

mere form is not regarded as being of greater importance than substance and merits. Early in the history of our government that great jurist Mr. Justice STORY, in the case of *De Lovio v. Boit*, announced the doctrine which has since received approbation from the bench and bar generally, extending the admiralty and maritime jurisdiction of the courts of the United States to include causes of action arising *ex contractu*, which, in England, owing to the jealousy of the common-law judges and the power of the court of king's bench to issue writs of prohibition, were excluded from the jurisdiction of the high court of admiralty. It was many years afterwards that for the first time a case before the supreme court afforded an opportunity for it to pass upon precisely the same question. But finally, in the insurance case of *Insurance Co. v. Dunham*, the opportunity came, and in a learned and exhaustive opinion by the late Mr. Justice BRADLEY the court sanctioned Judge STORY's views, and settled the controversy so long maintained as to the jurisdiction of the admiralty courts of the United States over cases founded upon maritime contracts. Although not referred to directly, *Cutler v. Rae* has been considered as overruled by that decision. The district and circuit courts have more than once treated it as an overruled case. See *Coast Wrecking Co. v. Phoenix Ins. Co.*, 7 Fed. Rep. 242; *The San Fernando*, 12 Fed. Rep. 342. It is my opinion that this suit is cognizable as an admiralty cause in this court, and that the exceptions to the libel are not well founded. Exceptions overruled.

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CALIFARNO *et al.* v. MACANDREWS *et al.*

(District Court, S. D. New York. June 3, 1892.)

1. PRACTICE—TENDER—SOUTHERN DISTRICT OF NEW YORK.

In the district court for the southern district of New York a libellant may at any time, on order of the court, obtain money tendered and deposited in court, sufficient only being reserved to cover future costs.

2. SAME—INTEREST.

In the same court, when respondent serves written notice that he consents to libellants taking an order for the withdrawal of the whole or any specific portion of a sum so deposited in the registry, interest on so much of libellants' claim thereafter ceases.

In Admiralty. Application for money deposited on tender. See 49 Fed. Rep. 376.

*Wing, Shoudy & Putnam*, for libellants.

*Wilcox, Adams & Green*, for respondents.

BROWN, District Judge. Before suit the respondents tendered \$1,507.-39 for freight due. The libellants declined to accept that amount, and filed their libel claiming \$1,603.54. The respondents thereupon, before answer and in accordance with rule 72 of this court, deposited the

amount of their tender in the registry, and afterwards pleaded the tender and deposit in their answer. Upon the trial the libelants were found entitled to \$1,603.54, the amount claimed. From the decree entered for that sum with interest and costs, the respondents appealed to the circuit court of appeals. After the appeal was perfected, the libelants applied to that court for an order directing the payment to them of the amount deposited in this court. The circuit court of appeals declined to make any order as to the deposit, on the ground that it had no authority to interfere; and that, as the fund on appeal remained in the district court, the appellate court had no control over the fund, or over the district court in respect to it, "except when the cause is reviewed and determined, and remanded for further proceedings in pursuance of the determination." As the fund is, therefore, held to remain under the jurisdiction of this court, it is proper that any suitable order in reference to it should be allowed. In the case of *Ralli v. Troop*, a similar application was entertained in the circuit court, after an appeal to the supreme court.

Upon such a tender and deposit the libelants will in any event be entitled to the benefit of the amount deposited. The effect of the subsequent litigation relates only to their right to a larger sum, or to the costs of litigation. At common law, when money is tendered and brought into court, the plaintiff is at all events entitled to it. 1 Saund. 33, note 2; *The Rossend Castle*, 30 Fed. Rep. 462, 464, and cases there cited. In the last case it was considered by this court that rule 72, requiring the tender to be deposited in court, was designed to adopt to that extent the common-law practice. If so, the deposit should be deemed to be available to the libelant as on a common-law deposit. *Taylor v. Railroad Co.*, 119 N. Y. 561, 23 N. E. Rep. 1106. Rule 72, moreover, expressly provides that the tender deposited in court shall "abide the order, or decree, to be made in the matter." The effect of the rule, therefore, is to make the moneys deposited under it practically the moneys of the plaintiff, obtainable at any time through the order of the court upon such terms as may be just.

By the Code of Civil Procedure of this state, (section 732,) the right of the plaintiff to take out money so paid in, is recognized; and this is in accord with the ordinary practice in this court upon the consent and stipulation of the parties. Such a course is advantageous to both parties, as it saves to one or the other the loss of interest which must arise if the deposit remains in the registry during a long litigation. And as the libelant is entitled, in any event, to the benefit of the whole deposit, neither party can be benefited by, or have any interest in, the detention of the fund in the registry during the subsequent litigation, beyond what is necessary for a reasonable indemnity against future costs.

It is but just, however, that the respondent, who has paid his money into court, should not be required, in case of his ultimate success, after appeal it may be, to look to the security of the libelant's bond alone for

the considerable amount of costs which in that case would accrue in his favor. Complete equity will be done, and the interests of both parties subserved, if a sufficient sum be reserved to cover all such prospective costs, and the residue of the fund be at once paid over to the libellant. If the defendant fail in his defense, he will by this means be at least saved a considerable difference in interest upon the amount so paid over.

An order may be entered in accordance herewith, reserving \$300 for future costs in this action. Such will be the future practice. Hereafter, also, on written notice of the respondent's consent that the libellant may take an order for the withdrawal of the whole or any specific portion of the sum tendered, interest on so much of the libellant's claim will thereafter cease.

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THE BENTON.

UNITED STATES *v.* ROEHRIG *et al.*

(District Court, E. D. Missouri, E. D. June 16, 1892.)

(No. 3,491.)

**1. SHIPPING—PUBLIC REGULATIONS—PASSENGER BOATS CARRYING OIL.**

Rev. St. § 4472, forbidding the conveying of petroleum and other inflammable articles on passenger steamers, provides that "refined petroleum, which will not ignite at a temperature less than 116 deg. of Fahrenheit thermometer, may be carried on board such steamers upon routes where there is no other practicable mode of transporting it." *Held*, that petroleum of the required test could not be carried on a passenger steamer to a point of transshipment, when it was practicable to transport such petroleum by rail for about the same rate, although there was no rail route from the point of transshipment to the point of consignment.

**2. SAME—"PRACTICABLE" TRANSPORTATION.**

The word "practicable," as used in the statute, means commercially practicable, as distinguished from physically or mechanically practicable. *U. S. v. Thornburg*, 6 Fed. Rep. 41, and *U. S. v. Wise*, 7 Fed. Rep. 190, followed.

In Admiralty. Libel of Information against Robert Roehrig and Mrs. J. R. Ern, owners of the steamer Benton, for transporting coal oil and gasoline on a passenger steamboat contrary to the provisions of Rev. St. § 4472. Judgment for the United States.

The said section provides that "no loose hay, loose cotton, or loose hemp, camphene, nitroglycerine, naphtha, benzine, benzole, coal oil, crude or refined petroleum, or other like explosive burning fluids, or like dangerous articles, shall be carried as freight or used as stores on any steamer carrying passengers. \* \* \* Refined petroleum, which will not ignite at a temperature less than 110 deg. of Fahrenheit thermometer, may be carried on board such steamer upon routes where there