

that, if unusual exertion or expenditure had been made to obtain the earlier despatch, this should be compensated. The evidence showed it had not, the despatch being no quicker than is common in such cases. This construction seemed to be required, not only by the terms of the contract, but by its spirit. It seemed reasonable to believe that the parties dealt on the basis of the ore's cost to the plaintiff and the demand for it; that his profits were thus secured, and that, as the cost of transportation was then unknown, this was provided for by the clause in question, which had no other object. It seemed improbable that the parties contemplated the plaintiff's receipt of a large additional sum, by charging the defendants so much more on account of freight than was expended. Such was the court's impression at the trial. The credit claimed on account of "stevedores' commissions" paid the plaintiff, did not seem to fall within the terms of the contract, nor so directly within its spirit as to justify this claim. After full consideration of what was urged in support of the rules, it is sufficient to say that we are not convinced that the instruction was erroneous. The rules are therefore dismissed.

The plaintiff has also made the point that so much of the claim on account of freight as relates to the Campinil and Alvito ores delivered under similar contracts is inadmissible under the pleadings. The point, however, comes too late. If it had been made at the trial a plea of set-off might have been entered. The evidence was admitted without objection on this ground. The plea might still be entered, we think, if necessary to sustain the verdict.

---

THE IRA B. ELLEMS.

OTIS MANUF'G Co. v. THE IRA B. ELLEMS.

(Circuit Court, E. D. Louisiana. December 22, 1891.)

1. SHIPPING—CHARTER-PARTY—CONSTRUCTION.

Under a charter-party which provides that the charterer shall furnish a cargo of logs, "to be delivered along-side, and held at charterer's risk and expense," the charterer is not entitled to damages for the loss of logs delivered along-side, but carried away by reason of negligent mooring.

2. ADMIRALTY—EVIDENCE—EX PARTE DOCUMENTS.

The official documents of the officers of a foreign nation having jurisdiction of a port of lading, containing what purports to be a protest by a charterer against the action of the vessel, and depositions in support of the facts alleged in such protest, being *ex parte*, are not admissible to establish a controverted fact.

3. SHIPPING—LIEN FOR FREIGHT.

The refusal of a master to deliver a cargo until security is furnished for the freight gives no right of action to the charterer, as the cargo is subject to a lien for freight.

In Admiralty. On appeal from the district court. Libel by the Otis Manufacturing Company against the schooner Ira B. Ellems for damages for breach of a charter-party. Decree for defendant.

W. S. Benedict, for libelant.

O. B. Sansum, for claimant.

PARDEE, J. The charter-party expressly states that the second party (the Otis Manufacturing Company) "doth engage to provide and furnish the said vessel a full and complete cargo of mahogany, and (or) cedar logs, under and on deck, to be delivered along-side, and held at charterer's risk and expense." This stipulation defeats the claim advanced by libelant for damages for loss of logs delivered along-side of the vessel, but carried away and lost by reason of negligent fastening and mooring. The evidence in the case is clear to the effect that the vessel, having previously obtained her clearance papers, reported for cargo according to contract; that the libelant's agent furnished cargo at various times until the vessel was nearly loaded, when, on the loss of a raft of logs by reason of negligent mooring to the ship, the agent notified the master that he had no more cargo to deliver, and was "ready to finish up;" and that the master tendered bills of lading, which were refused by the agent. And there is no evidence in the record to the contrary. This puts an end to the libelant's claim "that in contravention of law, good morals, and proper conduct, and in fact, said vessel, after having been partially loaded under said charter-party, ran away from said port of Tupilco, without signing proper papers or delivering any bills of lading under said charter-party." The official documents from the customs and other officials from the republic of Mexico, having jurisdiction of the place of lading, offered by the libelant, containing what purports to be a protest made by libelant's agent, and the deposition of certain witnesses in support of the facts alleged in the protest, being *ex parte*, are not admissible in evidence to establish any controverted fact, and are not, of themselves, even if admissible, sufficient in substance to contradict the sworn testimony offered by claimants on the hearing of this case. The fact that the master of the vessel demanded security for freight before delivering cargo gives rise to no cause of action on the part of the libelant. The master, under the contract and under the law, having a lien upon the cargo for the payment of freight, was authorized to refuse delivery until the freight should be secured or satisfied. The trouble with libelant's case is that, while on paper he has made serious charges, and set forth sufficient grounds of damage, he has utterly failed to establish the same by competent evidence. The decree in the district court could not have been other than as given, and a decree to the same effect must go upon the appeal.

MCDONALD *et al.* v. HOPE MIN. Co.

(Circuit Court, D. Montana. November 16, 1891.)

**1. REMOVAL OF CAUSES—TIME OF FILING PETITION—DEMURRER.**

As the removal act requires the petition to be filed at or before the time "defendant is required by the laws of the state" to answer, the filing of a demurrer, instead of an answer, as allowed by Comp. St. Mont. p. 81, § 87, does not enlarge the time for filing the petition; for the allowance of an answer after demurrer is within the discretion of the court, and is not in accordance with any provision of law.

**2. SAME—RULE OF COURT.**

The time allowed by the court for answering, after the overruling of such demurrer, is not "the time \* \* \* defendant is required \* \* \* by a rule of the state court \* \* \* to answer," within the meaning of that clause of the removal act; for that has reference only to jurisdictions where the time to answer is fixed by a general rule of court instead of by statute.

In Equity. On motion to remand.

*Wm. Scallon, F. W. Cole, and H. F. Titus, for plaintiffs.*

*Forbis & Forbis, for defendant.*

KNOWLES, J. This cause is presented on a motion to remand the same to the state court, on the ground that the petition for removal was not filed within the time prescribed by law. Plaintiffs commenced their action by filing their complaint against defendant on the 3d day of January, 1891, in the district court of the third judicial district of the state of Montana, in and for Deer Lodge county. Summons was duly issued upon this complaint, and served upon the defendant on the 20th day of January, 1891. Defendant appeared in the cause on the 22d day of said month, two days after said service, by filing a general demurrer to the complaint, specifying that the complaint did not state facts sufficient to constitute a cause of action. There seems to have been no ruling upon this demurrer. On the 5th day of June, of the same year, defendant filed its petition for removal from the above state court to this. The law of Montana requires that the defendant in a cause, if served in the county in which the same is commenced, must appear and answer the complaint within 10 days from the date of service of summons. Defendant was served in the county in which the action was brought. The language of the act of congress of 1887, and as corrected by the act of 1888, upon the subject of the removal of causes from the state court to the federal courts, contains this clause as to the time when the petition for removal should be filed: "At the time or any time before the defendant is required by the laws of the state, or a rule of the state court in which suit is brought, to answer or plead to the declaration or complaint of the plaintiff." It would seem that, taking the state statute as to the time when a defendant is required to answer after service of summons, and this provision upon removal, and there cannot be much dispute as to the time when the petition for removal should be made. The party is required by the law of the state to answer within 10 days after service of summons, and the statute of congress provides that when this time arrives, as provided by the state law, the petition for removal shall