The libelant contradicts Mr. Smith flatly, by saying that he knew nothing of the destruction of the paper until told of it, when he desired to see it or have a copy. It seems plain that Mr. Smith is mistaken. There is nothing else, as before stated, which tends to support this branch of the defense. The respondent may have supposed at the time, that the second charter was to take the place of the first, as his testimony indicates, but there is nothing which tends to show that the libelant agreed that it should, or that he did not expect to hold the respondent to his contract. The circumstance that Pettit & Co. paid a small sum in addition to the amount which the second charter named as freight, to induce the libelant to take this cargo, does not seem to have any bearing on the question. The respondent was interested in procuring a cargo for the vessel and had an inducement to make the sacrifice involved in this payment,—independently of a settlement with the libelant. The carriage of this cargo necessarily reduced the damages which might result from his failure to comply with his contract; and besides, the procurement of this charter entitled his firm to commissions several times greater than the sum paid.

I will not consider the question of damages. It is possible none were sustained. If the second charter was as valuable as the first, so that the libelant made as much under it as he would have made under the first, and suffered no detention, he cannot complain. I will submit this question to a commissioner, (if the parties do not agree respecting it,) and will base the decree on his report, after it has been approved.

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## THE MAHARAJAH.

## ENNIS *v.* THE MAHARAJAH *et al.*

(*Circuit Court of Appeals, Second Circuit.* December 14, 1891.

SHIPPING—LIABILITY FOR PERSONAL INJURIES.

Libelant, in the employ of a stevedore in loading a ship's cargo, was assigned to work a winch belonging to the ship. In so doing, his hand slipped from the handle of the crank-bar of the winch, and was caught and crushed in the cogs. The winch was of an old pattern, with unguarded cogs; but a person using it could protect himself from such an injury as occurred to libelant by a simple expedient, which libelant neglected. Libelant was aware of the dangers of the winch, but used it without complaint for several hours. *Held*, that he was not entitled to recover damages from the steam-ship for the injury received.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Admiralty. Libel by George Ennis against the steam-ship Maharajah for personal injuries. Libel dismissed. See 40 Fed. Rep. 784. Affirmed on appeal to the circuit court. Libelant appeals. Affirmed.

*Robert D. Benedict*, for appellant.

*Wilhelmus Mynderse*, for appellees.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. While the libelant was driving a winch belonging to the steam-ship, his hand slipped from the handle of the crank-bar, and was caught and crushed in the cogs, whereby he sustained serious injury. He was in the employ of a stevedore who was engaged in loading the ship with cargo, and had been assigned by him to work the winch. He imputes his injuries to the negligence of the steam-ship, upon the theory that the winch was unsafe because the handle came dangerously near the cogs in operating the crank-bar, and the cogs were not covered by a guard, and also because the handle was slippery from grease and steam that escaped from defective parts of the machine. The proofs are that the winch was, in details of structure, substantially like those in general use at the time it was built, had been used on the steam-ship for a dozen years or more, and was not materially out of repair; that such winches are still in common use upon vessels, but an improved machine has been also introduced, constructed with a guard over the cogs; and that the handle was not exceptionally slippery on the day of the accident. It also appears that the libelant was familiar with winches, having operated them for 10 or 12 years, and that he had been operating this one nearly all day before the accident took place, and had not made any complaint about it. Manifestly the libelant undertook to use a machine which he knew would endanger his hand unless he exercised due care. Owing to a momentary relaxation of proper caution, he met with such an accident as he could have foreseen. His own conduct affords the best evidence that the machine was not exceptionally unsafe, inherently or casually. If it had been, he would not have used it without objection. All the elements of danger incident to its use were patent to him after he had used it a few minutes; yet he used it several hours, and, until he was hurt, without a complaint, or attempting to protect himself by the simple expedient adopted after the accident by the witness Smith. He has no just ground of complaint against the steam-ship. One who voluntarily undertakes to perform a service for another impliedly consents to assume the known risks incident to it, and cannot impute to the other any breach of duty or negligence founded solely upon the presence of such risks. The decree is affirmed. As the libelant sues *in forma pauperis*, the affirmance is without costs.

## PACIFIC POSTAL TEL. CABLE CO. v. IRVINE *et al.*

(*Circuit Court, S. D. California.* January 19, 1892.)

1. JURISDICTION—DIVERSE CITIZENSHIP—PLEADING.
An allegation that plaintiff is a New York corporation, and that defendants are "residents" of California, does not show diverse citizenship.

2. TELEGRAPH COMPANIES—USE OF HIGHWAY.
The use of a public highway by a telegraph line erecting poles and wires thereon is an additional burden, and where the fee is in the adjacent owner cannot be taken without his consent, or by statutory proceedings, in which he is entitled to compensation.

In Equity. Motion for an injunction.

*George Hayford*, for complainant.

*Wilson & Lamme*, for defendants.

Ross, District Judge. There are two very substantial reasons why the motion for an injunction herein should not be granted:

1. Neither the original nor the amended bill shows diverse citizenship of the parties, upon which ground alone the jurisdiction of this court is invoked by the complainant. In the amended bill it is alleged that the complainant is a New York corporation, and that the defendants are residents of the state of California. But a person may be a resident of a state of which he is not a citizen. There are many residents of California who are not citizens of any state of the Union.

2. The papers submitted upon the motion show that the telegraph poles and wires in question were erected by complainant upon land, the fee of which is in the defendant James Irvine, and over which the right of way for a public road had been theretofore granted to the board of supervisors of the county in which the land is situate. It appears that the poles and wires were erected by complainant under a grant from the board of supervisors so to do, but without the consent and against the protest of the defendants. The right of way granted to the supervisors was for a public road, that is to say, a way to be used by the public for ordinary travel. Where the fee of the highway is vested in the public, there can be no valid legal objection to the grant by the public of a right to erect such poles and wires without regard to the adjacent property holders; but where, as here, the fee of the highway remains in the adjacent owner, and only its use for purposes of public travel has been granted, I think it clear that every use of the highway not in the line of such travel is an additional burden, for which the proprietor of the fee is entitled to additional compensation, and which cannot be constitutionally taken from him without his consent, except by proceedings regularly instituted and prosecuted according to law.

Motion denied.

## KANSAS & A. V. RY. CO. *v.* PAYNE *et al.*

(*Circuit Court of Appeals, Eighth Circuit.* January 25, 1892.)

1. RAILROAD COMPANIES—RIGHT OF WAY—COMPENSATION—INJUNCTION.
Complainants occupied a tract of land in the Indian Territory, fronting on the Arkansas river, opposite the city of Ft. Smith, and were engaged in operating a ferry at that point, under a license granted them by the Cherokee Nation. The K. & A. V. Ry. Co., in 1888, condemned a right of way through said tract of land to the river, under Act Cong. June 1, 1886, which authorized it to build a railroad through the Indian Territory, and to condemn land to be used for *railway, telegraph, and telephone purposes only.* On March 15, 1890, congress authorized the railway company to build a bridge across the Arkansas river, to be used as a *railway, passenger, and wagon bridge.* The last act recited that the building of the railway, as authorized by the act of June 1, 1886, involved the necessity of constructing the bridge. *Held:* (1) That, by the act of March 15, 1890, congress impliedly authorized the railway company to use its right of way as a road-way for ordinary travel, so far as might be found necessary to give vehicles and foot passengers access to its bridge. (2) That the grant of the right to build a bridge for the purpose of general travel did not infringe the ferry franchise. (3) That the complainants were not entitled to compensation for the loss of ferry patronage, as the building of the bridge and suitable approaches thereto for general travel had not cut off access to the ferry landing, or rendered it any less feasible than before to operate a ferry. (4) That a court of equity would not enjoin the railway company from permitting foot passengers and vehicles to travel over its right of way, to such extent as might be necessary to reach the bridge, for the reason that the damages, if any, incident to such use, might be recovered in an action at law, and were certainly very small, if not purely nominal; and, furthermore, because the railway company did not propose to intrude upon the possession of any lands occupied by the complainants.

2. SAME—RELIEF IN EQUITY.
A court of equity is not bound to grant an unconditional order of injunction when it can afford adequate relief in some other manner. Adequate relief would have been afforded in the present case by requiring the railway company to give a bond to pay such damages, if any, as might be eventually assessed against it in consequence of the alleged new use imposed on the right of way.

Appeal from the Circuit Court of the United States for the Western District of Arkansas.

Action by Gabriel L. Payne and Houston J. Payne against the Kansas & Arkansas Valley Railway Company to restrain the use of defendant's right of way for approaches to a passenger and wagon bridge. Defendant appeals from a decree for complainants. Reversed.

*H. S. Priest* and *Alex. G. Cochran*, for appellant.

*John H. Rogers*, for appellees.

Before CALDWELL, Circuit Judge, and SHIRAS and THAYER, District Judges.

THAYER, District Judge. This is an appeal from an order granting and continuing a preliminary injunction, as authorized by the seventh section of the act of March 3, 1891, creating this court. The sole question for our consideration is whether the existing injunction was properly awarded, and that is to be determined on the case made by the bill and answer, and the affidavits and exhibits filed in the lower court on the hearing of the motion. The record before us shows that the appellant is a corporation created and existing under and by virtue of the laws of the state of Arkansas, and that by an act of congress approved June 1, 1886, (24 St. p. 73,) it was authorized to locate, construct, and operate a railway, telegraph, and telephone line through the Indian Territory, be-