

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

is no other practicable mode of transporting it, under such regulations as shall be prescribed by the board of supervising inspectors, with the approval of the secretary of the treasury," etc. It was admitted that the gasoline was carried contrary to the statute, and as to the coal oil the facts were agreed substantially as follows: The Benton was engaged in navigating the Mississippi and Missouri rivers, and the steamboat Annie Dell was engaged in navigating the Osage river. There was a contract between them whereby the Annie Dell received directly from the Benton freight which was to be carried up the Osage. On June 24 and on August 10, 1891, the Benton received, at St. Louis, certain barrels of refined petroleum, which, as declared in the statement of facts, "would not ignite at less than 100 [it should be 110] deg. Fahrenheit." One of these shipments was put on the wharf at Bonnett's Mills, and the other at Osage City, both in the state of Missouri, and from there were taken on board by the Annie Dell, and carried to points on the Osage river. There were railroad lines from St. Louis to Bonnett's Mills and to Osage City, but not to the points on the Osage river to which the goods were consigned. The difference between the steamboat and rail rates between the first mentioned points was insignificant.

*Geo. D. Reynolds*, U. S. Atty.

*Elezeous Smith*, for defendants.

THAYER, District Judge. Under the agreed statement it does not appear that the steamer had the right, under any circumstances, to carry the coal oil in question, as the statement of facts recites that the coal oil carried would not ignite "at less than 100 deg. Fahrenheit." The inference is that it would ignite above that temperature. It will be observed that coal oil cannot be carried, under any circumstances, on a passenger steamer, unless it will bear a test of 110 deg. Fahrenheit. Rev. St. § 4472. I presume, however, that the stipulation was intended to read "110 deg.," and will accordingly decide the case on that assumption. The word "practicable," as used in the statute, (section 4472,) has been held to mean "commercially practicable," as distinguished from "physically or mechanically practicable," and that seems to be a very reasonable, if not a necessary, interpretation of the statute. *U. S. v. Wise* and *U. S. v. Thornburg*, 6 Fed. Rep. 41, and 7 Fed. Rep. 190. It appears from the agreed statement that there was a practicable mode of transporting the coal oil in question from St. Louis to Osage City and Bonnett's Mills otherwise than by steamer. It might have been carried by rail between those points for about the same price charged by the steamer. On the other hand, it appears that there was no practicable mode of transporting it from Osage City and Bonnett's Mills to the points further up the Osage river to which it was destined than by steamer. Does this latter fact render the transportation of the commodity from St. Louis to Osage City and Bonnett's Mills by a passenger steamer lawful? The court decides this question in the negative. It was not commercially impracticable, as the agreed statement shows, to

ship the oil to its ultimate destination partly by rail and partly by water. It had to be unloaded, in any event, at Osage City and Bonnett's Mills, and to be thence forwarded to its destination by another steamer, as the steamers that ply on the Missouri river cannot ordinarily ascend the Osage; and the total cost of transportation over the whole route, if carried from St. Louis to the latter place by rail, would not, as it seems, have been materially greater than if carried for the whole distance by water. If it be conceded that inflammable commodities, like coal oil, can be lawfully carried on passenger steamers merely because the ultimate point of destination is a short distance off the line of a railroad, then it would frequently happen that such commodities would be carried for long distances by water, thereby enhancing the dangers of travel and defeating the beneficent purposes of the act. The court is accordingly of the opinion that when, as in the present case, it is commercially practicable to transport such a commodity as coal oil by rail for a considerable portion of the distance to be covered, and thence by water to its ultimate destination, that method of transportation is the only one that can be lawfully employed, even though it is possible to transport it for the entire distance by water, and not possible to transport it the entire distance by rail. Entertaining these views, judgment will be entered for the government on the second count, and also on the first count, of the information.

BOSTON & A. R. Co. *et al.* v. PULLMAN'S PALACE CAR Co.*(Circuit Court of Appeals, First Circuit. August 2, 1892.)*

No. 9.

## APPEALABLE ORDERS — INTERLOCUTORY DECREE — PATENTS — CIRCUIT COURTS OF APPEAL.

In a suit for infringement of a patent the usual decree for a perpetual injunction and accounting was passed after a full hearing on the merits. More than two months thereafter defendant petitioned for a rehearing and dissolution of the injunction, which was afterwards denied. Pending this petition the circuit court of appeals was created. Held that, assuming the decree for injunction and accounting to be an interlocutory decree, from which an appeal would lie to that court within 90 days under section 7 of the act creating it, (Act March 3, 1891; Supp. Rev. St. 901.) yet the order denying the rehearing was not appealable, for it was not an interlocutory decree or order continuing an injunction, within the meaning of that section, and it is immaterial that there was no right of appeal at the time the injunction was granted.

Appeal from the Circuit Court of the United States for the District of Massachusetts. Appeal dismissed.

*Causten Browne*, for appellants. *C. K. Offield, Frederick P. Fish*, and *John S. Runnells*, for appellees.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PUTNAM, Circuit Judge. This is a bill in equity, brought in the circuit court for the district of Massachusetts by the Pullman's Palace Car Company against the appellants, for an alleged infringement of patents owned by the complainant. On the hearing of the merits on bill, answer and proofs, a decree for a perpetual injunction and for an accounting was passed by the circuit court October 9, 1890. 44 Fed. Rep. 195. October 11, 1890, an injunction writ was issued, as ordered by the decree, and October 13, 1890, the writ was returned duly served. February 26, 1891, the respondents in the circuit court filed a petition for a rehearing and a dissolution of the injunction. September 8, 1891, after the act establishing this court was approved, the circuit court denied the petition for a rehearing; and again, December 1, 1891, the following order was entered:

"And now, to wit, December 1, 1891, it is ordered that the petition filed February 26, 1891, for dissolution of the injunction herein, be denied."

December 28, 1891, the original respondents filed a petition for an appeal to this court, which was allowed, with an assignment of errors as follows:

"That the court erred in denying the defendants' said petition for dissolution of injunction upon the facts shown in support thereof. That the order denying the petition for dissolution of the injunction was, in effect, an order continuing the injunction; and that the court erred in continuing the injunction upon the facts shown in support of the petition for dissolution thereof."

The appeal was duly entered in this court, and the original complainant, now the appellee, seasonably—March 19, 1892—filed a motion to