"The clamping arm, Fig. 6, consists of a thumb piece, D, clamp, L, and heel, O, the whole supported in position by the pins, N, N." "At its forward end, L, the clamp bar is slotted * * * for the reception of the nose of the driver." "In front of this slot is the bifurcation, M (which may be a slot or a hole). The object of this is to embrace the sides of the pin, F (located at I in the base), and force the papers which may be placed in the clamping jaws down upon the same, so that they may be held from slipping while others are placed upon them. * * * This pin may also, for special purposes, be dispensed with sometimes. Beneath the slot, L, when in place, is a raised part of the base, J, forming a block, upon which the slotted portion, L, of the clamping arm rests, and which, together with it, forms the jaws whereby the papers are held firmly together." "The clamping arms, Fig. 6, are so constructed that when the thumb lever is depressed the heel, O, will pass sufficiently far beneath the bearing, N, to hold the slotted portion, L, raised from the base, J, until the end, M, is pressed upon, when it will close with a snap, and drive the papers down upon the pin, F (Fig. 1). In using two of these clips, they are set open, and stand thus until the papers are laid in place, when they are successively closed, or the thumb pieces, D, D, may be connected by a cross bar, so that both are actuated simultaneously."

The circuit judge held that this carefully described arrangement of parts, whereby the clip might be set open or "cocked" while the papers were being inserted, thus leaving both hands free for arranging them suitably in place, and whereby, when the papers were so placed, it might be closed with a snap, was an essential part of the device described, and must be read into the claim, as being the "paper-filing clip, B D." In this opinion we concur. The specification contains no suggestion that this particular arrangement of parts may be dispensed with, as it does with regard to the pin, F; and where a patentee has thus carefully and specifically pointed out the details of a structure, which details, as he shows, discharge a stated function, it is not for the court to declare them immaterial. Defendant has no such arrangement of parts. The upper arm of his clip is held in engagement with the base, or with the intermediate paper, by a spring impinging upwardly upon the thumb piece, and not permitting the thumb piece to be set back or cocked. It seems probable that, in consequence, defendant's clip is not as convenient in use as the complainant's, but certainly it does not infringe.

So far as the patent of 1883 is concerned, there is nothing to add to the opinion of the judge of the circuit court. In view of the state of the art, there was no patentable invention in altering the slots of the guide clip so as to permit the staple driver to be inserted both crosswise and lengthwise, nor so as to give sufficient room to drive a staple with a projecting eye. The decree of the circuit court is affirmed, with costs.

PANAMA R. CO. v. NAPIER SHIPPING CO., Limited.

(Circuit Court of Appeals, Second Circuit. April 18, 1894.)

ADMIRALTY—REVIEW OF COMMISSIONER'S FINDINGS.

The findings of a commissioner appointed to ascertain damages in relation to questions of fact depending on conflicting evidence should not be disturbed by the court, unless error or mistake is clearly apparent.

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

This was a libel by the Napier Shipping Company, Limited, against the Panama Railroad Company, to recover damages for injuries received by libelant's steamer Stroma while lying at respondent's pier at Colon, Panama. The district court originally dismissed the libel (42 Fed. 922), and libelant appealed to the circuit court, where the decree was affirmed pro forma, and an appeal taken to this court. On February 16, 1892, this court reversed the decree (1 C. C. A. 576, 50 Fed. 557), with directions to ascertain the amount of libelant's loss, and render a decree therefor with costs. The cause was accordingly referred to a commissioner, and on the coming in of his report the exceptions taken thereto by respondent were overruled, and the report adopted. From this decree respondent has now appealed.

Coudert Bros., for appellant.

Butler, Stillman & Hubbard (Wilhelmus Mynderse, advocate), for appellee.

Before WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. The only questions raised by this appeal relate to the award of damages made by the decree of the circuit court upon overruling the exceptions of the appellant to the report of the commissioner to whom it was referred to ascertain the libelant's damages. The exceptions, aside from those taken to the allowance of interest, challenge the correctness of the commissioner's findings upon matters of fact. The only ones relating to the allowance of interest which have been argued orally or in the brief of counsel for the appellant also depend upon the correctness of the commissioner's findings upon matters of fact, the contention being that interest should only have been allowed upon the amount of damages which should have been awarded, instead of upon the amount actually awarded.

We think the court below properly adopted the commissioner's findings of fact, and correctly overruled the exceptions. The conclusions of such an officer, like those of a master in chancery, will not be disturbed as to matters of fact which depend upon conflicting testimony, unless error or mistake is clearly apparent. Whether the expenses of the libelant in raising and patching the steamer at Colon were reasonably incurred under the circumstances, whether it was more judicious to bring her to New York, in view of the extensive repairs which were necessary, than to attempt to have them made at New Orleans, whether the repairs made in New York were necessarily consequent to the injuries inflicted by the negligence of the appellant, or were in part consequent upon the negligence of the servants of the libelant, whether the sum paid for repairs was reasonable in amount or not, and whether the expenses and losses incurred by the libelant were or were not enhanced by any want of diligence or prudence on its own part, were all questions de-

pending upon conflicting testimony and inferences of fact. The circuit court could not have safely disturbed the conclusions of the commissioner.

The decree is affirmed, with interest, and costs of both courts.

UNITED STATES v. TWO HUNDRED AND FIFTY KEGS OF NAILS.

(Circuit Court of Appeals, Ninth Circuit. April 2, 1894.)

No. 139.

SHIPPING—COASTING TRADE—VIOLATION OF STATUTE.

The statute prohibiting the transportation of merchandise between ports of the United States in foreign vessels (Rev. St. § 4347) is not violated by shipping goods from New York to Antwerp in one foreign vessel, and afterwards forwarding them by another to a California port, although this was the intention from the outset.

Appeal from the District Court of the United States for the Southern District of California.

This was a libel by the United States seeking the forfeiture of 250 kegs of nails for violation of Rev. St. § 4347. The circuit court overruled a demurrer to the answer, and entered judgment against the United States, from which they have appealed.

George J. Denis, for the United States.

Page & Eells and Andros & Frank, for appellee.

Before McKENNA and GILBERT, Circuit Judges, and HANFORD, District Judge.

GILBERT, Circuit Judge. The United States filed a libel of information for the forfeiture of merchandise claimed to have been unlawfully transported from one port of the United States to another port therein, in vessels owned by subjects of a foreign power, in violation of section 4347 of the Revised Statutes. The owner of the merchandise made a special defense, setting forth the facts constituting the shipment. These facts are that the merchandise was wholly of the produce and manufacture of the United States; that it was shipped at New York in a Belgian vessel, consigned, under regular bills of lading, to a commercial house at Antwerp; that there the merchandise was discharged and landed, and was subsequently shipped on a British vessel, consigned to the owners at the port of Redondo, in California, under bills of lading signed by the master of the British ship, and was carried to Redondo, where it was entered at the customhouse as a manufacture of the United States which had been exported, and was now returned to this country; that the owners produced the certificate of exportation from New York, and presented to the collector at Redondo the evidence required by the regulations of the treasury department that the merchandise was entitled to free entry; that, at the time of the exportation from New York, it was the intention to land the goods at Antwerp, and afterwards forward them by another vessel to Redondo.

The United States demurred to this answer upon the ground that the same did not state facts sufficient, in law, to constitute a defense

The demurrer was overruled, and decree entered against the libelant, and from that decision this appeal is taken.

The decision of the case upon the appeal must depend upon the proper construction to be given to section 4347 of the Revised Statutes, which reads as follows:

"No merchandise shall be transported, under penalty of forfeiture thereof, from one port of the United States to another port of the United States in a vessel belonging wholly or in part to a subject of any foreign power; but this section shall not be construed to prohibit the sailing of any foreign vessel from one to another port of the United States, provided no merchandise other than that imported in such vessel from some foreign port, and which shall not have been unladen, shall be carried from one port or place to another in the United States."

Is the transportation of merchandise which is described in the answer rendered illegal by the language of the statute? The facts set forth in the defense show that the merchandise in question was not transported directly from one port to another port of the United States, nor was it transported in one foreign vessel. On the other hand, it was carried from a port of the United States to a foreign port in a foreign vessel, and was there reloaded into a second foreign vessel, and thence carried to another port of the United States. The laws of the United States for the protection of shipping, and for the collection of revenue in duties, are intended for the practical use of men engaged in commerce. They are intended to be read in the light of commercial usage, and they are to be interpreted "according to the commercial understanding of the term used." Elliott v. Swartwout, 10 Pet. 137. In interpreting the provisions of such a statute, it is rather the letter of the law, than its spirit, which is to be regarded.

In the plain and ordinary meaning of the words, "to transport goods from one domestic port to another" means to carry goods in one continuous voyage, either directly from the one port to the other, or by the customary voyage pursued in commerce between the ports. It does not mean to carry them in two distinct and separate voyages, or in two distinct vessels. When the merchandise in this case was carried from New York to Antwerp, in an opposite direction from its ultimate destination, and was there discharged, there clearly had been, so far, no violation of the statute. Neither was the subsequent reloading and transportation to Redondo, in itself, a violation of the statute. But it is said that the two voyages are to be regarded as one, and that, viewed in the light of the result, the penalty of the statute has been incurred. But it is not the result that is prohibited by the statute. Were these goods transported from one port in the United States to another port in a vessel belonging in whole or in part to foreign subjects? If they were, the penalty denounced by the statute has been incurred. If they were not, then it makes no difference that the result accomplished was that which is intended to be obviated by the statute.

It was the intention of congress, by this act, to protect American shipping. It was evidently not considered necessary to extend the protection further than the words of the statute indicate. It was

not contemplated that American shipping, in carrying goods between domestic ports, would ever be put to the strain of competition with foreign bottoms by transportation in the circuitous method disclosed in this case. The protection of the statute goes no further than the words, in their plain, obvious sense, indicate. Shippers of merchandise are still left free to transport goods from New York to Redondo by sea in any method they see fit, provided they do not ship them direct from the one port to the other in the prohibited vessel. The protection of the statute was intended to be limited, and the court has not the right to extend it further than to the transportation precisely described in the terms of the statute.

But it is urged that the facts disclosed in this case amount to a palpable evasion of the statute, and that such is admitted to have been the intention of the parties to the transaction. The purpose the parties had in view can make no difference with the interpretation of the statute. They practiced no concealment or fraud upon the government. Their acts were done openly. They had the statute before them for their guidance. The unlawful act there defined was malum prohibitum only. The statute left them free to ship goods from New York to Redondo in any manner they saw fit, save and except the manner therein prohibited. They followed a method not mentioned in the statute. They had the right to assume that the whole intention of congress had been expressed in the words of the statute.

This view is sustained by the subsequent legislation of congress upon the same subject. Section 4347 is a re-enactment of the act of congress of March 1, 1817, entitled "An act concerning the navigation of the United States." 3 Stat. 351. On July 18, 1866, in consequence of evasions of that law already committed or threatened on the Canadian frontier, congress passed an act which is now embodied in the Revised Statutes as section 3110, and reads as follows:

"If any merchandise shall at any port in the United States on the northern, northeastern or northwestern frontiers thereof, be laden on any vessel belonging in whole or in part to a subject of a foreign country, and shall be taken thence to a foreign port to be reladen and reshipped to any other port in the United States on such frontiers, either by the same or any other vessel, foreign or American, with the intent to evade the provisions relating to the transportation of merchandise from one port of the United States to another port of the United States in a vessel belonging in whole or in part to the subject of a foreign power, the merchandise shall, on its arrival at such last named port, be seized and forfeited to the United States, and the vessel shall pay a tonnage duty of fifty cents per ton on her admeasurement."

This section of the statutes expresses the legislative intention upon the subject of the evasion of the provisions of section 4347. It furnishes conclusive proof that that subject was brought to the attention of congress. Congress thereupon passed the act prohibiting such evasion, but confined the prohibition to transportation between ports within certain defined territorial limits,—the ports of the northern, northeastern, and northwestern frontier. The will of congress with reference to this subject having been expressed by this enactment in regard to certain specified ports, transportation

by this method between all other domestic ports is, by implication, excluded from the prohibition. But it is contended that the force of this consideration is overcome by the fact that section 3110 imposes a new penalty,—a penalty to be enforced against the ship, in addition to the forfeiture of the cargo; and the argument is that it was the purpose of congress to impose additional restrictions to transportation on the northern frontier by way of the Canadian ports in evasion of section 4347, and to leave other violation of that section to be punished by the penalty therein provided. We find no warrant for so narrowing the scope of section 3110. No reason can be suggested why congress should intend one punishment for evasion of the law by transportation via Canadian ports, and another for other transportation evasive of section 4347. Section 3110 contains the expression of the will of congress concerning the whole subject of the evasion of the previous statute. It is probable that, at that time, evasion of the law by transportation by way of a European port was not contemplated, or if thought of, was deemed so improbable as to require no prohibition.

But if the terms of section 4347 are admitted to be ambiguous and uncertain, so that the court may be left in doubt concerning their application to the facts presented in this case, then it follows, from settled legal principles of construction of that class of statutes, that the doubt must be resolved against forfeiture. Sutherland, in his work on Statutory Constructions (section 361), says:

"No case has arisen in which a penalty or forfeiture has been sustained for being within the supposed intention of the statute when not within its terms."

And he quotes from Dwarris on the same subject as follows:

"Judges, therefore, where clauses are obscure, will lean against forfeitures; leaving it to the legislature to correct the evil, if there be any. With this view, the ship-registry acts, so far as they apply to defeat titles and create forfeitures, are to be construed strictly, as penal, and not liberally, as remedial, laws."

This principle has been universally applied to provisions of the revenue acts. In Adams v. Bancroft, 3 Sumn. 384, Fed. Cas. No. 44, Story, J., said:

"Laws imposing duties are never construed beyond the natural import of the language, and duties are never imposed upon the citizens upon doubtful interpretations; for every duty imposes a burthen on the public at large, and is construed strictly, and must be made out, in a clear and determinate manner, from the language of the statute."

In the case of U. S. v. Breed, 1 Sumn. 160,[1] it appeared that the duty on white or powdered sugar was 4 cents a pound; and on loaf sugar, 12 cents a pound. Certain sugars were imported, which were powdered and white; but it was contended that the sugar was in fact loaf sugar, highly refined, and that it had been crushed for the purpose of evading the act. But the court said:

"To constitute an evasion of a revenue act which shall be deemed, in point of law, a fraudulent evasion, it is not sufficient that the party introduces another article, perfectly lawful, which defeats the policy contemplated by the

[1] Fed. Cas. No. 14,638.

act. There must be substantially an introduction of the very thing taxed, under a false denomination or cover, with the intent to evade or defraud the act. * * * It is a misfortune incident to all laws that they are necessarily imperfect, and, from human infirmity, fall short of all the intended objects. But in all such cases it is the business of legislation, and not of courts of justice, to correct the evil."

The principles announced in that case guided the decision of the court in the case of Merritt v. Welsh, 104 U. S. 694, in which the court said:

"Great stress is laid on the charge that sugars are manufactured in dark colors on purpose to evade our duties. Suppose this is true. Has not a manufacturer a right to make his goods as he pleases? If they are less marketable, it is his loss. If they are not less marketable, who has a right to complain? If the duties are affected, there is a plain remedy. Congress can always adopt such laws and regulations as it may deem expedient for protecting the interests of the government."

It may be added that, since the commencement of the present suit congress has amended section 4347, and has made its interdiction extend to transportation such as was had in this case, by inserting in that section the following words:

"And the transportation of merchandise in any such vessel or vessels from one port of the United States to another port of the United States via any foreign port shall be deemed a violation of the foregoing provision." 27 Stat. 455.

It is the judgment of the court that the decree be affirmed.

UNITED STATES v. REED.

(Circuit Court of Appeals, Second Circuit. April 19, 1894.)

No. 94.

SEAMEN—SHIPPING COMMISSIONERS' EXPENDITURES.

Under Act June 26, 1884, c. 121, § 27, which provides for audit and payment of expenses of shipping commissioners, expenditures required to enable a commissioner to discharge his official duties and to maintain the "suitable premises" therefor required by Rev. St. § 4507, are a proper charge against the United States, and the provisions of the act in that respect are not repealed by Act June 19, 1886, § 1, providing for payment of compensation to the commissioners and their clerks only.

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

This was an action by James C. Reed against the United States, brought under Act March 3, 1887 (24 Stat. 505), for expenditures by him as shipping commissioner. The circuit court rendered judgment for plaintiff. The United States appealed.

Henry C. Platt, U. S. Atty., and Charles D. Baker, Asst. U. S. Atty., for the United States.

George E. P. Howard, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. The plaintiff, prior to July 1, 1884, had been duly appointed shipping commissioner of the United States

at the port of New York, had duly qualified, and entered upon the discharge of his duties. He continued to hold that office and discharge its duties until March 1, 1891. During part of this period he occupied rooms in the United States barge office. Subsequently, by direction of the secretary of the treasury, he removed his offices from said barge office, and procured offices at No. 25 Pearl street, and storage room for deceased seamen's effects at No. 19 Pearl street, in said city. Between the 1st day of July, 1886, and the 1st day of March, 1891, the plaintiff incurred various expenses and made various disbursements, amounting in the aggregate to the sum of $4,033.71, for rent of offices and storage of deceased seamen's effects, cost of said removal of his offices, for stationery, telephone service, for Maritime Register, ice, freight on blanks, safe-deposit vault, telegrams, repairs, etc. The record shows that these were proper, necessary, and reasonable expenditures, required to enable the commissioner to comply with the statutes and regulations relating to his official duties. Without them, it would not be practicable for him to discharge those duties, to make his official reports, or to maintain the "suitable premises" for the transaction of the public business which the law requires. Rev. St. U. S. § 4507. That any of the items charged for are unreasonable in amount, or the prices excessive, nowhere appears.

It is unnecessary to enter into any extended discussion as to the provisions of the original act of 1872, which created the office, regulated its administration, and fixed the fees to be paid and the compensation to be received by the commissioner out of those fees. Reference may be had to In re Shipping Com'r of Port of New York, 13 Blatchf. 339, Fed. Cas. No. 12,792. Nor has section 4507, Rev. St. U. S., which requires the commissioner to lease suitable premises at his own cost, any bearing upon the questions here raised, inasmuch as the subsequent act of June 26, 1884, c. 121, § 27 (23 Stat. 59), is controlling of the case at bar. It reads as follows:

"Section 27. The secretary of the treasury shall appoint a commissioner for each port of entry which is also a port of ocean navigation, and which in his judgment may require the same; such commissioner to be termed a shipping commissioner, and may from time to time remove from office any such commissioner whom he may have reason to believe does not properly perform his duties, and shall then provide for the proper performance of his duties until another person is duly appointed in his place. Provided, that shipping commissioners now in office shall continue to perform the duties thereof until others shall be appointed in their place. Shipping commissioners shall monthly render a full, exact and itemized account of their receipts and expenditures to the secretary of the treasury, who shall determine their compensation and shall from time to time determine the number and compensation of the clerks appointed by such commissioner with the approval of the secretary of the treasury subject to the limitations now fixed by law. The secretary of the treasury shall regulate the mode of conducting business in the shipping offices to be established by the shipping commissioners, as hereinafter provided, and shall have full and complete control over the same, subject to the provisions herein contained; and all expenditures by shipping commissioners shall be audited and adjusted in the treasury department in the mode and manner provided for expenditures in the collection of customs. All fees of shipping commissioners shall be paid into the treasury of the United States, and shall constitute a fund which shall be used under the direction of the secretary of the treasury to pay

the compensation of said commissioners and their clerks and such other expenses as he may find necessary to insure the proper administration of their duties."

Expenses such as these now under consideration appear to have been audited by the treasury department, as a proper charge against the United States, and paid down to July 1, 1886. Where the statute which renders such expenditures a necessary incident to an office does not expressly or by clear implication provide that they shall be paid for by the incumbent of the office out of his compensation, they are, under the authorities, a proper charge against the United States. Andrews v. U. S., 2 Story, 202, Fed. Cas. No. 381; U. S. v. Flanders, 112 U. S. 92, 5 Sup. Ct. 67. The statute last quoted expressly provides for their audit, adjustment, and payment.

The appellant refers to the act of June 19, 1886 (24 Stat. 79), the first section of which is as follows:

"Section 1. On and after July 1, 1886, no fees shall be charged or collected by inspectors of steam-vessels or shipping-commissioners, for the following services to vessels of the United States. [Here follows a long enumeration.] Collectors or other officers, inspectors of steam-vessels and shipping commissioners who are paid wholly or partly by fees shall make a detailed report of such services and the fees provided by law, to the secretary of the treasury, under such regulation as that officer may prescribe; and the secretary of the treasury shall allow and pay from any money in the treasury not otherwise appropriated, said officers such compensation for said services as each would have received prior to the passage of this act; also such compensation to clerks of shipping commissioners as would have been paid them had this act not passed: provided, that such services have, in the opinion of the secretary of the treasury, been necessarily rendered."

The contention that this section repeals the provisions of the act of 1884 (supra) as to expenditures by shipping commissioners other than for clerks is wholly without merit. There is nothing in the act last quoted which is susceptible of any such construction. It contains no repealing clause, it does not refer directly or indirectly to such expenditures, nor does it necessarily imply any intention to impose the burden of maintaining suitable premises for the transaction of the public business, which the shipping commissioner is expressly required to procure (section 4507, U. S. Rev. St.), upon him instead of upon the government, which requires it to be maintained, and which had assumed the obligation of maintaining it, and paying the necessary expenses thereof, under the acts of 1872 and 1884.

There is no weight in the suggestion that, at the time the compensation of the shipping commissioner was fixed under the section above quoted from the act of 1884, "he was informed that it was to be understood that from such compensation he should pay all his official expenses except for employes and rent." The law regulating this subject is to be found, not in the "understanding" of some former secretary of the treasury, nor in the "information" given to the plaintiff, but in the statute itself, which is too clear and unambiguous to admit of but one construction. The judgment of the circuit court is affirmed.

HOT SPRINGS INDEPENDENT SCHOOL DIST. No. 10, OF FALL RIVER COUNTY, v. FIRST NAT. BANK OF HOT SPRINGS et al.

(Circuit Court, D. South Dakota, W. D. March 1, 1894.)

No. 80.

REMOVAL OF CAUSES—ACTION UNDER UNITED STATES LAWS—NATIONAL BANKS

A suit to compel the receiver of a national bank to pay to complainant certain assets of the bank in his hands is one arising under the laws of the United States, within the meaning of the acts of March 3, 1887, and August 13, 1888, in regard to the jurisdiction of the federal courts.

Suit by the Hot Springs Independent School District No. 10, of Fall River County, S. D., against the First National Bank of Hot Springs and Alvin Fox, receiver of said bank.

Martin & Mason and Anderson & Anderson, for complainant.
William R. Steele and Henry Frawley, for defendants.

SANBORN, Circuit Judge. This is a motion to remand this suit to the state court on the ground that it is not a suit "arising under the constitution or laws of the United States" under the act of March 3, 1887, as corrected by the act of August 13, 1888 (25 Stat. 433; Supp. Rev. St. p. 612, § 2). This suit is brought to compel the receiver of this insolvent national bank to first pay to the complainant, out of the funds of the bank in his hands, several thousand dollars, before he pays any dividend to any creditors, on the ground that this receiver holds this sum of money as a trust fund for the complainant, and not as a part of the property of the bank, to be distributed among its creditors. Whatever funds and property this receiver has, he has received from this insolvent bank, and he holds them by virtue of the laws of the United States relative to the appointment and action of receivers of such banks. His defense to this suit, and to every suit brought against him as receiver, is based upon these laws of the United States under which he holds his appointment, and in accordance with which he must discharge the trust devolved upon him. In this suit he has interposed a demurrer to the plea of the complainant, and the question now at issue is, what construction shall be placed upon the provisions of the national banking laws with reference to the distribution of the funds of insolvent banks by receivers under the admitted facts of this case? I am clearly of the opinion that this case is one arising under the laws of the United States, and the motion to remand is denied. Sowles v. Witters, 43 Fed. 700; Sowles v. Bank, 46 Fed. 513; San Diego Co. v. California Nat. Bank, 52 Fed. 59.

SWOPE v. VILLARD et al.

(Circuit Court, S. D. New York. May 16, 1894.)

1. CORPORATIONS—RIGHT OF STOCKHOLDER TO SUE IN BEHALF OF CORPORATION—RECEIVERS.

A stockholder of a corporation that is in a receiver's hands has no right to sue upon a cause of action in favor of the corporation upon refusal of