to look after his cattle, on a free pass, under an agreement by which he assumed all risk of personal injury. He was injured while traveling on the stock train, and then sued the railroad company for damages. Negligence on its part was proved and found by the jury. The supreme court held that the case, on its facts, was one of carriage of the drover for hire. The distinct question raised, as stated by the court, was whether a railroad company carrying passengers for hire can lawfully stipulate not to be answerable for their own or their servants' negligence in reference to such carriage.

The court says that a common carrier may, by special contract, limit his common-law liability; that that was held in *New Jersey Steam Nav. Co.* v. *Merchants' Bank;* and that the case of *Lockwood* seemed to be almost precisely within the category of the decision in 6 How.—the contracts in both cases being general, exempting the carrier from all risk, and the court in the case in 6 How. having held that it would not be presumed that the parties intended to include the negligence of the carrier or his agents in such exemption. The court then, in the *Lockwood* case, proceeds to examine the question whether common carriers may excuse themselves from liability for negligence. It reviews the course of decisions in New York on the subject, and concludes that the courts of New York had carried the power of the common carrier to make special contracts to the extent of enabling him to exonerate himself from the effects of even gross negligence; but it proceeds to examine the question as one of general commercial law, arising in a federal court administering justice in New York, and having equal and co-ordinate jurisdiction with the courts of that state. It then discusses the cases on the subject in Pennsylvania, Ohio, Maine, and Massachusetts, and cites those in other states, and English cases, and cases as to both passengers and goods in the supreme court. Among the cases as to goods were *York Co.* v. *Central R. R.* 3 Wall. 107, and *Express Co.* v. *Kountze,* 8 Wall. 342. In view of all these cases, it holds that a carrier, having a regularly established business for carrying all or certain articles, and especially if that carrier be a corporation created for the purpose of the carrying trade, and the carriage of the articles is embraced within the scope of its chartered powers, is a common carrier; that a special contract about its responsibility does not divest it of that character; that it cannot be permitted to stipulate for immunity for the negligence of its servants; that the business of a carrier is a public one, and those who employ the carrier have no real freedom of choice, and the carrier cannot be allowed to impose conditions adverse to public policy and morality; that freedom from liability for losses through sheer accident, or dangers of navigation, which no human skill or vigilance can guard against, or for losses of money, or valuable articles, liable to be stolen or damaged, unless apprised of their character or value, or for like cases, is just and reasonable, and may be stipulated for; but that a public carrier cannot stipu-

late for exemptions which are unreasonable and improper, and which amount to an abdication of the essential duties of his employment; that a stipulation for exemption from liability for negligence is not just or reasonable; that a failure to exercise such care and diligence as are due from the carrier is negligence; and that the carrier remains liable for the negligence if the exemption stipulated for is unlawful.

The court then formulates its conclusions thus: (1) A common carrier cannot lawfully stipulate for exemption from responsibility when such exemption is not just and reasonable in the eye of the law. (2) It is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself or his servants. (3) These rules apply both to carriers of goods and carriers of passengers for hire, and with special force to the latter. (4) A drover traveling on a pass, such as was given in that case, for the purpose of taking care of his stock on the train, is a passenger for hire. Although the case of *Lockwood* was one of a passenger and not of goods, the court took pains to say that the rules it laid down were applicable to a carrier of goods. The reason assigned was that the principles which demanded the existence of the rules in regard to passengers demanded that they should apply in regard to goods, though they applied with special force to passengers. Those principles were fully discussed in the opinion.

In *Express Co.* v. *Caldwell*, 21 Wall. 264, it is stated to be settled law that the responsibility of a common carrier may be limited by an express agreement, if the limitation be such as the law can recognize as reasonable, and not inconsistent with sound public policy; and the cases in 3 and 17 Wall. are cited as holding that such limitation cannot extend to losses by negligence or misconduct. This view is again asserted in *Railroad Co.* v. *Pratt*, 22 Wall. 123 and in *Bank of Kentucky* v. *Adams Express Co.* 93 U. S. 174. These cases involved goods carried on land. No legal distinction can be perceived between goods carried by a common carrier on land and goods carried by one on the ocean, in respect to this question. It is urged, however, that the contract here was to be chiefly performed on board of a British vessel, and to be finally completed in Great Britain, and the damage occurred in Great Britain, and that the law of Great Britain, which is asserted to be different from the law here, is applicable to the case. As to this suggestion it is sufficient to say that the answers expressly admit the jurisdiction of the district court asserted in the libels, and that it is not set up in the answers that the laws of Great Britain, or any other law than that of the forum, is applicable to the case, nor is the law of Great Britain, if it be different, proved as a fact. The case must be decided according to the law of the federal courts, as a question of general commercial law. Aside from this, it may be said that there was nothing in these contracts of affreightment to indicate any contracting in view of any other law than the recognized law of such

forum in the United States as should have cognizance of suits on the contracts.

As the libelants paid the losses and damage resulting from the negligence for which the respondent was liable, they were subrogated to the rights of the insured, and are entitled to maintain these suits to recover what they so paid. *Hall* v. *Railroad Cos.* 13 Wall. 367; *The Monticello,* 17 How. 152.

It is urged for the respondent that as the libelants insured these risks, and were paid for so doing, they should bear the loss; that by the contract the shipper was the insurer against the negligence, relieving the ship-owners of what would otherwise have been his risk, and reinsured the risk with the libelants; and that the agreement of the shipper to insure against the negligence gave him the insurable interest which he reinsured. The answer to this view is that the libelants insured the goods against the risks specified in the policies, which risks covered the damage in question, and that they are entitled to the rights of the shippers under the contracts; and, as the exemption agreed on would be of no avail as a defense to suits by the shippers, it is of no avail against the libelants in this forum. The policy of the maritime law to limit the liability of ship-owners is invoked, and it is urged that they ought to be allowed to limit their liability by contract. The liability of ship-owners is limited by statute, (Rev. St. §§ 4282–4289,) and the extent to which such limitation is thus allowed may be considered as indicating the views of congress as to how far legislation ought to prescribe exemption. It is said in *Railroad Co.* v. *Lockwood,* 17 Wall. 361, that these statutory provisions as then enacted in the act of March 3, 1851, (9 St. at Large, 635,) leaves the ship-owner liable to the extent of his ship and freight for the negligence and misconduct of his employes, and liable without limit for his own negligence. In section 1 of the act of 1851 there was a proviso that nothing in the act contained should prevent the parties from making such contract as they pleased, extending or limiting the liability of ship-owners. As to that clause, it is said in the same case that that proviso neither enacts nor affirms anything, but simply expresses the intent of congress to leave the rights of contracting as it stood before the act. But that proviso is not re-enacted in the Revised Statutes, and as a portion of the section containing it is embraced in a section of the Revision, the proviso is repealed by force of section 5596.

The amounts due to the libelants were ascertained by competent and sufficient proofs, the exception of the respondent to such competency and sufficiency having been waived and stricken out. There must be decrees for the libelants, with costs, for the amounts stated in the respective conclusions of law filed.

THE MONTANA. (TWO CASES.)[1]

(Circuit Court, E. D. New York. August 21, 1884.)

PRACTICE—AMENDMENT OF PLEADING—NEW ALLEGATIONS—APPEARANCE—ADMISSION OF JURISDICTION—APPEAL.

After the decision of these cases on the merits, (see *ante*, 715,) a motion was made in the circuit court by the respondent for leave to amend its answers so as to qualify its appearance in these actions, and its admission of the jurisdiction of the federal courts, and to set up and prove a law of Great Britain alleged to be applicable to the cases, by which the liability of the respondent for the losses would be limited. Rule 4 of the circuit court provides that an appeal shall "state whether it is intended, on the appeal, to make new allegations, to pray different relief, or to seek a new decision on the facts, and the appellants shall be concluded in this behalf, by the appeal filed." The petition of appeal in these cases stated that the respondent, on the appeal, intended "to have the cause heard anew on the pleadings and proofs in the district court, and other proofs to be introduced in the circuit court." *Held*, that the respondent was concluded from making new allegations in the circuit court on the appeal; that, having appeared unreservedly and admitted the jurisdiction of the district court, the respondent could not, in the circuit court, be permitted to change that to a qualified appearance and admission.

In Admiralty.

Butler, Stillman & Hubbard, for libelants.

Beebe & Wilcox, for claimants.

BLATCHFORD, Justice. In the decision rendered by this court in these cases it was said *ante*, 728:

"It is urged, however, that the contract here was to be chiefly performed on board of a British vessel, and to be finally completed in Great Britain, and the damage occurred in Great Britain, and that the law of Great Britain, which is asserted to be different from the law here, is applicable to the case. As to this suggestion, it is sufficient to say that the answers expressly admit the jurisdiction of the district court asserted in the libels, and that it is not set up in the answers that the law of Great Britain, or any other law than that of the forum, is applicable to the case, nor is the law of Great Britain, if it be different, proved as a fact. The case must be decided according to the law of the federal courts, as a question of general commercial law. Aside from this, it may be said that there was nothing in these contracts of affreightment to indicate any contracting in view of any other law than the recognized law of such forum in the United States as should have cognizance of suits on the contracts."

In the decision rendered by the district judge he remarked (17 FED. REP. 379): "It is said, in behalf of the defendants, that their liability upon these bills of lading must be determined by the laws of England. But the undisputed facts show that there is no ground for such a contention." The respondent now moves, in these cases, "for leave to amend the answers herein in the particulars mentioned and shown in the proposed amended answers hereto annexed, and for leave to prove the law of Great Britain, as therein prayed, and for such

[1] Reported by R. D. & Wyllys Benedict, of the New York bar.

other and further relief as may be just." The motion is made before decrees are signed. The allegations of the original answers, which are proposed to be amended, are these:

"*First.* That the said the Liverpool & Great Western Steam Company, Limited, has duly appeared herein. * * * *Tenth.* The respondent denies each and every allegation contained in the ninth article of the libel, except as herein admitted, and except that it admits the jurisdiction of this honorable court."

The ninth article of the libel in each case was this:

"*Ninth.* All and singular the premises are true, and within the admiralty and maritime jurisdiction of this honorable court."

The answers, if amended as proposed, are to contain the following allegations, the parts not found in the original answers being in italics:

"First. That the said the Liverpool & Great Western Steam Company, Limited, has duly appeared herein, *but without prejudice to its right to rely upon the hereinafter mentioned law of Great Britain as a ground of defense to the said libel.* * * * Tenth. The respondent denies each and every allegation contained in the ninth article of the libel, except as herein admitted, and except that it admits the jurisdiction of this honorable court, *without prejudice, however, to its right to rely upon the hereinafter mentioned law of Great Britain as a ground of defense to the said libel.* * * * *Fifteenth. The respondent, further answering, says that the said steamer, at the time of the said accident, was sailing under the flag of Great Britain. Sixteenth. That the law of Great Britain, at all the times mentioned in the said libel, enabled ship-owners, by express contract, to exempt themselves from liability for the consequences of any damages or injury to goods transported on their ships, howsoever the same might have been caused, whether arising from negligence, default, or error in judgment of the master, mariners, engineers, or others of the crew, or otherwise. Seventeenth. That by the contracts for the transportation or carriage of the goods claimed to have been lost or damaged by the libelant, the respondent had expressly, and in conformity with the said law, exempted itself from any liability whatsoever. Eighteenth. That the said contracts were subject to and governed by this said law.*"

The affidavit of the proctor for the respondent, on which the motion is based, says, "that the respondent contends that the question of its liability is governed by and should be decided under the law of Great Britain; that by the said law the respondent would be exempt from liability to the libelants in these actions; that no proof of the said law has been made, it having been understood by deponent that the same was recognized by the libelants, and formal proof thereof would not to be required by them; that the question was argued, and reference and allusion made to the books of statutes and reports of decisions of Great Britain, without objections on the part of libelants in the district court; that the libelants, in their brief of argument before this court, expressly admit that such is the law of Great Britain, in the following words, viz.: 'and in the English courts, which uphold to the fullest extent the carrier's right to limit his liability, and which seem to recognize some special reason in favor of

the privilege of exemption as applicable to the owners of vessels or steam-ships, as contradistinguished from land carriers;' that nevertheless the libelants made the point in this court, and for the first time, that the proof had not been made; that the court in its said decision has recognized this point, and held the same well taken; that great injustice may result to the respondent from this technicality, and it therefore prays that it may be permitted to amend its answers in the said actions, so that they will aver the existence of the said law and its applicability to these actions; that grave questions and doubts exist as to the power of the courts of the United States to decide the questions involved in these actions without a reference to the said law; that the issues to decide this question, under the view taken by this court, are not properly raised by the answers of the respondent, it having appeared unreservedly, and admitted therein the jurisdiction of the district court; that jurisdiction was obtained by the district court in these cases by process *in personam*, with clause of foreign attachment, under which property of the respondent was seized, and the respondent appeared in consequence thereof; and that it was not intended by such appearance, or by the admission of the jurisdiction of the court, to waive its right to rely upon the said law as a ground of defense. It therefore prays that it also be permitted to amend its answers, so that they will qualify the appearance and admission of jurisdiction in this particular," and "that it may be permitted to prove in this court the said law of Great Britain, and for such other relief as may be just."

The libelants oppose this motion. Rule 24 of the rules in admiralty prescribed by the supreme court applies to and covers only amendments of informations and libels. Rule 51 of those rules applies only to amending a libel. By rule 46 the circuit court has power in cases not provided for to regulate its practice in such manner as it shall deem most expedient for the due administration of justice in suits in admiralty. Rule 52 contemplates that there shall be a "prayer for an appeal" in the district court, and that such paper shall form a part of the record to be transmitted to the circuit court on appeal. This court has promulgated rules in regard to appeals in admiralty as follows:

"Rule 3. Every appeal to the circuit court, in a cause of admiralty and maritime jurisdiction, shall be in writing, signed by the party, or his proctor, and delivered to the clerk of the district court from the decree of which the appeal shall be made; and it shall be returned to the court, with the necessary documents and proceedings, within twenty days, and by the first day of the next term after the delivery thereof to the clerk, unless a longer time is allowed by the judge.

"Rule 4. The appeal shall briefly state the prayers, or allegations, of the parties to the suit, in the district court, the proceedings in that court, and the decree, with the time of rendering the same. It shall also state whether it is intended, on the appeal, to make new allegations, to pray different relief, or to seek a new decision on the facts, and the appellants shall be concluded in this behalf, by the appeal filed."

The final decrees of the district court in these cases were filed and entered February 19, 1884. On the twenty-ninth of February, 1884, a notice of appeal by the respondent was filed in the district court in each case. On the sixth of May, 1884, a petition of appeal in each case was filed in the district court. The petition complies with rule 4 of this court, and says: "and on the said appeal it intends to have the said cause heard anew on the pleadings and proofs in the district court, and other proofs to be introduced in the said circuit court." The petitions of appeal do not state that the appellants intend to make new allegations in this court on the appeals. They are, therefore, concluded in that behalf by the appeals filed. The respondent, having stated in its answer that it had duly appeared in each suit, cannot be permitted now to state that it made a qualified appearance. It does not appear that it made a qualified appearance, or other than an absolute appearance. The respondent having admitted in its answers the jurisdiction of the district court, cannot be permitted now to change that admission to a qualified admission. The making of these allegations in the answers was not influenced by anything but the facts of the case as then before the respondent. There was no mistake or misapprehension of fact, and there is no suggestion that the respondent did not know then all it knows now in regard to the facts of the case. The allegations that the steamer was sailing under the British flag, and that the contracts purported to exempt the respondent from liability, and as to what the law of Great Britain was, are allegations of facts known to the respondent when the answers were filed. The allegation that the contracts were subject to and governed by the law of Great Britain, as an allegation of fact or law, does not set up anything newly discovered; and if it is intended to set up a new defense beyond any set up before, it is such a new allegation as rule 4 of this court, as to appeals, was intended to cut off, unless the petition of appeal should state an intention to make new allegations in this court. That rule is a reasonable one, and is calculated to promote the due administration of justice in suits in admiralty. The motion is denied.

THE STATE OF MAINE. (Four Cases.)

(*District Court, S. D. New York.* December 31, 1884.)

1. SEAMEN'S WAGES—ADVANCE WAGES—ACT OF JUNE 26, 1884.
The act of June 26, 1884, forbidding advances of wages to seamen, is not applicable to the shipment of seamen in foreign ports.
2. SAME—MAKING ACTS OF SHIP-MASTERS IN FOREIGN JURISDICTION CRIMINAL.
Though congress may possibly make acts done by American ship-masters within a foreign jurisdiction criminal, though legal by the laws of the port where the acts are committed, such an intention is not to be presumed from general language merely, which may be fully satisfied by its application within the jurisdiction of the United States, but should only be inferred from specific indications of an intention to include acts done in foreign territory.
3. SAME—CONSTRUCTION OF ACT OF CONGRESS.
The general purposes of the above act, as well as some of its specific provisions and its necessary results, indicate a contrary purpose in this case.
4. SAME—VOUCHERS—WITNESSES DISCREDITED.
A master in Antwerp, having unsuccessfully endeavored to procure necessary seamen without an advance of wages, subsequently shipped several seamen, agreeing through the consular office to pay their back board bills, on account of their wages, by their consent, and upon vouchers signed by them; and such bills were paid. Upon arrival at this port some of the seamen refused to allow the deductions under the above act, and libeled the vessel, and also denied their own vouchers. *Held*, their testimony being discredited, that the bills paid were valid offsets to their wages.

In Admiralty.

Alexander & Ash, for libelants.

Henry D. Hotchkiss, for claimant.

BROWN, J. In August, 1884, the American ship State of Maine, being at anchor at Antwerp, and in need of seamen there, shipped a crew, of whom the libelants were a part. Before doing so the captain in vain endeavored to procure a crew without making any advances of wages or paying any sailors' bills there. He was subsequently able to obtain a crew only upon providing for the payment of certain bills for board that were claimed to be due from the men there. The men were shipped under the supervision of the American consul at Antwerp, and the bills were paid by the captain through him. The correctness of these bills in each case was certified by the signatures of the seamen. Upon arrival at this port the crew left the ship, according to the master's statement, without being discharged, and before she was fairly made fast. In rendering his account to the shipping commissioner at this port the captain charged against the various members of the crew the amount of the bills that he had paid in their behalf, the vouchers for which were produced, signed by the men, as above stated. The majority of the crew accepted the balances due to them. Four of the libelants insisted on their full wages under the act of June 26, 1884, and in their testimony they deny that the bills were owed by them, and also deny their signatures to the vouchers.

The most important question presented is whether the act of June