

held that there was neither a law of the state forbidding the transaction of business on that day, nor a general usage ingrafted into the commercial and maritime law forbidding the unloading of vessels. See, also, *Powhattan Steam-boat Co. v. Appomattox R. Co.* 24 How. 247. In neither of these cases was it intimated that the Sunday laws were inapplicable to maritime transactions.

Neither is this case affected by the fact that a portion of each voyage was to be performed within Canadian waters, and that the law of Canada upon the subject of Sunday observance is not proven. Both the inception and completion of performance were to take place in this state, and the mere circumstance that, in the course of their trips, the steamers must pass beyond the boundaries of the state, does not free the contract from its taint of illegality.

A new trial must be denied.

MOWAT and others v. BROWN and others.

(Circuit Court, D. Minnesota. July, 1883.)

PRACTICE—CONTINUANCE—ABSENCE OF MATERIAL WITNESS.

Where a defendant, having good reason to believe that his co-defendant, who is a resident of Canada and has not been served, will be present at the trial as he has promised, in reliance on such promise has failed to take his testimony by deposition, and the testimony of the co-defendant is material, a continuance of the case may be granted to allow such testimony to be taken.

At Law.

Atwater & Atwater, for plaintiffs.

A. R. Lewis, for defendants.

NELSON, J., (*orally*.) A motion is made in this case for a continuance on account of the absence of a material witness. The material witness is the co-defendant, who was not served with process. The suit was brought against Brown & Brown, consisting of Calvin Brown and his brother. The plaintiff resides in Minneapolis, and the co-defendant not served resides in Canada. The suit is brought upon a bill of exchange, in which both parties are interested. Issue was joined in the state court of the county of Hennepin some time in February, and the case was removed to this court some time in the month of July. The co-defendant, who was not served, it appears, according to the affidavit of the party served, was in Minneapolis in the latter part of February, this year. He stated to the co-defendant that he would be on hand ready to be a witness, and to be examined as a witness for him in the case. Calvin Brown, who was served, supposed and he had reason to believe that his co-defendant, who was equally interested in the result of the controversy, would be present in attendance as a witness, as he had so stated, and in view of that

fact his deposition was not taken, neither was he served with a summons to appear at this term, when he was in this state in February. I think, from all the facts stated in the case, that there is no doubt about the materiality of the testimony of the co-defendant, Brown, who is now in Canada. His brother was led to believe, even as late as this month,—about the sixth or seventh of this month,—that he would be in attendance, by a correspondence that he had with him. In view of these facts, stated in the affidavit, notwithstanding objection being made by plaintiff to the continuance of this case, it will have to go over the term.

The motion for continuance is granted.

UNITED STATES v. MARQUETTE, H. & O. R. Co.

Circuit Court, W. D. Michigan, N. D. July 23, 1883.

1. RAILROADS—TAXATION OF UNDIVIDED PROFITS—ACT OF 1866—ACT OF JULY 14, 1870.

The undivided profits of a railroad corporation in 1871, carried to an account in the books of the company, known as "unexpended earnings," and used for construction, are liable to taxation under the act of congress amending the act of 1866, passed July 14, 1870, which provides that there "shall be collected for and during the year 1871 a tax of two and one-half per centum * * * on all undivided profits of such corporation which shall have accrued and been earned and added to any surplus, contingent, or other fund."

2. SAME—INTENT OF ACT OF 1870.

The statute of 1870 was intended to reduce the tax on profits from five to two and one-half per cent., but was not intended to remove from such reduced tax any part of the profits.

3. SAME—FAILURE TO MAKE RETURNS—LAPSE OF TIME.

As it was made the duty of the railroad company, under the acts of 1866 and 1870, to make returns to the proper internal revenue officer of the amount of income, profits, and taxes, when no returns have been made by the company, a failure on the part of the United States to demand such tax, or to institute proceedings to recover the same until 1881, cannot constitute a bar to an action to recover such tax when it does not appear that the delay has prejudiced the company by the disappearance or loss of evidence essential to its defense.

4. SAME—SHORTENING TRACK—IMPROVEMENTS—CONSTRUCTION.

The amount expended by the railroad company in this case for a piece of new line for the purpose of shortening its tracks properly belonged with expenditures for improvements, and having been paid from the earnings, the amount so expended should be deducted from the amount subject to the tax.

Action of Debt.

John W. Stone, for the United States.

W. P. Healey and *J. L. Stackpole*, for the defendant.

WITHEY, J. The question in this case is whether a railroad company, in 1871, was required to pay an income tax on its undivided profits used for construction. In that year the Marquette & Ontonagon Railroad Company owned and operated a road in the upper peninsula of Michigan. In 1872 the road was sold and reorganized