

In re THE LUCKENBACK.¹

(District Court, S. D. New York. March 9, 1886.)

SHIPPING—LIMITATION OF LIABILITY—PRACTICE—FILING PETITION—PROPER COURT—ADMIRALTY RULE 57.

A libel having been filed for damages against the tug L. in the district court of the United States for the Eastern district of New York, upon which, after judgment against the tug, an appeal was taken by the owners to the circuit and thence to the supreme court; and other suits for damages arising out of the same disaster having been brought against the owners in the state courts in the Southern district of New York,—a petition to limit liability was filed by the owners in the district court for the Southern district during the pendency of the appeal in the libel suit. On motion to dismiss the proceedings, as having been brought in the wrong district, *held*, that the petition should have been filed in the district court of the Eastern district, in which the original libel was filed, and the motion to dismiss was granted.

In Admiralty.

Butler, Stillman & Hubbard, (Mr. Mynderse,) for petitioners.
Goodrich, Deady & Platt, opposed.

BROWN, J. The steam-tug E. Luckenback having been heretofore libeled in the Eastern district on a claim of damages for negligence, she was adjudged liable, and a decree entered against her. Upon appeal, that decree was affirmed in the circuit court, and from the decree of affirmance a further appeal was taken to the supreme court, where that appeal is now pending. Other suits arising out of the same disaster have been commenced in the state courts in this district against the owners of the tug; and the owners have now filed in this court a petition for a limitation of liability. A motion to dismiss the petition has been made, under the fifty-seventh rule of the supreme court in admiralty, upon the ground that the petition is filed in the wrong district, and should have been filed in the Eastern district. The fifty-seventh rule provides that "the said libel or petition shall be filed, and the said proceedings had, in any district court of the United States in which said ship or vessel may be libeled; * * * or, if the said ship or vessel be not libeled, then in the district court for any district in which said owner or owners may be sued in that behalf." Both clauses of the rule above cited are in the present tense. There is a libel pending, and the vessel is libeled; but not in any district court. The appeal removed the cause completely into the circuit court.

In the case of *The Benefactor*, 103 U. S. 239, proceedings to limit liability, after an appeal to the circuit court had been had, on the libel for damages, were taken in the district court for the Eastern district, where the libel for damages had been filed. The supreme court, in reversing the decree of the circuit court in the limited lia-

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

bility proceedings, directed that all the further proceedings therein be had in the circuit court; and at the same time provided by the new rule (58) that, where "such cases are or shall be pending in said courts on appeal from the district courts," "the rules and regulations shall apply to the circuit court."

This rule was adopted on the ground of convenience. It is based solely upon the pendency of the cause in the circuit court, and because the final decree, after appeal to the supreme court, is ordinarily a decree of the circuit court upon the mandate of the supreme court. The question considered by the supreme court in the case of *The Benefactor* was, where shall the limited liability proceeding be continued upon a reversal by the supreme court of a decree of the circuit in that proceeding? The court directed in that case, and provided generally by rule 58, that in "such cases" the further proceedings might be had in the circuit court. I do not think that the decision, or rule 58, was intended to determine the place where the *original* proceeding to limit liability should be commenced, even though a libel for damages might be then pending in the circuit, or in the supreme court.

In all admiralty causes, the district court is the court of original jurisdiction, and the circuit court is an appellate court only. The proceedings in limitation of liability ought undoubtedly to be conducted, so far as possible, upon the analogy of all other proceedings in admiralty, and therefore commenced in the district court, so that the right of appeal and review in the circuit may remain unimpaired. The words "such cases," near the close of rule 58, should therefore be construed as referring only to the cases of direct proceedings to limit liability, and not to cases in which only a libel for damages may be pending in the circuit on appeal.

The question comes back, therefore, to the construction of rule 57. Under that rule, as the vessel has been libeled for damages, the second clause does not apply; and consequently the words "may be libeled," in the previous clause, must be construed as including cases in which the vessels may *have been libeled*. The present proceedings should therefore have been instituted in the district court of the Eastern district. This conclusion harmonizes with the precedent of *The Benefactor*, *ubi supra*, which should be followed in this case.

The motion to dismiss the proceeding will therefore be granted.

THE MARY FRASER.¹

MARCUSSEN and others v. THE MARY FRASER.

LAURO v. SAME.

(District Court, S. D. New York. March 17, 1886.)

1. COLLISION—ANCHORING—FOUL BERTH.

The bark S. having come to anchor at least 800 feet distant from another vessel, the ship F., which lay at anchor about half a mile from the Staten island shore, in New York harbor, *held*, that the position of the S. was not so dangerously near the F. as to render her liable to the charge of negligence for anchoring in a "foul berth."

2. SAME—TWO VESSELS—DRAGGING ANCHOR—NEGLIGENCE.

The bark S. having thus anchored near the ship F., the vessels swung at ease and without interference during four changes of the tide, both vessels being held by their port anchors only. Afterwards the ship F. dragged anchor, and drifted towards the bark S. until their cables fouled, when both began to drift. The F. dropped her starboard anchor, but the F. at no time dropped her starboard anchor. With the turn of the tide the ship drew across the bows of the bark S., and all efforts to separate them by the use of sails and lines being of no avail, and no tug being procurable, as the tide became stronger both vessels were carried down the stream until they collided with another vessel, the M., and again with another, the N., which latter, together with the bark S., was injured. *Held*, that it was negligence on the part of the ship F. that her starboard anchor was not let go as soon as she was perceived to be drifting, as well as afterwards, while the vessels were still apart. As the evidence showed no fault on the part of the bark S., *held*, that the latter was not bound to slip her port anchor for the F.'s benefit, nor to run the risk of paying out suddenly all her spare chain, but that the damage occasioned should be borne by the ship.

In Admiralty.

James K. Hill, Wing & Shoudy, for libelants.*Sidney Chubb*, for claimants.

BROWN, J. The above libels arise out of damages caused by the drifting of vessels at anchor. On the seventh of August, 1885, the Norwegian bark Svalen was towed down the harbor upon the flood-tide, preparatory to going to sea, and came to anchor about half a mile off the Staten island shore at a distance variously estimated from 600 to 1,800 feet north-westerly from the British ship Mary Fraser which had been previously anchored there upon her arrival from sea.

One of the defenses of the claimants is that the Svalen anchored in a foul berth; that is, dangerously near the Mary Fraser. The two remained in the same relative position, however, for about 24 hours, during which time there were four turns of the tide, and they swung at ease without any interference with each other. The weight of evidence would show that they were at least 800 feet apart; and I find that, under the circumstances of their situation, that was sufficient

¹ Reported by Edward G. Benedict, Esq., of the New York bar.