wise or prudent to start upon a night voyage with such an unruly craft as the spile-driver so near a helpless boat, at a time when the wind was aft, and, according to one of the witnesses, ominous signals were in the sky. The determination of the jury ought not to be interfered with. *Davey* v. *Ætna Life Ins. Co.* 20 Fed. Rep. 494; *Gilmer* v. *City of Grand Rapids,* 16 Fed. Rep. 708, 711; *Mengis* v. *Lebanon Manuf'g Co.* 10 Fed. Rep. 665; *Blanchard's Gunstock Turning Factory* v. *Jacobs,* 2 Blatchf. 69.

But it is urged that the court fell into error in instructing the jury as follows:

"If you find that the only fault in the case was an improper cleat upon the spile-driver, that would not, of itself, be sufficient to charge the defendants, unless you find also that the facts were of such a character that the defendants knew, or ought to have known, of the defective character of the cleat."

Upon this branch of the evidence, then, the following propositions were submitted: *First,* was there an improper cleat, and, if so, was the injury occasioned solely by reason thereof? *Second,* did the defendants know of the defect, or could it have been discovered by the exercise of ordinary care and diligence on their part? It is insisted that there is no evidence that the defendants knew, or were chargeable with knowledge, of want of sufficiency in the cleat. That it proved inadequate is not disputed. It gave way from the bolts being pulled out through the deck of the spile-driver, fairly indicating, from the standing-point of the plaintiff, that it was improperly fastened; that the wood to which it was attached was decayed, or that in size, construction, or position, it was incapable of bearing the strain placed upon it. It is obvious that some of these defects could have been discovered at a glance; others by a careful examination, and others still only by a minute and thorough inspection, which the defendants were not required to make. Whether the defendants should have discovered the defect depended upon various questions which the jury only were competent to decide. The mere happening of the accident, if they adopted the plaintiff's theory regarding it, was alone sufficient to raise a presumption of negligence. For instance, they might have found that the cleat broke early in the night before the winds and waves became boisterous. On the contrary, they might have adopted the defendants' theory that it broke from a peril of the sea; because of the sudden, angry, and unexpected tempest. That the prior finding, unexplained, would be sufficient to inculpate the defendants can hardly be doubted. On the one hand the defendants were not held to the strict rule applicable to common carriers, and on the other their duties were not confined to the less onerous obligations which a master owes to his employes. They occupied a medium ground between the two. They were bailees for hire, having life and property in their keeping, and they were required to exercise ordinary care, skill, and prudence, in arranging and navigating the tow. Whether they fulfilled their obligations in these respects, was, upon all the evi-

dence, a question of fact for the jury, and not a question of law for the court. For these reasons it is thought that the instruction complained of was not erroneous, but was as favorable to the defendants as they could reasonably ask. Of the many authorities upholding the foregoing propositions, a few, which may be regarded as more or less controlling in this court, are here given. *Rose* v. *Stephens & C. Transp. Co.* 20 Blatchf. 411; S. C. 11 FED. REP. 438; *Robinson* v. *New York Cent. & H. R. R. Co.* 20 Blatchf. 338; S. C. 9 FED. REP. 877; *Rintoul* v. *Same*, 17 FED. REP. 905; *Alden* v. *Same*, 26 N. Y. 102; *Worster* v. *Forty-Second St. R. Co.* 50 N. Y. 203; *Mullen* v. *St. John*, 57 N. Y. 567; *Lyons* v. *Rosenthal*, 11 Hun, 46; *The Quickstep*, 9 Wall. 665; *The M. M. Caleb*, 10 Blatchf. 467, 471; *The Sweepstakes*, Brown's Adm. 509, 514.

The motion for a new trial is denied.

THE RESCUE.

(District Court, W. D Pennsylvania. June 20, 1885.)

1. TOWAGE—EXEMPTION FROM NEGLIGENCE.

   An understanding that a tow-boat should not be responsible for damages to the tow upon a contemplated trip, would not exonerate the tow-boat from the consequences of actual negligence in the performance of the service undertaken.

2. SAME—DAMAGES.

   The general rule is that the damages recoverable for injury to a vessel by a collision should not exceed her then value.

In Admiralty.

D. T. Watson, for libelant.

Knox & Reed, for respondent.

ACHESON, J. The evidence, as a whole, scarcely warrants the conclusion that there was any express agreement relieving the Rescue from that measure of care and diligence which the law imposes upon a tow-boat. But if the conversation between John Jackson and W. C. Jutte was as the latter testifies, still it would not exonerate the tow-boat from the consequences of actual negligence in the performance of the service undertaken. *Powell* v. *Pennsylvania R. Co.* 32 Pa. St. 414. The contract, however, having been entered into with the prospect of encountering ice, there was no culpability in undertaking the trip; and it may be conceded also that if there was any increased risk arising from the presence of ice, the libelant should be held to have accepted that hazard. The real question in the case then is whether the Rescue was forced upon the flat-boat by the pressure of the ice or struck it negligently.

And here the weight of evidence is most decidedly against the

Rescue. In backing towards the flat after the tow-boat had broken the ice and opened a way to Jackson's float, there was a plain lack of that degree of care which the occasion called for. As no one was left on the flat to warn off the Rescue as she approached, it was imperative that some one should have been on watch at the stern of the tow-boat. Conceding that the pilot is correct when he says the flat could be seen from the pilot-house "every time I looked at her," still he had his other appropriate duties to perform and could not closely and constantly watch the flat. Hence, as he himself states, the stern of the tow-boat was only about seven or eight feet from the flat when he rang the stopping-bell, and the headway was not arrested in time. The flat was not only hit by the Rescue, but one of her wheel-arms, coming down on the top of the flat, forced it under water. Undoubtedly, the collision could have been avoided by the exercise of proper care. The proof is clear that the disaster was altogether the result of culpable negligence on the part of the Rescue.

The libelant's claim, so far as it relates to the expense of raising and repairing the flat-boat, is well made out; but the item of demurrage must be disallowed. The evidence as to actual loss here is somewhat vague, and I incline to think there was unnecessary delay in raising the flat. The controlling reason, however, for denying demurrage is that the other damages allowed are probably as much as the flat was reasonably worth when she was sunk. Now, the general rule is that the damages allowed for injuries to a vessel should not exceed her value at the time of collision, (*The Venus*, 17 FED. REP. 925,) and there is nothing in this case to take it out of that rule.

Let a decree be drawn in favor of the libelant for $459.21, with interest from July 1, 1884, and costs.

THE WM. KRAFT.

(*District Court, W. D. Pennsylvania.* June 17, 1885.)

PURCHASE OF VESSEL—NOTICE OF LIEN—ESTOPPEL.

While respondents were negotiating for the purchase of a steam-boat, a lien-creditor notified them of his claim, and warned them not to buy until it was settled; but subsequently informed them that it was settled, at the same time remarking that they ought to see that they got a good bond; thereupon the respondents completed the purchase, and paid the price, taking the customary bond of indemnity against liens generally. *Held*, that such creditor was estopped from asserting that said claim was a lien against the boat in the hands of the respondents, to the prejudice of the respondents and their surety in said bond.

In Admiralty.

Albert York Smith, for libelants.

Knox & Reed, for respondents.