BOWEN v. DECKER and another.

(*District Court, S. D. New York.* December 14, 1883.)

1. DEMURRAGE—UNSAFE BERTH—CHANGE—IDLE DAYS.

The consignee of a vessel is bound to provide a safe berth. Where, by custom, the consignee has an allowance of three "idle days" in discharging a cargo of lumber, and he consumes them all before the discharge is begun, any subsequent want of readiness and delay in receiving the lumber at a different part of the dock, to which the vessel is compelled to go for safety from ice, will be at the risk and charge of the consignee, where it appears that such readiness might have been had in the first instance at the safe part of the dock.

2. SAME—ELEMENTS, WHEN NO DEFENSE.

Though the change of berth was made necessary by the elements, the ice in this case in no way interfered with the consignee's getting ready to receive the cargo, and the ice was therefore no defense to them against a claim for demurrage, and did not extend the time, or idle days, allowed them to receive the cargo.

Action for Demurrage.

Beebe & Wilcox, for libelant.

W. Howard Wait, for respondents.

BROWN, J. On the fourteenth of February, 1881, the schooner F. E. Lawrence, loaded with 260,555 feet of lumber consigned to the respondents, arrived at their docks at the Jane-street pier. This pier was a very short one, and the north side of it was liable at that season to be rendered unsafe for vessels through floating ice coming in from the northward. The pier and bulk-heads were so incumbered with lumber that the schooner could not begin to unload until the 17th. On Sunday, the 20th, the schooner being somewhat injured by the invasion of ice, moved to the south side of the pier, where the pier and bulk-head were so filled up that no further discharge could be had until Wednesday, the 23d. At the time of removal I think the evidence shows that lumber could not be conveniently discharged on the northern bulk-head, through the schooner's ports, as is customary. The unlading was finished on March 7th. Nine working days, *i. e.*, at the average rate of 30,000 feet per day, is a reasonable and customary rate of discharge. Twenty-one days in all, including Sundays and holidays, were consumed. The respondents were bound to provide a safe place of discharge, either at the north or south side of the pier, as circumstances required. By the usage, which was not controverted in this case, they had the benefit of three idle days; but having consumed all of these at the outset, while the schooner was at the north side, the respondents cannot be allowed for the schooner's subsequent loss of time through their want of readiness to receive the lumber on the south side afterwards, when it became necessary to shift the schooner to the south side on account of ice. *Smith* v. *Yellow Pine Lumber*, 2 FED. REP. 396. From the injury to the schooner on the north side already received, the master was justified in removing her on Sunday, the 20th, to the south side to avoid the

ice. In taking their three "idle days" to provide facilities for unloading at the north side, where the situation was uncertain as respects safety, the respondents took the risk of any further delay at the south side, if in fact it should become necessary to remove there. Though the danger at the north side arose "from the elements," it was not such as interfered in any way with the respondents' providing a safe place of delivery on the south side of the pier. The cases cited by the respondents (*The Glover*, 1 Brown, Adm. 166; *Coombs* v. *Nolan*, 7 Ben. 301; *Fulton* v. *Blake*, 5 Biss. 371; *Cross* v. *Beard*, 26 N. Y. 85) are therefore not applicable to this case.

The evidence shows that the delay at the south side was at least two days, through want of readiness to receive the lumber. The day which was too cold to work is not identified as one of these. One of them, however, February 22d, was a public holiday, which must be deducted. Code, § 3343, sub. 21. The respondents will therefore be held responsible for one day's delay, amounting to $40, with interest and costs. There is no such preponderance of evidence as shows that the remaining three days' delay was through the respondents' fault.

Decree for $40, with interest and costs.

WOODRUFF v. NORTH BLOOMFIELD GRAVEL MINING CO. and others.[1]

(*Circuit Court, D. California.* January 7, 1884.)

1. PUBLIC AND PRIVATE NUISANCE FROM MINING DEBRIS.

The Yuba river rises in the Sierra Nevada mountains, and after flowing in a westerly direction about 12 miles across the plain after leaving the foot-hills, joins the Feather. At the junction, within the angle of these two rivers, is situated the city of Marysville. The Feather thence runs about 30 miles and empties into the Sacramento. These three rivers were originally navigable for steam-boats and other vessels for more than 150 miles from the ocean, at least as far as Marysville—the Sacramento being navigable for the largest-sized steamers. The defendants have for several years been and they are still engaged in hydraulic mining, to a very great extent, in the Sierra Nevada mountains, and have discharged and they are discharging their mining *debris*,—rocks, pebbles, gravel, and sand,—to a very large amount, into the head-waters of the Yuba, whence it is carried down, by the ordinary current and by floods, into the lower portions of that stream, and into the Feather and the Sacramento. The *debris* thus discharged has produced the following effects: It has filled up the natural channel of the Yuba above the level of its banks and of the surrounding country, and also of the Feather below the mouth of the Yuba, to the depth of 15 feet or more. It has buried with sand and gravel and destroyed all the farms of the riparian owners on either side of the Yuba, over a space two miles wide and twelve miles long. It is only restrained from working a similar destruction to a much larger extent of farming country on both sides of these rivers, and from in like manner destroying or injuring the city of Marysville, by means of a system of levees, erected at great public expense by the property owners of the county and inhabitants of the city, which levees continually and yearly require to be enlarged and strengthened to keep pace with the increase in the mass of *debris* thus sent down, at a great annual cost, defrayed by means of special taxation. It has polluted the naturally clear water of these streams so as to render them wholly unfit to be used for any domestic or agricultural purposes by the adjacent proprietors. It has filled to a large extent, and is filling up the bed and narrowing the channels of these rivers, and the navigable bays into which they flow, thereby lessening and injuring their navigability, and impeding and endangering their navigation. All these effects have been constantly increasing during the past few years, and their still further increase is threatened by the continuance of the defendants' said mining operations. *Held*, that these acts, unless authorized by some law, constitute a public and private nuisance, destructive, continuous, increasing, and threatening to continue, increase, and be still more destructive.

2. SPECIAL INJURIES TO THE COMPLAINANT.

During all this time the complainant was and he now is owner in fee of a block of buildings in Marysville, in the business portion of the city, about 500 feet from the levee on the Yuba. Originally the steam-boat landing for the city was on the Yuba, nearly opposite to this block, but by reason of the filling up of that river its navigation has been prevented, and the landing is now in the Feather, three-fourths of a mile distant from said block. By a break in the levee of the Yuba during one of its annual floods, the city of Marysville was inundated, the water stood several feet deep in this block, *debris* was deposited in it, its underpinning was washed out so that the roof fell in, and the repairs of these injuries cost between $2,000 and $3,000. The building is liable in the same manner to similar injuries from every flood in the river. The complainant also owns two farms,—one of 952 acres, abutting on the Feather a few miles below Marysville, upon which there was formerly a public steam-boat landing for shipping and receiving freight and passengers, but which has become useless by the filling up of the river in front; the other of 720 acres, abutting on the opposite bank of the Feather. Seventy-five acres of one of these tracts and 50 acres of the other have been completely buried and destroyed by the *debris*, and

[1] See S. C. 16 FED. REP. 25.