

BURNS *v.* THE SPAIN.<sup>1</sup>

(*District Court, E. D. New York. March 14, 1884.*)

## COLLISION IN SLIP—CANAL-BOAT AND PROPELLER—CONTRADICTORY EVIDENCE.

A canal-boat, lying in the same slip with a steam-ship, fouled the screw of the steam-ship and received injuries which caused her to sink. On the part of the canal-boat it was alleged that the accident was due to the screw being put in motion before the steam-ship was unmoored, which created a current. The steam-ship denied that the screw had been put in motion, and claimed that the canal-boat had drifted with the tide against the screw. *Held*, the testimony being contradictory, that the case did not present such a preponderance of evidence in favor of the libelant as to allow it to be held that he had proven his case, and the libel was dismissed, without costs.

In Admiralty.

*J. A. Hyland*, for libelant.

*John Chetwood*, for claimants.

BENEDICT, J. The libelant's canal-boat, lying in the same slip with the steam-ship Spain, on the morning on which the steamer sailed, in May, 1882, fouled the screw of the steamer, and there received injuries which caused her to sink. The charge of the libelant is that before the steam-ship was unmoored her screw was put in motion in the slip, without notice or warning to the boats in the slip, and thereby a current created which forced the libelant's boat upon the screw while in motion. On the part of the steam-ship, it is averred that the screw of the steam-ship was not moved prior to the accident, but that the canal-boat, through negligence, drifted by the tide upon the screw, the same not being in motion, where she was injured by coming in contact with the screw at rest, and not by a blow from the screw in motion. The testimony upon the point of the inquiry, namely, whether the screw of the steam-ship was in motion on the morning in question before the canal-boat got foul of the screw, contains contradictions that I have not been able to reconcile. I am satisfied that there is misstatement or concealment on one side or the other, but the case does not present such a preponderance of evidence in favor of the libelant's account of the accident as will permit me to hold that he has proven his case. I must therefore dismiss the libel. I give no costs.

<sup>1</sup> Reported by R. D. & Wyllys Benedict, of the New York bar

## MACNAUGHTON v. SOUTH PAC. C. R. Co.

(Circuit Court, D. California. March 24, 1884.)

## 1. REMOVAL OF CAUSES FROM STATE COURT—APPLICATION MUST SPECIFY WHEN GROUND EXISTED.

In order to show jurisdiction in a federal court over a cause removed thither from a state court on the ground of the parties being residents of different states, it must appear in the application for removal that this ground subsisted at the time the suit was instituted in the state court.

## 2. SAME—AMENDMENT NOT A RIGHT.

The amending of an application so as to show jurisdiction is a matter within the discretion of the court, and cannot be claimed by a party litigant as a right.

## 3. SAME—“SESSION” EQUIVALENT TO “TERM” IN CONTEMPLATION OF ACT OF CONGRESS.

The word “session” in the present constitution of California, relative to the sittings of courts, is “term” within the contemplation of the act of congress.

## Motion to Remand.

*H. N. Clement*, for plaintiff.

*Gordon Blanding*, for defendant.

SAWYER, J. This action was commenced in the Fourth district court of the state of California on August 1, 1879. Defendant demurred August 22, 1879, and the demurrer was overruled. Defendant having answered, plaintiff demurred to that part of the answer setting up new matter as a defense, October 2, 1879. The new constitution of California of 1879 having in the mean time taken effect, the case went into the superior court, as successor to the state district court, and on January 23, 1880, was assigned to department No. 7 of the superior court. On March 22, 1880, the demurrer to the answer was sustained, with leave to amend. An amended answer was filed April 1, 1880, which, under the Code of Civil Procedure, put the case at issue, and it was ready for trial. On January 21, 1884, the defendant filed a petition to remove the case to the United States circuit court, on the ground that the plaintiff is a citizen of Missouri, and the defendant a citizen of California. The petition alleges that “there is in this action a controversy between citizens of different states, to-wit, a controversy between your petitioner, the defendant herein,—which said defendant was at the time of the commencement of this action, ever since has been, and now is, a corporation duly organized and existing under and by virtue of the laws of the state of California, and which said defendant is a citizen of the said state of California,—and the *plaintiff* herein, *who is* a citizen of the state of Missouri.” The proper bond was filed, and a copy of the record obtained by petitioner and filed in the circuit court, February 7, 1884, the state court having made no order and taken no action upon the petition. The plaintiff moved to remand the case to the state court, on the grounds: (1) That it is not shown by the petition that plaintiff was a citizen of Missouri at the time of the com-