

MANHATTAN TRANSP. CO., Limited, v. MAYOR, etc.<sup>1</sup>

(District Court, S. D. New York. December 11, 1888.)

WHARVES—CONCEALED OBSTRUCTION.

A wharf-owner is liable for damage caused to a vessel by concealed obstructions which might have been ascertained by the owner with reasonable diligence.

In Admiralty. Libel for damages.

*Wilcox, Adams & Macklin*, for libellant.

*Henry R. Beekman*, for respondent.

BROWN, J. The liability of the owner of a wharf for damages caused to a vessel by concealed obstructions which might have been ascertained by the owner by reasonable diligence has been frequently declared as a rule of law. *Christian v. Van Tassel*, 12 Fed. Rep. 884. The case of *Smith v. Havemeyer*, 32 Fed. Rep. 844, has been recently affirmed in the circuit court, reasserting the same doctrine. 36 Fed. Rep. 927. See, also, *The Moorcock*, 13 Prob. Div. 157.

The libellant's canal-boat was moored on March 10, 1888, along the bulk-head between the piers off Sixty-First and Sixty-Second streets, East river, heading up. On the following morning she was found sunk. An examination showed that two or three of her planks were broken on the port side, not far from her keel, and the adjoining planks chafed and rubbed up to the bilge. This was from 15 to 20 feet aft of the stem. Her captain estimates that she was moored with her stem about 45 feet below the Sixty-Second street pier. When found sunk, her stem-lines were broken, and her bow swung off a considerable distance into the deep water. Other evidence shows that she sank about 3 o'clock A. M., about the time of low water there. Subsequent examination of the bottom showed a boulder at a point about 75 feet below the Sixty-Second street pier, and from 6 to 8 feet off the bulk-head. This corresponds as nearly as is to be expected with mere estimates of the position of the boat; and as no other probable or adequate cause appears for the wound in the bottom of the boat, or for her sinking, I must find it to have been caused by the boulder above referred to. That was 7.3 feet below the surface at low water. The canal-boat drew between 8 and 9 feet. If she had first sunk from leaking, and then slid down the incline against some boulders in the deeper water outside, the wound would have been on the starboard side. No cause for her leaking before striking the boulder appears, the allegation that she was previously in leaky condition not being sustained.

The master of the boat had no notice of any obstruction in that locality, though he was cautioned to keep away from the upper corner, and for that reason, as he says, moved his boat considerably downward. The obstruction being one that was discoverable by reasonable care on the defendant's part, the libellant, not being in fault, is entitled to a decree, and to an order of reference to compute the damages.

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.

MILLER v. SHARP *et al.*

(Circuit Court, N. D. Iowa, E. D. January 9, 1889.)

## REMOVAL OF CAUSES—SEPARABLE CONTROVERSY.

A lessee is interested in the controversy in a suit to set aside his lessor's title to the leased premises as fraudulent, and to quiet title in complainant; and when he, being a resident of the same state as complainant, is made a party defendant, though the lessor is a resident of another state, the controversy is not wholly between citizens of different states, and is not removable.

In Equity. On motion to remand.

Bill by Andrew Miller against John C. Sharp and others to set aside a conveyance of realty, and to quiet title.

*Blair, Norris & Dunham*, for complainant.

*Fouke & Lyon*, for defendants.

SHIRAS, J. This suit was brought in the district court of Delaware county, Iowa, and in the bill herein filed the complainant avers that the defendant John C. Sharp, through fraud, procured the conveyance by complainant to Sharp of certain realty, situated in Delaware county; that thereupon Sharp and wife conveyed the same to John Utter by a quitclaim deed, knowledge of the alleged fraud being charged upon Utter, and that C. B. Eaton is in possession of the premises as a tenant of said Sharp. The prayer is that the conveyances to Sharp, and from Sharp to Utter, be declared fraudulent and void; that complainant be decreed to be the owner of the realty in fee-simple; that the lease to Eaton be declared void, and that complainant's title be quieted as against all the defendants. The defendants Sharp and Utter filed a petition for the removal of the cause into the federal court, averring therein that the complainant is a citizen of the state of Iowa; that the defendants Sharp and Utter are citizens of the state of Wisconsin; and that C. B. Eaton is a citizen of the state of Iowa; that he is merely a nominal party; and that there is a separable controversy in the suit, to which Eaton was not a proper or necessary party. The transcript of the record having been filed in this court, the complainant now moves for an order remanding the cause, on the ground that the complainant, Miller, and the defendant Eaton are shown upon the face of the record to be citizens of the same state.

To sustain the jurisdiction of this court it is urged that there is in the suit a controversy which is wholly between the complainant and the defendants Sharp and Utter, and therefore the cause is removable under the provisions of section 2 of the act of August 13, 1888. The contention is that the question of the fraud which is alleged to have been practiced by Sharp upon complainant, and by which the latter was induced to convey the realty in question to Sharp, constitutes a separate controversy, which is wholly between the parties named. In one sense this is true, in that, according to the allegations of the bill, Sharp alone made the fraudulent representations which formed the inducement for the conveyance of the property; and therefore it may be said that as to the fraud