped after seeing the other boat. Must a ferryboat operating in a fog be under such speed in approaching a pier that it can be stopped after discovering and before colliding with a boat at a pier? The inquiry is one of importance. It will be observed that the headway of the ferryboat was so slow that, according to her master, she would not steer. This was due to her having double screws. Hence there was but a single means of averting collision, and that was by proceeding so slowly through the water that the boat could be stopped before striking an object discovered ahead; that is, the boat should be under control as to speed. That seems to be a conclusion sound in logic and highly useful in practice, and the failure to observe it in the case at bar puts the ferryboat in fault. Unless such be the rule, vessels that will not steer under slow headway are excused from liability. It may be that the headway was inconsiderable; but when, from the construction of the vessel, the rudder has become useless, the headway should be diminished so as to be controllable when approaching a pier, where the presence of another vessel is expected. For it must be remembered that the master of the *Cincinnati* knew that he was off his course, that he was near pier 13, and that a boat might be expected to be lying at the end of the pier. Why, then, should he approach the pier in a dense fog, with a momentum that he could not check sufficiently to avert a collision? But it is urged that the *Fletcher* was also in fault. It is thought that she gave signals pursuant to her duty in that regard. But does she fall within the statute prohibiting vessels from lying at the end of piers? The statute is a part of the Greater New York charter, and is as follows:

"It shall not be lawful for any vessel, canalboat, barge, lighter or tug to obstruct the waters of the harbor by lying at the exterior end of wharves in the waters of the North or East river, except at their own risk of injury from vessels entering or leaving any adjacent dock or pier; and any vessel, canalboat, barge, lighter or tug so lying shall not be entitled to claim or demand damages for any injury caused by any vessel entering or leaving any adjacent pier." Laws 1897, c. 16, § 879.

The *Cincinnati* was not "entering or leaving any adjacent dock or pier." The *Fletcher* was obstructing *Starin's* slip to the south, but the *Cincinnati* was not seeking to enter that slip, and her entrance thereto was not anticipated, nor had she any right therein. The statute undoubtedly intends to prevent the use of piers forming the boundaries of slips to or from which another vessel seeks entrance or exit. A vessel in passage may not rake a ship lying at the end of a pier in the river, and exculpate itself from responding therefor upon the ground that it was making its way in a fog and trying to find and enter its proper slip, and that the injured ship was at the end of the pier, in violation of the statute. A broader view of the statute than that here adopted is inconsistent with its words and spirit, and incompatible with the necessities of the port, which the legislature may be presumed to have considered. A decree should be entered for the libellant, with costs.

WHALEN v. GORDON et al.

(Circuit Court of Appeals, Eighth Circuit. May 29, 1899.)

No. 1,109.

1. JURISDICTION OF FEDERAL COURTS—AMENDMENT OF PLEADING TO SUPPLY JURISDICTIONAL FACTS.

Where the facts warrant the exercise of jurisdiction by a federal court, but the pleader has failed to state them properly, as by omitting to allege a proper element of damages, which reduces the amount claimed below the jurisdictional limit, the court is not deprived of the usual power to permit him to do so by amendment, by the mere fact that the amendment will constitute a jurisdictional averment.

2. LIMITATION OF ACTIONS—AMENDMENT OF PLEADING—RELATION TO BEGINNING OF ACTION.

An amendment to a petition, which sets up no new cause of action or claim, and makes no new demand, but simply varies or expands the allegations in support of the cause of action already propounded, relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point. But an amendment which introduces a new or different cause of action, and makes a new or different demand, does not relate back to the beginning of the action, so as to stop the running of the statute, but is the equivalent of a fresh suit upon a new cause of action, and the statute continues to run until the amendment is filed; and this rule applies although the two causes of action arise out of the same transaction, and, by the practice of the state, a plaintiff is only required in his pleading to state the facts which constitute his cause of action.

3. SAME—RULE APPLIED.

Where plaintiff's original petition was for the recovery of damages for an alleged breach of warranty in a contract of sale, an amended petition alleging a rescission of such contract, and seeking to recover the purchase price paid, states a new and different cause of action, and does not relate back to the commencement of the action, for the purpose of saving the case from the bar of the statute.

4. SAME—SECOND SUIT—IOWA STATUTE.

Code Iowa 1897, § 3455, which provides that, where a plaintiff fails in an action for any cause except negligence in its prosecution, a new action, commenced within six months, shall be deemed a continuance of the first, for the purpose of the statute of limitations, does not apply where the cause of action stated in the second action is different from that alleged in the first, though based on the same transaction.

Caldwell, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Iowa.

On March 11, 1892, Joseph Whalen, the plaintiff in error, sold a stallion to Charles L. Gordon and others, who were co-partners as the Tiger Horse Company, and delivered to them the following written warranty, which was signed by himself and one D. A. Lyons: "To the Tiger Horse Co., Caledonia, N. D.: This is to certify that I guaranty stallion named Admiral, No. 3,333, to be seven years old, sure foal-getter (with proper care), and sound and true in all respects." The purchase price of this horse was \$100 in cash, and \$1,700 in the promissory notes of the purchasers, one half of which was payable in one year, and the other half in two years, from the date of the sale, with interest at 8 per cent. per annum. The purchasers paid the cash, and delivered their notes. On March 30, 1892, they notified Whalen that the horse failed to fulfill the warranty, and offered to return him, and on May 12, 1892, they brought an action against Whalen, Lyons, and J. T. Selby and B. E. Ingwaldson, in the district court of Traill county, in the state of North Dakota, in which they