THE CANARY No. 2.[1]

(*Circuit Court, S. D. Alabama.* June, 1884.)

1. ADMIRALTY PRACTICE—TERMS OF COURT.
   From the commencement to the end of a term there is, in contemplation of law, but one sitting, although there may be adjournments or recesses.
2. SAME—APPEAL—TIME FOR PERFECTING.
   In the absence of any general rule or special order fixing the time within which the bond must be given, the appellant has, under admiralty rule 45, thirty days from the rendition of the decree within which to perfect his appeal.
3. SAME—WHEN RETURNABLE.
   No order of the district court fixing the return is necessary. The law makes the appeal returnable to the next term of the circuit court.
4. SAME—APPEAL BOND.
   The form of appeal bond given by BENEDICT for Southern district of New York is good.
5. SAME—BY WHOM TAKEN.
   Appeal bonds may be taken before a United States commissioner, in absence of a rule of court providing otherwise.

On Motion to Dismiss Appeal.

Hannis Taylor, for libelant.

J. L. & G. L. Smith, for claimants.

PARDEE, J. The decree appealed from was rendered in the district court, February 1, 1884, and at the same time an appeal was allowed and amount of bond fixed. February 9th a bond taken and approved by McKinstry, United States commissioner, was filed. The term of the district court ended, as appears by the certificate of the clerk, March 19, 1884.

1. The bond was filed during the term at which the decree was rendered. The court sits in terms twice a year, fixed by law. From the commencement of a term until the end, (although there may be adjournments or recesses, whether from day to day or with intervals of several days,) there is, in contemplation of law, but one sitting during a term.

2. In this case no time was fixed, either by the general rules of the court or by special order, within which the bond was to be given, and therefore, as I understand rule 45, (Adm. Rules,) the appellant had 30 days from the rendition of the decree, within which delay he did perfect his appeal.

3. It is not necessary that the district court, in allowing an appeal, should specify that it should be to the next term of the circuit court. The law sends the appeal to the next term of the circuit court. There is no dispute that this is the proper term of the circuit court to consider the appeal.

4. The bond is in the form given by BENEDICT for the Southern district of New York, and is in accordance with the practice in this

[1] Reported by Joseph P. Hornor, Esq., of the New Orleans bar

district as I have observed it. I think it is sufficient to protect the appellees.

5. In the absence of a rule of court providing otherwise, appeal bonds in admiralty may be taken before a United States commissioner. Rev. St. § 945.

The motion to dismiss must be overruled.

THE NAIL CITY.

(District Court, W. D. Pennsylvania. 1884.)

1. TOWAGE—LIABILITY FOR LOSS—NOTICE TO CONSIGNEE.
   A transportation company undertook to tow a barge loaded with staves from Ravenswood, West Virginia, to Pittsburgh, and upon arrival there tied up the barge in the company's landing. For want of proper fastening the barge broke loose and the staves were lost. *Held*, that until reasonable notice was given the consignee of the staves of their arrival there was no delivery, and that the company was answerable for the loss.
2. CONSIGNEE—RIGHT TO SUE.
   The consignee, although the mere agent of the non-resident owner, can sue in admiralty in his own name for the value of the staves.

In Admiralty.

J. M. Stoner, for libelant.

Barton & Son, for respondent.

ACHESON, J. This suit is for the value of about 67,000 staves, which, the libel charges, one Reuben W. Cooper, as the agent in that behalf of James F. Stone, on December 12, 1879, shipped by the steamer Nail City, at Ravenswood, in West Virginia, to be transported on board barge No. 48, hitched to and under the control and management of said steamer, to the port of Pittsburgh, there to be delivered to the libelant, for a certain stipulated freight, to be by him paid; which staves, it is alleged, were never so delivered, but were lost by the negligence of the master and the owner of said steamer, or of persons by them employed. The fact of such shipment is admitted, but the answer denies that the staves were shipped by Cooper as agent of Stone, and alleges, to the contrary, that the contract for the transportation of the staves was made with Cooper in his own behalf, and that the staves were deliverable to him, and, in fact, were delivered to and accepted by him at the respondent's landing at Pittsburgh; and it is further alleged that the libelant had actual notice from Cooper of the arrival of the staves, and was warned by him that owing to a rapid rise in the Monongahela river the barge was in peril, and should be removed from the respondent's landing; that the libelant was in fault in not so removing it, and hence was himself alone responsible for the loss of the staves; and the answer denies the alleged negligence. The testimony in the case is very voluminous, and in

many particulars conflicting. I have very carefully read and considered it, and, after much reflection, find the facts to be as hereinafter stated.

The Nail City and her barge No. 48 belonged to the Monitor Towboat & Lumber Company, (the party defending this suit,) a corporation engaged in transporting merchandise on the Ohio river. The company had a landing at Pittsburgh, and its custom there was, upon the arrival of its loaded barges at its landing, to give notice thereof to the consignees of the cargo. The staves here in question belonged to James F. Stone, who employed Reuben W. Cooper to procure transportation for them from Ravenswood (Stone's place of residence) to Pittsburgh, and to load the staves at the former place. This, in fact, was the extent of Cooper's agency in the premises. The libelant was Stone's broker at Pittsburgh to receive and sell his staves, and he was the consignee of this particular lot, and was to pay the freight thereon.

On November 20, 1879, Cooper sent the defendant company this telegram, viz.:

"PARKERSBURG, W. VA., Nov. 20, 1879.

"*Monitor Tow-boat and Lumber Co., Wheeling, W. Va.:* Can I have No. forty-eight to load staves for Pittsburgh? Answer.

"R. W. COOPER."

He received the following reply:

"WHEELING, W. VA., Nov. 20, 1879.

"You can load her with bucked staves at two dollars, and rough at two fifty per M. JOHN A. ARMSTRONG."

Mr. Armstrong was the president of said company. Subsequently the freight was fixed at $1.75 per thousand. Cooper took the barge from Parkersburg to Ravenswood, and there loaded upon it some 12,000 or 15,000 staves, and then turned the loading over to Stone himself, who completed it by November 27th.

On December 9, 1879, Stone visited Wheeling, and there had an interview with John A. Armstrong about the transportation of these staves. The two differ as to the details of their conversation; but the evidence, upon the whole, satisfactorily establishes that Armstrong was then informed by Stone that the staves belonged to him, and that they were to be delivered to the libelant at Pittsburgh. In the course of a day or two Armstrong sent the Nail City to Ravenswood for barge No. 48 and other barges, which the steamer took in tow on December 12th, and proceeded therewith up the river to Wheeling. There was no bill of lading for the staves. At Wheeling barge No. 48 was left while the Nail City made two trips with other barges to Pittsburgh and back. While barge No. 48 lay at Wheeling, John A. Armstrong visited Pittsburgh, and on December 17, 1879, called at the libelant's office, on Duquesne Way, above Eighth street, to collect a freight bill, and then and there had a conversation with the libelant in respect to said

barge. The witnesses who testify as to what occurred on that occasion are the libelant, his clerk, Joseph W. Craig, and Mr. Armstrong. They all agree that the libelant complained of the delay in bringing the barge forward, and that in reply to an inquiry the libelant informed Armstrong that Stone had directed him to pay the freight, which he would do. The libelant testifies:

"He [Armstrong] then told me that he had barge No. 48 at Wheeling, containing staves consigned to me. He asked me if I had been notified to pay him, or the company, the freight. I answered him, 'Yes;' that Mr. Stone had notified me to pay them $1.75 per thousand, which I told him I would do as soon as the staves were delivered to me and counted. He said, 'All right; pay it to Martin, the agent, at the wharf-boat.' "

With this Mr. Craig substantially coincides, adding that Armstrong expressly agreed that notice should be given the libelant of the arrival of the barge; but Mr. Armstrong testifies that he told the libelant he was doing the towing for Cooper, to whom, if in Pittsburgh on their arrival, the staves were to be delivered; but, if not there, then they were to be delivered to the libelant, and that when they arrived he would have Cooper or the libelant notified.

It is, however, shown by uncontradicted evidence that in the previous summer there was a transaction between all these parties precisely corresponding with what the libelant alleges was the arrangement in respect to the staves in question. In July or August, 1879, Cooper procured from the Monitor Tow-boat & Lumber Company a barge, which Stone loaded with staves, and which the company towed to Pittsburgh and delivered to the libelant, he paying the freight. Moreover, the libelant had been the consignee of many cargoes of staves (from other consignors) brought to Pittsburgh by said company, and its uniform custom had been to put the barges in its landing, and notify the libelant, who then sent a tow-boat for the barges, returning them when emptied. Why, then, should Mr. Armstrong have assumed the position which he claims to have taken in the interview of December 17th? Why should he have insisted upon a delivery of this lot of staves, in the first instance, to Cooper? The latter was not the owner of the staves, and was not to handle them at Pittsburgh. They were, in fact, consigned to the libelant, who was to pay the freight. All this was known to Armstrong. Furthermore, the libelant was a responsible resident dealer, while Cooper was a nonresident. In view of the undoubted facts just narrated, I am the more disposed to credit the testimony of the libelant and Craig as to what transpired at the interview of December 17th; and, upon the whole evidence, I find that John A. Armstrong did then agree, without any qualification, that notice of the arrival of barge No. 48 at Pittsburgh should be given the libelant. Besides, it is shown that about December 20, 1879, John A. Loper carried a message from the libelant to Andrew Martin, the resident agent of the Monitor Tow-boat & Lumber Company in charge of the company's office at its wharf-boat.