and many also object to receiving empty petroleum barrels, because of their combustible character. And this construction of the meaning of the contract is enforced by that placed upon it by the parties themselves, all of whom seemed to concede that the master had properly proceeded to the place where he did proceed, and that under the circumstances it was the duty of the respondents to provide a lighter to receive their barrels. If an instrument is ambiguous, and both parties have acted upon a particular construction of it, that construction, if in itself admissible, will be adopted by the court. *Chicago* v. *Sheldon*, 9 Wall. 50, 54; *Jackson* v. *Perrine*, 35 N. J. Law, 137; *Stone* v. *Clark*, 1 Metc. 378; *Forbes* v. *Watt*, L. R. 2 Sc. & D. 214.

The libelant followed the instructions of the consignees of the iron, and proceeded to a place of discharge within the port where the iron could be delivered on the dock, but where the dock-owners would not permit the petroleum barrels to be landed. No objection was made by the respondents when it was suggested that they should provide a lighter; and they undertook to obtain one. They knew that the iron could not be discharged until their barrels were removed. In consequence of their delay the lay days expired.

It must be held that the libelant was not in fault because in selecting a place for the delivery of the cargo in conformity with the contract of the parties he selected one which was not altogether convenient for the respondents; that the lay days began to run after the ship reached the berth to which she was directed by the consignees of the rails; and that the detention of the ship was caused by respondents' delay.

A decree for four days' demurrage, at £10 per day, and interest, is directed, with costs to the libelant in the district court, and the costs of this appeal.

THE ASHFORD.

(*District Court, D. New Jersey.* July 17, 1884.)

COLLISION—CONTRADICTORY SIGNALS.

Libel for damages received in a collision, alleged to have occurred through the fault of the respondent in blowing contradictory signal whistles. The court investigates the conflicting testimony, and awards the damages as asked.

Libel *in Rem.*

Beebe & Wilcox, for libelant.

H. Kettell, for claimant.

NIXON, J. This libel is filed to recover damages for a collision which occurred on the twenty-first of November, 1883, on the Erie canal, about one-half mile west of Albion, between the libelant's boat, the Rapid, and the claimant's boat, known as No. 104, which was

the consort of another boat, also owned by the claimant, and called the Ashford. They were canal steam-boats, and were loaded, the Rapid having on board a full cargo of coal, and drawing about six feet of water. The Ashford and No. 104 were attached together, the latter in front of the former, and being propelled and controlled in all her movements by her. The Rapid was bound west towards Buffalo, and the Ashford east towards Troy. At a short distance from the point of collision there was a bend in the canal to the northward or tow-path side. The canal was about 100 feet wide where the surface of the water touched the bank, but the banks were sloping, so that laden boats of the draught of six feet could not approach nearer than ten feet of the side of the canal without touching the bottom. The collision occurred between 4 and 5 o'clock in the morning, which was before daylight at that season of the year. The boats had their regulation lights burning. Their lights were seen, the one by the other, when the boats were from a quarter to half a mile apart. There is conflicting testimony in regard to their speed. The Ashford had the current in her favor, and was going about three miles an hour, while the Rapid was proceeding at a slower rate of speed. About the time of observing each other the Ashford first sounded one whistle, which was at once answered by the Rapid; then three whistles, which the Rapid replied to with three. Here the proofs radically diverge with regard to the subsequent whistles. The libelant contends that the Rapid shortly afterwards gave three whistles, while the claimant insists that only two were given, which he promptly answered with two, and turned his boat to the tow-path side of the canal, as the two whistles signaled him to do. The general rule of the road for boats passing on the canal is for each to go to the right. The signal of one whistle means that movement, the boats passing on the port side of each other. Two whistles are a call for the boats to go to the left, giving their starboard side to each other. Three whistles are calls to slow up and slacken their speed. Remembering these rules and the signification of the whistles it is easy to account for the collision. The Ashford told the Rapid, by sounding the one whistle, that she wished to pass to the right. The Rapid assented by her reply. The collision took place on the tow-path side of the canal, where the Rapid was lying in obedience to the first signal. The Ashford, steaming from the heel-path, struck the port bow of the Rapid a few feet aft of the stem with such force that she almost immediately filled and sank. She claimed that she was governed by the signal of two whistles of the Rapid in thus going over to the tow-path side. On the other hand, the Rapid denied that she sounded two whistles, and insisted that she gave three to warn her to slow up. There is great conflict in the testimony on this point, but I think the weight is with the libelant, that three whistles were blown. The collision was caused by this mistake of the Ashford. and there must be a decree for the libelant, with costs.

McElroy *v.* Kansas City.

(Circuit Court, W. D. Missouri, W. D. August, 1884.)

1. Constitutional Law—Missouri Const.—Bill of Rights, § 21—Property Taken or Damaged—Public Use—Compensation.
   The damage to property, by the constitution of Missouri, is placed upon the same basis as the value of the property taken, and neither can be done without compensation first made. This constitutional guaranty needs no legislative support, and is beyond legislative control.
2. Same—Change of Grade of Street—Damage.
   When property is damaged by establishing the grade of a street, or by lowering or raising the grade of a street previously established, it is damaged for public use, within the meaning of the constitution.
3. Same—Incorporation of City by Special Charter before Adoption of Constitution.
   That a city was incorporated under a special charter before the adoption of the constitution of 1875, and its charter continued in force, will not render the constitutional provision in respect to damages to property inoperative within the territorial limits of such city.
4. Same—Enjoining Municipal Corporation—Matters Considered.
   A chancellor, in determining an application for an injunction, must regard not only the rights of complainant which are sought to be protected, but the injuries which may result from the granting of the injunction; and in applying this rule in a case where it is sought to enjoin a municipal corporation against which an action for damages would lie, from changing the grade of a street, the court should consider (1) the amount of injury to the complainant; (2) the solvency of the defendant, and (3) the character and importance of the public improvement.
5. Same—Condition Precedent to Right to Perform Act Enjoined—Ability of Defendant to Perform Condition.
   Where the defendant has an ultimate right to do the act sought to be restrained, but only upon some condition precedent, and compliance with the condition is within the power of the defendant, injunction will usually be granted until the condition is complied with.
6. Same—Inability of Defendant to Perform Conditions—Form of Order.
   Where the defendant has an ultimate right to do the act sought to be enjoined, upon certain conditions, and the means of complying with such conditions are not at its command, the court will endeavor to adjust its order so on the one hand as to give to the complainant the substantial benefit of such conditions, while not restraining defendant from the exercise of its ultimate rights.

On Application for Injunction.

Bryant & Holmes, James Scammon, and *Botsford & Williams,* for plaintiff.

Karnes & Ess, Jeff Brumback, and *Wash. Adams,* for defendant.

Brewer, J. The complainant in this case seeks an injunction to restrain the grading of a street in front of his lot. He is the owner of a lot on the south-east corner of Sixth street and Tracy avenue, having a frontage on Tracy avenue of 41½ feet and on Sixth street of 110 feet. The grade on Tracy avenue has been established, and the avenue graded in front of complainant's property. This grade was 220 feet at the corner of Tracy avenue and Sixth street above the city directrix, or base line from which the elevations of the streets in said city are determined. On February 25, 1884, the defendant, by an ordinance entitled "An ordinance to grade a part of Sixth street