full cargo of sulphur,—570 tons. When she reached this port the master filed his protest, reporting jettison of part of his cargo, 41.481 tons, and of a chain, cable, anchor, water-casks, sails, awnings, hawsers, lines, and cordage, property of the ship. An adjustment of general average was made by Mr. Johnson, a professional adjuster, based on the statements of the protest and of the log. The net sum charged against cargo under this adjustment is $477.20. The cargo had been delivered under the general average agreement. The owner of the cargo makes no complaint as to the mode of the adjustment. He denies the facts upon which it was based.

The adjustment is not conclusive. The facts are open to inquiry. *The Alpin*, 23 Fed. Rep. 819; *The Niagara*, 21 How. 9. The libelant's testimony is this: The bark left Girgenti, 22d April, 1891. She met no severe weather, and no unusual incident, until the night of 26th of July, 1891. About 11:30 P. M., the night being dark and rainy and the wind fresh, she came into collision with some dark object, unknown, at a point upon her bow just about, perhaps a little below, the water-line. She disengaged herself immediately, and passed on. Her rate of speed was six knots. Very soon the sound of water was heard, entering the ship, but from the thickness of the frame at the bow the exact place of the leak could not be ascertained. It would have been a difficult and tedious task to cut into the frame in order to find the spot. The pumps were manned at once by four men. At 2 P. M., the water still gaining on her, sails were shortened. Two casks of water at the bow, holding three-quarters of a ton, were broken open. The starboard anchor chain, and more chain, with the kedge, were thrown overboard. The water still gaining, a consultation was held, and the conclusion reached to jettison cargo. The bark had four hatchways,—a small one near the bow, another just abaft the foremast, the main and mizzen hatch. They concluded to begin at this second hatch. In order to get at this hatch, it was necessary to remove certain articles—spare sails, awnings, rope, and hawsers—piled up on it. These were all removed, and for the purpose of speedy removal were thrown overboard. When the hatch was cleared, they got at cargo, and threw overboard 15 to 20 tons of sulphur. They then went to the main hatch and threw over the rest,—in all, 41.481 tons. This lightened the ship. The water was gotten under control, the leak ceased, and by 2 P. M. the next day the ship was dry. She came into this port on 31st July. No survey of the vessel for the purpose of ascertaining the nature and extent of the injury to her hull was ever had, nor was she repaired, except by a mate, who was a sort of carpenter; and at what cost does not appear. The hatchway was 4 feet square. In order to get at it, they had to remove, from on top of it, 1 foresail, measuring 220 yards; 2 stay-sails, 200 yards; 1 spanker, 110 yards; 4 awnings, 200 yards each; 1 top-gallant sail, 130 yards; 1 topsail, 160 yards; 2 5-inch hemp hawsers, 120 fathoms each; 1 hemp towline, 7 inches, 100 fathoms. The sulphur lay on the skin of the ship, 1½ feet from the keel. When the pumps were sounded, at first, she had in her 2 feet of water above the skin, which continued to increase

until cargo was jettisoned, about 11 A. M. the next day. This is the ship's statement.

The Italian law requires the master to have, among other things, an inventory of ship's equipment, spare sails, etc., called "*inventario di bordo.*" Code Commerce, § 643, subd. 19, p. 202. Without this, general average for such articles cannot be claimed. Lown. Gen. Av. p. 445. The question was asked, whether this ship had such an inventory. As the testimony was all taken through an interpreter, it is impossible to say whether the witness understood the question. He said that the inventory was in the log of the day of the occurrence, and that the master had a list of articles on the ship. At all events, it was not produced. The sulphur was discharged on her arrival in port. It came out in lumps and in powder, as sulphur always does, with no marks of water. Considering this statement, it is impossible to resist the impression that there was great exaggeration, both in the alleged condition of the bark, and in the number and value of the articles jettisoned. The collision, which, it is claimed, threatened immediate disaster, left no marks of injury, either to hull or cargo, which could be discovered on arrival at port. The reckless jettison of articles of great use and value, before touching the cargo, worth very much less; adopting this mode of getting at cargo, although the main hatchway was at once accessible, and the whole hold was without compartments; the enormous amount of sails, awning, hawsers, and rope piled up on the surface of the hatch, only four feet by four; the great disadvantage in getting at the truth, arising from the intervention of an interpreter between seafaring men and the counsel, thus preventing anything resembling searching cross-examination; the failure to produce the *inventario di bordo*,—all of these considerations deepen the impression. It is the duty of the libelant to make out his case by the preponderance of credible evidence. The testimony does not enable the court to reach the conclusion that the articles specified were jettisoned from the hatch next forward of the main hatch, nor can it be ascertained what articles from this hatch really were jettisoned, if indeed any were. All these must be excluded from the general average adjustment. It is not inappropriate to quote here the language of Lowndes on General Average, (4th Ed. § 22, p. 92.)

"Many ships are lumbered with all kinds of useless articles on deck, which increase the risk, and are sure to be thrown overboard on the first approach of danger. To guard against the abuse of this practice the rule in England, as in Germany and most other states, is that jettison of ship's materials off the upper deck is not treated as general average, unless it be of such articles as are necessary for the navigation of the ship, and therefore are carried on deck in conformity with the custom of the trade. Boats, studding-sails and their gear, spare spars, anchors, are examples of articles properly carried on deck. Water-casks, provisions, spare sails, cables, ought not to be. Hawsers, in coasting trades or for short voyages, may properly be on deck, though for a long voyage they should be got below as soon as they are dry."

The other articles jettisoned will be allowed. Let the average adjustment be corrected in accordance with this opinion.

NORTHERN PAC. R. CO. v. AMATO.

(Circuit Court of Appeals, Second Circuit. January 18, 1892.)

1. CIRCUIT COURT OF APPEALS—WRITS OF ERROR.
Under the act establishing the circuit court of appeals, (26 St. p. 826, c. 517,) which provides, in section 11, that all existing provisions of law, "regulating the system and methods of review through appeals and writs of error," shall be applicable to such review in the circuit court of appeals, a writ of error returnable to the circuit court of appeals may be issued from the clerk's office of the circuit court in which the action was tried.

2. SAME—JURISDICTIONAL AMOUNT.
As Rev. St. U. S. § 691, as amended by Act Feb. 16, 1875, limiting the jurisdiction of the supreme court to cases involving $5,000 or over, was expressly repealed by section 14 of the circuit court of appeals act, there was no ground for contending that such limitation applies to the jurisdiction of the circuit court of appeals.

3. SAME—DATE OF CREATION.
The act creating the circuit court of appeals took effect from the date of its passage, and the court had jurisdiction to review, by writ of error, a judgment entered thereafter, and before the third Tuesday in June following, which was merely the day for the first meeting of the court, as fixed by the joint resolution passed on the same day with the act. *In re Claasen*, 11 Sup. Ct. Rep. 735, 140 U. S. 200, followed.

4. SAME—PENDING SUITS.
The circuit court of appeals has jurisdiction to review causes pending in the circuit courts at the time of its creation, even though such causes, being for less than $5,000, were not before reviewable in any court. Making the cause reviewable is not impairing the jurisdiction of the court, within the meaning of the clause of the joint resolution which declares that the act shall not in any wise impair the jurisdiction of any federal court in pending causes. *In re Claasen*, 11 Sup. Ct. Rep. 735, 140 U. S. 200, followed.

5. BILL OF EXCEPTIONS—TIME OF SETTLING AND FILING—CIRCUIT COURT RULES.
While rules 67 and 69 of the circuit court for the southern district of New York require exceptions in common-law cases to be drawn up and served before judgment, they do not require the exceptions to be settled and filed before that time.

6. MASTER AND SERVANT—CONTRIBUTORY NEGLIGENCE.
Whether it was contributory negligence for a railroad laborer, returning from his work at night across a slippery railroad bridge, to walk "at his ease," without keeping a lookout for trains, in view of his boss' assurance that there would be no trains for two hours, is a question for the jury.

Error to the Circuit Court of the United States for the Southern District of New York.

Action by Dominick Amato against the Northern Pacific Railroad Company for damages for personal injuries. The cause was brought originally in the supreme court of New York for New York county, and was subsequently removed by defendant to the United States circuit court for the southern district of New York. Verdict and judgment for plaintiff in the sum of $4,000, and a motion for a new trial denied. 46 Fed. Rep. 561. Defendant brings error. Affirmed.

On writ of error from the supreme court, affirmed, 12 Sup. Ct. Rep. 740.

STATEMENT BY LACOMBE, CIRCUIT JUDGE.

In November, 1888, Amato, the defendant in error, who was a laborer on the railroad of the plaintiff in error, was run over, and his leg cut off, by one of the company's locomotives. He had been at work, with a gang of 56, near the west end of the railroad bridge, at Bismarck, in North Dakota. They lived near the east end of the bridge, and it was the custom of the company to take the men home from their work on a