to the collision. At a more moderate rate, even from the time she was seen by the steamer, the latter would have gone clear; and the schooner must, for this reason, be held chargeable with contributory negligence.

This fault is not charged against the schooner in the libel, but it appeared from her own testimony and upon own showing at the trial. There would seem to be no possibility, therefore, of her owners having been misled by this proof, or in any way surprised; nor is it certain that before the trial the schooner's speed was known to the owners of the steamer. The fault was alleged and argued on the final hearing. An amendment of the pleadings would, on motion, have been allowed, as was done in the case of *The Oder*, even upon appeal in the circuit after a final decree in the district court. 13 FED. REP. 272, 283. If the admiralty, like other courts, proceeds *secundum allegata et probata*, and requires proper pleadings to apprise the respective parties of what they are to meet, and to prevent surprise, yet where the facts fully appear without objection, and there is no dispute or question concerning them, it would be a perversion of justice to disregard them; and in such a case the pleadings should be deemed to be amended accordingly; the only question is one of costs. See, also, Roscoe, Adm. Jur. (2d. Ed.) 194; Order 27, § 1, under "Judicature Act."

No satisfactory reason is given why the steamer's whistles were not heard, or, at all events, attended to, on board the schooner. The foghorn from Eaton's Neck could not be mistaken for them. The two seamen on the schooner seem to have heard these whistles during 15 minutes preceding the collision. That was ample time to have procured and exhibited a torch-light, as required by statute; and in this respect the schooner would seem to have been guilty of inattention and negligence. The direction in which the seamen heard the whistles, about two points on their port bow, showed that the whistles could not have come from Eaton's Neck, and indicated some steamer near the schooner's course. It is impossible to say that the exhibition of such a torch-light would not have done any good; it was one of those occasions when every requirement of the rules should have been observed, and when, through the obscuration of the colored lights by fog till the vessels were near each other, the display of a torch-light might, by its penetrating a few rods further through the fog, have enabled the steamer, notwithstanding her high speed, to have averted the collision. *The Pennsylvania*, 19 Wall. 125; S. C. 12 FED. REP. 914; *The Excelsior*, Id. 203.

Each vessel, therefore, must be held in fault. A reference may be taken to compute the damages to each, and judgment entered for half the excess in favor of the greater sufferer. *The North Star*, 106 U. S. 17; [S. C. 1 Sup. Ct. Rep. 41.]

In the proceeding of the owners of the schooner to limit their liability, they may take the usual order.

UNITED STATES *v.* GEO. E. WHITE.

SAME *v.* WM. P. WHITE.

SAME *v.* JOHN P. WHITE.

SAME *v.* TUTTLE and others.

(*Circuit Court, D. California.* July 30, 1883.)

1. JURISDICTION—FRAUD.
   The United States courts have jurisdiction to vacate a patent to lands, in a proper case, on the ground of fraud.
2. FRAUD IN PROCURING PATENT.
   The frauds for which courts will set aside a patent, granted by the United States in the regular course of proceedings in the land-office, are frauds extrinsic or collateral to the matter tried and determined, upon which the patent issued, and not fraud consisting of perjury in the matter on which the determination was made.
3. PERJURY AND FALSE TESTIMONY.
   Perjury and false testimony in the proceeding, by means of which a patent is secured by fraud, is not fraud extrinsic or collateral to the matter tried and determined in the land-office, within the meaning of the rule, and a patent will not be set aside on that ground alone.
4. PERJURY—INJURY.
   Where no pecuniary injury to the United States is shown by the bill, and it does not appear that there is any other right in the land against the government, whether a court of equity should set aside a patent obtained on false testimony, if otherwise proper, *quære.*
5. RETURN OF PURCHASE MONEY.
   Where the United States files a bill to set aside a patent, on the ground that it was obtained upon false testimony, it should at least offer to return the purchase money paid by the patentee for the land.
6. EQUITY.
   When the United States comes into a court of equity asking equity like a private person, it should do equity.
7. SAME—FORFEITURE.
   Courts of equity never enforce penalties or forfeitures.
8. FORFEITURES.
   If the United States desires to enforce the penalties and forfeitures imposed by section 2262 of the Revised Statutes, for obtaining a patent to land upon false affidavits, it must do so by a proper proceeding at law, where the party charged will be entitled to a trial of the charge by a jury.

In Equity.

A. P. Van Duzer, for the United States.

L. D. Latimer and *Barclay Henley*, for defendants.

SAWYER, J. The first of these cases, *U. S.* v. *Geo. E. White*, is a bill in equity to vacate a United States patent, issued to the defendant on the ground that it was obtained upon false and fraudulent affidavits and proofs, made under the pre-emption laws. It is alleged that on May 6, 1876, the defendant filed a declaratory statement under the pre-emption laws upon a quarter section of land