himself proved that the flotsam and jetsam of the high water was all borne to the railroad embankment, and left in a great pile there after the subsidence of the flood, drawn by the suck of the culverts; and not a single witness testified that any of the flotsam and jetsam drifted back towards the warehouse. It was vital to the plaintiff's case that he should have proved that, if there had been no obstruction in the culvert, there would have been no water above the floor of the warehouse. It was a non sequitur to assume that, because there was obstruction in the culverts, therefore there was high water in the warehouse; and he failed to produce any affirmative evidence to show that there would have been no high water in the warehouse if there had been no obstruction in the culverts. I must therefore instruct the jury to find a verdict for the defendants.

FERGUS FALLS WATER CO. v. CITY OF FERGUS FALLS.

(Circuit Court, D. Minnesota, Sixth Division. February 4, 1895.)

1. CITIES—CONTRACTS FOR WATER.
   Where a city with a population of 5,000 and an assessed valuation of property of two and a quarter millions of dollars contracts with a person giving him the exclusive privilege of laying water mains in the city for 30 years, and providing that he shall furnish the city with 50 fire hydrants, for each of which it shall pay him a rent of $80 per year for the 30 years, with a stipulation that, at the end of 10 years, it may, at its option, buy the waterworks, at a price commensurate with the productive value thereof, the contract will not, after the city has enjoyed the benefit of it for over 10 years, be held so unreasonably oppressive or contrary to public policy as to be void.
2. SAME.
   Under the power given a city by its charter to contract for waterworks, it has power to make necessary and proper arrangements to provide for payment of the same.

Action by the Fergus Falls Water Company against the city of Fergus Falls.

Frank W. Booth, for plaintiff.
Mason & Hilton, for defendant.

NELSON, District Judge. This is an action brought by plaintiff against the city of Fergus Falls to recover the sum of about $5,600, with interest, on account of rent for water supplied to defendant under a certain contract embodied in one of the city ordinances. There is no contention whatever as to the facts, and a stipulation in writing was filed that the case should be heard and decided by the court, without a jury.

The agreed facts are as follows:

March 3, 1881, the legislature of the state of Minnesota granted to defendant a charter, the provisions of which, material to this case, are as follows (Sp. Laws 1883, p. 1):

Chapter 4, § 5: "The city council shall have power and authority to make, ordain, publish, enforce, alter, amend or repeal all such ordinances for the

government and good order of the city, * * * and for these purposes the said city council shall have authority by such ordinances:"

Subsection 45: "To contract with any person, persons or corporations for the lighting of such streets or parts of streets and public places as the city shall deem proper, for the convenience and safety of the inhabitants, and also for supplying the city with water."

Subsection 47: "The city council may permit any parties or corporation to lay water mains and pipes in any and all streets and alleys, highways and public grounds of the city, and shall regulate the position of the same, so that they shall not obstruct or interfere with the common sewers or with the proper drainage of the city."

Chapter 7, § 3: "The city council shall have power to purchase, keep and maintain fire engines and other fire apparatus, and to build and maintain engine houses, hose houses and such other buildings as may be necessary or convenient. * * *

Section 4: "The city may maintain the present volunteer fire companies and authorize the organization of such other volunteer companies as in its discretion may be necessary or expedient."

Section 7: "The city council shall have power and authority to make by ordinance all needful rules for the government of the fire department, and for the protection and use of all engine houses, telegraph lines, and other property and apparatus pertaining thereto, and of the water works, mains, pipes, cisterns, and hydrants in said city as used in connection with said department. * * *"

Chapter 8, § 1: "The city council shall have the care, supervision and control of all highways, streets, alleys, public squares and grounds within the limits of the city, and may lay out and open new streets and alleys, and extend, widen, straighten and may build, maintain, repair bridges across streams and railway tracks, may provide for the pavement of gutters or the roadbeds of any streets or alley."

On April 19, 1883, Ordinance No. 18, relative to gas and water works, was passed by the common council of defendant, certain portions of which, material to this case, are set out as follows:

"Ordinance XVIII.

"Gas Works and Water Works.

"(Passed April 19, 1883.)

"Section 1. In consideration of the benefits that will result to the city of Fergus Falls and its inhabitants from the erection and operation of gas and water works, there is hereby granted unto Carroll E. Gray, his associates or assigns, the privilege of establishing, maintaining and operating gas and water works, and the construction of pipe lines, open or closed stand pipes, reservoirs, conduits, gas holders, necessary and sufficient in size; also the laying of mains, pipes, and the placing of fire hydrants and lamp posts in and along the streets, avenues, alleys and public grounds of the city of Fergus Falls, county of Otter Tail, state of Minnesota, as the same now exist or may hereafter be extended, for the supply of gas or water suitable for domestic and other purposes, for and during the term of thirty (30) years from and after the passage of this ordinance. The said city of Fergus Falls shall and will abstain, for the period of said thirty (30) years, from and after the passage of this ordinance, from granting to any party or parties other than the said Carroll E. Gray, his associates or assigns, the right or privilege to lay water pipes in any of the streets, avenues, alleys, public grounds or sidewalks or furnish water to said city or its inhabitants or any portion thereof, and to abstain from so doing for and on its own behalf; and said city will also abstain for a period of ten (10) years, from and after the passage of this ordinance, from granting to any party or parties, other than the said Carroll E. Gray, his associates or assigns, the right or privilege to lay gas pipes in any of the streets, avenues, alleys and public grounds or sidewalks, or furnish gas to said city or its inhabitants or any portion thereof, and the said city will likewise abstain from so doing for and on its own behalf: provided, however, that

at the expiration of said thirty (30) years, should the city refuse to grant to the said Carroll E. Gray, his associates or assigns, the right to continue and maintain said works for another term of twenty (20) years in and upon the public ground and streets of the said city, and to supply the said city and the inhabitants thereof with gas or water on reasonable terms, then and in such case the city shall purchase from said Carroll E. Gray, his associates or assigns, said gas works or water works, or either of them, and the property connected therewith, at a fair valuation, as provided for in section ten (10)."

"Sec. 4. * * * The public fire hydrants rented by said city are not for the private use of its citizens or for street sprinkling purposes, but shall be used only for fire protection purposes, fire company practice, and for flushing gutters through hose. * * *

"Sec. 5. In further consideration of the benefits that will accrue to the city of Fergus Falls and its inhabitants from the erection and operation of water works, and for the better protection of the city against fire, the city of Fergus Falls hereby agrees and binds itself to rent, and does hereby rent, from said Carroll E. Gray, his associates or assigns, fifty (50) public fire hydrants of the class and character hereinbefore described, to be located on the aforesaid six (6) miles of pipes, for and during the term of thirty (30) years from and after the completion of the works, and agrees to locate the same promptly along the lines of the street mains, on written demand of the said Carroll E. Gray, his associates or assigns, and upon submission by the said grantees to said city of a plan of the location of the said street mains. The said city agrees to use said hydrants carefully, protecting them from molestation or damage by the employees or officers of said city, and pay said Carroll E. Gray, his associates or assigns, for any injury which may result from misuse or abuse by the servants or employees of the city. The rental to be paid for the use of said hydrants shall be eighty ($80) dollars each per annum, payable to the said Carroll E. Gray, his associates or assigns, or to his or their order, and the payment shall be made quarter yearly therefor, pro rata, viz.: On January first, April first, July first and October first of each and every year during the term of this contract, or until said works are purchased by said city as hereinafter provided for. The said hydrant rental to begin from the dates when each of such hydrants shall be put in successful operation. For any additional fire hydrants, the city may thereafter require and locate the annual rental to be paid by the city shall be seventy ($70) dollars per hydrant for the next fifty (50) hydrants, and all after that number fifty ($50) dollars per hydrant.

"Sec. 6. In the event that said Carroll E. Gray, his associates or assigns, after said works shall have been in successful operation, suffer a suspension of a supply of good and wholesome water, thereby causing an insufficiency for domestic and other purposes and for a period exceeding sixty (60) days, then in that event said Carroll E. Gray, his associates or assigns, shall forfeit all exclusive franchises herein granted, unless such suspension shall have been caused by the act of God, by public enemies or unavoidable accident, and during any such failure of supply, all hydrant rental shall be suspended."

"Sec. 10. The city of Fergus Falls shall have the option and privilege at any time after the expiration of ten (10) years from the passage of this ordinance, or at the expiration of five or ten years thereafter, on giving six (6) months prior notice in writing to the said Carroll E. Gray, his associates or assigns, to purchase said gas or water works or either of them, and all property connected therewith, and necessary for the effective operation of the same at a fair valuation to be ascertained as follows, to wit: In the event said city and Carroll E. Gray, his associates or assigns, fail to agree upon the price, three (3) disinterested persons of good intelligence not residents of the county of Otter Tail shall be chosen and sworn to determine the value, one to be appointed by said city, one by said grantees, and the third by the two so appointed. When said three persons shall have been so chosen, and before they determine said value, the said city and the said grantees shall each at their option have the right to call nonresident experts not exceeding three (3) in behalf of each party, to give testimony under oath before said three appraisers as to such value. The said three appraisers shall then proceed to determine such value, and in so doing they shall take into consideration the

productive value of said gas or water works, rights, privileges and property. When the three or their majority shall have made an award in writing, ten per centum shall be added to the amount thereof, and the said city shall then have the option of refusing to purchase, or of paying to the said Carroll E. Gray, his associates or assigns, within six (6) months of the date of said award the amount thereof in cash and the said ten per centum additional thereon. If the said city shall refuse to purchase as aforesaid, it shall pay the necessary expense incurred, in making said award; in case the city buys, the expense of said award to be equally borne.

"Sec. 11. * * * The said Carroll E. Gray, his associates or assigns, shall also furnish, free of rent to the city, water for the use of the city hall and city offices, calaboose or jail, and to the city engine houses and fire department offices, also to the central high school."

"Sec. 13. Said Carroll E. Gray, his associates or assigns, shall within thirty (30) days from the passage and publication of this ordinance, file with the city clerk a written acceptance of the terms, obligations and conditions herein set forth, and after the date of the filing of said acceptance this ordinance shall be the measure of the rights and liabilities of said city and of said Carroll E. Gray, his associates or assigns, and shall constitute a contract. Said Carroll E. Gray, his associates or assigns, shall within thirty (30) days from such acceptance commence said gas or water works, and have said water works in operation and substantially completed as herein contemplated by the first day of December, 1883. In the event that said Carroll E. Gray, his associates or assigns, shall fail to have said gas works in operation the first day of December, 1883, then they shall forfeit all exclusive rights and franchises pertaining to the erection and operation of gas works herein conferred, unless longer time for such completion be granted by said city. In the event that said Carroll E. Gray, his associates or assigns, shall fail to have said water works in operation to supply water by the first day of December, 1883, then they shall forfeit all exclusive rights and franchises pertaining to the erection and operation of water works herein conferred, unless longer time for such completion be granted by said city.

"Sec. 14. All ordinances and parts of ordinances inconsistent with and repugnant to the provisions of this ordinance are hereby repealed, and this ordinance shall take effect and be in force from and after its passage and publication."

The water works were completed by the 1st of December, 1883, and have been in constant use ever since. On the 30th day of August, 1893, the city council duly passed, and the mayor approved, the following resolution:

"It is hereby resolved and determined that the contract for water supply through fire hydrants for fire protection, heretofore recognized as existing between the city of Fergus Falls and the Fergus Falls Water Company, under the provisions of Ordinance No. 18 of said city, be, and the same is hereby, declared to be null and void, and is hereby canceled. And it is hereby determined that the city will no longer take water from the said water company under the provisions of said Ordinance No. 18."

On the same day the city council passed, and the mayor approved, the following resolution:

"Resolved, that the city will take from the Fergus Falls Water Company for fire protection purposes from twenty-five hydrants, said hydrants to be situated as the council may hereafter designate. And it is hereby further determined that the city will pay the said water company, at such hydrants and such other hydrants as the city may from time to time engage to use, the sum of sixty dollars per hydrant per year; the said hydrant rents to be paid quarterly, at the end of each quarter of the year from the commencement of the contract. And the committee on water works are hereby instructed to so contract with the said water company for a water supply from the hydrants as hereafter designated by the city council."

Plaintiff refused, and still refuses, to accept the last-named proposition. A demurrer was interposed to the complaint, claiming that this court had no judisdiction, because no federal question was involved in the case. The demurrer was overruled by Judge Thomas, and will not be considered by me.

It is admitted that all rents have been paid under the provisions of the ordinance up to September 1, 1893, and no later; and this suit is brought to enforce the payment of rent which has accrued since that date. Defendant resists payment of rent on the ground that the contract embodied in the ordinance is illegal, unreasonable, oppressive, contrary to public policy, and that the common council had no authority to enact the ordinance in question; and, further, that, at the time of the passage of the ordinance, there was no revenue assessed, or funds of the city available, wherewith to pay the rent in question.

It is true that the charter merely gives defendant authority to contract with any person, persons, or corporation for supplying the city with water; but, in order to properly construe that section, we must read it in connection with other portions of the charter which may be applicable thereto. We find that power and authority are given the council to permit any parties or corporation to lay water mains and pipes in any and all streets and alleys, highways, and public grounds of the city, and the council is given the care, supervision, and control of all the highways, streets, alleys, public squares, and grounds within the limits of the city. The council also has power and authority to make all needful rules for the government of the fire department, and "may continue the present volunteer fire companies, and authorize the organization of such other volunteer companies as in its discretion may be necessary or expedient." Under the authority thus conferred upon it by the charter, express and implied, the city council, on the 19th day of April, 1883, enacted and passed the ordinance in question, which on the 30th day of August, 1893, it declared null and void, and refuses to pay rent thereunder. In enacting this ordinance the council did nothing prohibited by the charter, and the question is: Did it exceed its power in such a manner that, under all circumstances of the case, this court must say, as a matter of law, that the ordinance is void, and cannot be enforced? What are these circumstances? It appears that in April, 1883, the defendant, with a population of about 5,000, and an assessed valuation of property of $2,231,201, being desirous to be provided with water works, contracted for the same under this ordinance, and thereby induced the expenditure of a large amount of money on the part of plaintiff's assignors. The works were completed in accordance with the contract, and for nearly 10 years thereafter defendant has used and had the benefit of said water works for fire and other purposes, and has, during all that time, paid for the same, without objection, according to the terms of the contract. On August 30, 1893 (the population at this time not exceeding 4,000, and the assessed valuation having shrunk to $821,773), the common council declared this ordinance void, and refused to be bound any longer by its terms. On the same day, however, they passed another

ordinance, whereby they offered to take from the plaintiff, for fire protection purposes, 25 hydrants, at the rate of $60 each, and pay for the same quarterly.

It is stipulated that when fires have occurred in the city since August 30, 1883, some of the hydrants have been used by the volunteer fire companies of the city of Fergus Falls, but that such action on part of these companies was without any action or consent of defendant. It appears that these fire companies are under the control of the defendant; that no action was taken by the council forbidding the use of the hydrants for such purpose, and the city certainly had the benefit of them. Defendant claims that the ordinance granting this franchise to Gray and his assigns for 30 years, whereby defendant was bound to pay for 50 hydrants, at $80 each, during all that time, is void, for the reason that the city council had no authority to bind the defendant for such a period in advance. It must not be forgotten that 10 years of that time have elapsed; that the contract has but 20 years to run, and is now considerably modified. It is no longer an exclusive one, for the time has been reached when the defendant can purchase the works, not at the cost price or any arbitrary figure, but at a price to be agreed upon by three impartial persons, taking "into consideration the productive value of said water works, rights, privileges, and property." There is no claim of fraud, nor that the water works are useless or unnecessary. On the contrary, defendant by its second ordinance, of August 30, 1893, admits their usefulness and necessity. It is evident that the passage of the first ordinance, of August 30, 1893, was brought about by the fact that instead of growing, as was expected, the city had decreased in population and assessable valuation. The law does not favor the idea that a man shall abide by a contract when it is advantageous to him, and repudiate it when it becomes irksome. It is well settled that time and even exclusive contracts may be made by city authorities for the purpose of inducing persons to embark capital in such enterprises as water or gas works, and common sense and experience teach us that without such provisions capital would not be invested. The only question is, is this ordinance so unreasonable, so oppressive, so contrary to public policy that the law will interfere and declare it void? I am of opinion that, if this question had been raised at the outset, it is doubtful whether the city council had authority to give an exclusive contract of this character to any person for the purpose stated; but as plaintiff's assignor, relying upon the ordinance, in good faith invested a large sum of money in these works, and the city has for 10 years enjoyed the benefits thereof without objection or complaint, and has now the opportunity of purchasing the works at a reasonable valuation, commensurate with the productive value thereof, I do not consider that the ordinance is so unreasonable, oppressive, or contrary to public policy as to be void. Where a contract is sought to be avoided on the grounds above stated, it must be treated as a nullity by the party seeking to avoid it, and must be repudiated in toto. He cannot repudiate it, and at the same time reap any of the benefits derived from it, as the defendant has attempted to do.

As to the other defense, I do not think it can prevail. When the city received power from the legislature to contract for water works, the power to make necessary and proper arrangements to provide for the payment for the same was also granted. I think the plaintiff is entitled to recover the full amount claimed for rent, and judgment will be entered accordingly.

ROZA v. SMITH.

(District Court, N. D. California. January 28, 1895.)

No. 11,112.

FALSE IMPRISONMENT—DAMAGES.

S., the master of a vessel lying at a remote point on the coast of Alaska, suspecting that one R. had instigated a seaman to desert, seized R., put him in irons, and confined him in the "run," on board the vessel, for about 9 hours, keeping him in custody altogether about 18 hours. S. justified this act as a necessity, in order to compel the return of the deserting seaman. *Held*, that punitive damages should be allowed to R. for this indignity and invasion of his liberty, and that $500 was a proper allowance.

Libel in personam to recover $10,000 damages for unlawful detention and imprisonment on board the American steam whaler Narwhal, of which H. P. Smith was master. Five hundred dollars awarded.

Walter G. Holmes, for libelant.

Page, Eells & Wheeler, for respondent.

MORROW, District Judge. The libel in personam was instituted to recover damages in the sum of $10,000 for the unlawful detention and imprisonment of libelant on board the American steam whaler Narwhal by H. P. Smith, the respondent, he being at that time master. There is no substantial controversy as to the material facts of the case. The libelant is a whaler, and resided in 1892 at a whaling station known as "Shooting Station," situated at Point Barrow, on the northern coast of Alaska. About July 20th of that year, the Narwhal was lying at anchor off Point Barrow, waiting for the ice to break up, so that she might proceed eastward to her destined whaling grounds. Among her crew was one Joe Peters, who was boat steerer and hunter. The libelant and Peters had, it seems, been previously acquainted. On the 20th of July, Peters, who had been watching for an opportunity to leave the vessel for some time before, obtained the captain's permission to absent himself from the vessel to visit the steam whaler Balaena, which was lying near by. This was, however, a mere pretense to get away from the vessel, and he proceeded to the shore with the intention of going to Cape Smythe, the headquarters of the Pacific Whaling Station, some 15 or 16 miles distant. The station or house occupied by the libelant is in the direction of Cape Smythe, and is some five or six miles from where the Narwhal was lying. Peters had, previous to his leaving that vessel, sent his clothes on shore by a native, and had directed

that they be left at Roza's house. He reached the latter's place about 7 or 8 o'clock in the morning, remained there a few minutes, and then proceeded on to Cape Smythe. It appears from the testimony that the captain was informed of his desertion about 10 o'clock in the evening. Whether this is 10 o'clock of the same day that Peters reached Roza's house, or of the day preceding, is uncertain. The fact that daylight prevails at this season of the year at Point Barrow during the whole 24 hours renders the question of time somewhat dubious. Some natives came on board the vessel, and reported that Peters had been seen on his way towards Roza's house. The captain ordered a search to be made, to ascertain whether Peters' clothing was still on board, and found that all his things had been taken from the vessel. He testifies that he then went on shore, accompanied by the second mate and another officer of the vessel, and, visiting Roza's house, had an interview with him. He states that Roza told him that Peters was not there, and further told him that "he [Peters] had deserted the ship; but, if he [Roza] knew where he was, he would not tell me, or give me any assistance in finding the man." But Roza swears that when he was asked about Peters he told them that he had seen him at his house about two hours before. The first mate, in his deposition, could not recall the conversation that passed between the captain and Roza, although as to other matters his memory was apparently good. After this first interview, the captain returned to the vessel, leaving the two officers on shore to make further search. The latter subsequently returned on board, bringing with them Peters' clothes, and reported that they had found them at Roza's house. In regard to this the first officer states in his deposition that he was authorized by the captain to search Roza's house; that the latter was not there when he made the search; that the only person present was a native woman, with whom, it appears, Roza was living; that he obtained her permission to search the premises, and found the clothes in the loft, concealed from view. The captain, on learning this, again repaired to Roza's house. The latter was then there. Capt. Smith accused him of having instigated Peters to desert. This Roza denied. The captain told him he should take him on board the vessel, and keep him there until Peters' return. Roza refused to go, and the captain, with the assistance of the two officers, put him in irons. It is denied by the captain that he resorted to this measure. He, however, admits that he took the irons with him, and went prepared to use them in case Roza should offer any resistance. The first officer, who was called as a witness for the respondent, corroborates the testimony of Roza that the irons were placed on him. Roza told the captain to take the irons off, and he would go with them on board the vessel. The irons were thereupon removed, and he went peaceably on board with the captain, arriving there about 1 o'clock in the afternoon. The two officers remained on shore to make further search. Meanwhile Roza was kept under close watch, so that he might not escape. When the two officers subsequently returned on board without having found Peters, he was again put in irons, and placed in the hold of the vessel.

The place where he was confined is described by him as being a small and dark compartment, which was used as a storeroom, and was called the "run," entrance to it being gained by a small hatch right in the middle of the cabin floor. The captain states that it was about 20 feet in length, and perhaps 26 feet in width, and 7 feet high; that it was used for keeping light stores which were being used constantly; that it was not very full at the time, and that there was a space of 6 feet in which one could move about. Roza swears that the place was dark, ill-ventilated, and so uncomfortable that he could not rest or sleep. He was given nothing to eat during the entire time of his incarceration. This, however, is disputed by the captain. He was placed in the "run," according to the captain's testimony, between 10 and 11 o'clock at night, and kept confined there in irons until between 7 and 8 o'clock on the following morning, when the captain received word that Peters had been found, and Roza was thereupon released. He had, therefore, been in close confinement in irons for about 9 hours, and in the custody of the respondent on board the vessel for about 18 hours altogether. The libelant suffered no physical damage, so far as the proof shows, and his recovery must be upon the basis of exemplary or punitive damages for the oppression, humiliation, and indignity he suffered by reason of the wrongful act of the captain. The latter justifies his course on the ground of the necessity incident to the situation in which he was then placed. He testifies that he considered that Roza had instigated Peters to desert, and that he deemed himself justified, under the circumstances, in holding him as a hostage until Peters' return or capture, for the reason that there was no court or official to whom he could appeal or apply for redress; that the ice was breaking up at that time, thus affording him an opportunity of proceeding on his whaling voyage; that, unless he availed himself of this chance, another might not have occurred again that season; that Peters was a skillful hunter, whom he could ill afford to lose. The captain lays great stress upon the fact that his delay in getting Peters back greatly hazarded his chance of getting out into the whaling ground, and imperiled the successful outcome of the whole enterprise. But how this situation could, under any circumstances, justify the captain in his treatment of Roza, who was not concerned in the voyage, it is difficult to understand. Even conceding, for the sake of argument, that Roza had been guilty of instigating or conniving at Peters' desertion, the captain had no right to punish him for that offense. Had there been a court of competent jurisdiction accessible to which the captain could apply for redress, the only remedy he could have had against the offender, aside from his civil action for damages, would have been a penalty under section 4601 of the Revised Statutes, which provides that "whenever any person harbors or secretes any seaman belonging to any vessel, knowing him to belong thereto, he shall be liable to pay ten dollars for every day during which he continues so to harbor or secrete such seaman, recoverable one-half to the use of the person prosecuting for the same, the other half to the use of the United States." No criminal liability is attached, so far as merchant vessels are concerned, to the

act of enticing or assisting or conniving at a seaman's desertion. But the preponderance of the evidence establishes affirmatively that Capt. Smith was mistaken in believing that Roza had anything to do with Peters' desertion. Peters testified that he did not consult Roza, or disclose to him his intention of leaving the vessel, and that Roza never suggested the subject to him, or knew of his intention. He further states that he sent his clothes to Roza's house by a native, without having told Roza that he was going to do so, or obtaining the latter's permission. Roza, on his part, denies emphatically that he did or said anything to induce Peters to desert, or assisted him in doing so, or that he knew of his intention to desert. The circumstances of finding Peters' clothes in Roza's house, and that Peters had stopped there on his way to Cape Smythe, added to the further fact that Peters and Roza had been previously acquainted, did not furnish the captain with a reasonable excuse for his conduct in arresting and detaining Roza in irons as a hostage for the return of Peters. The captain disclaims having been actuated by malice. But to support an action of this character, and to recover exemplary or punitive damages, it is not necessary that express malice should be proved. A wanton disregard of the rights of others, such as was displayed in this case, will suffice. In Johnson v. Ebberts, 11 Fed. 129, Judge Deady said:

"The plaintiff testified that the reason he had the defendant arrested was, 'He had my note, and I wanted to know how he got it.' But no one has a right to cause the arrest of another as an experiment, for the purpose of finding out who committed a particular crime. This is trifling with the liberty and good name of another, which the law does not justify or excuse. But it must appear that the arrest was malicious, as well as without probable cause, before the defendant can be held responsible in damages. It is not claimed that there is any direct evidence of malice, but only that it is sufficiently shown by the circumstances of the case. The malice necessary to sustain this action is not express malice, a specific desire to vex or injure another from malevolence or motives of ill will, but the willful doing of an unlawful act to the prejudice or injury of another. Frowman v. Smith, 12 Am. Dec. 268."

The libelant was kept in irons in the "run" for about 9 hours, and was restrained of his liberty, in the custody of the captain, for about 18 hours altogether, on board the vessel. The captain justifies putting the libelant in irons while in the "run" because he was afraid the latter might set fire to the vessel, or do some other mischief. But this does not appeal very strongly to the court in view of the unlawful character of the whole proceedings. If there was danger that the libelant would set the vessel on fire, or commit any other mischief, the danger arose primarily out of the misconduct of the captain in detaining him on board without authority of law, and it therefore affords no justification for the imprisonment. No case analogous in its features to the case at bar has been cited, nor have I been able to find any. In Boyle v. Case, 18 Fed. 880, the plaintiff was unlawfully arrested by a vigilance committee, and confined in jail. They pretended to try him, and sentenced him to receive 25 lashes on his bare back, and, in pursuance of said sentence, caused him to be blindfolded, gagged, and taken from the jail during the following night,

onto the hill back of the town, where he was first tantalized or tortured by the information that he was to be hung, and then to receive 200 lashes, and finally was whipped on the bare back with a cat o' nine tails,—five men giving him five lashes each,—when he was sworn upon his knees never to reveal what took place on that occasion, nor to harm any one engaged in the transaction; that he was taken in irons to the Portland steamboat, and sent away on her. It was shown that he was a gambler and bartender, and that the committee considered him an obnoxious and undesirable character, and took these measures to rid the town of him. He was awarded the sum of $1,000. In the case of Harris v. Railroad Co., 35 Fed. 118, the facts of that case are much stronger than in the case at bar, and $5,000 were there awarded. As before stated, the libelant in this case suffered no actual physical damage, and the test of any recovery by him must be based upon the oppression, humiliation, and indignity heaped upon him, the wanton and unjustifiable disregard of his rights, and the harshness of his treatment. "Punitive damages may be awarded when a wrongful act is done willfully, in a wanton or oppressive manner, or even when it is done recklessly,—that is to say, in open disregard of one's civil obligations and of the rights of others. "The cases on the subject show that in the matter of assessing damages for false imprisonment, or for an assault or trespass, it is the duty of the jury to consider not only all the circumstances of aggravation attending the wrongful act, but, in some measure, at least, the nature of the right that has been invaded, and the effect upon social order of permitting a wrongdoer to escape without substantial punishment in case of a flagrant violation of the law and the rights of others." Fotheringham v. Express Co., 36 Fed. 252. Exemplary or punitive damages have a double object,—one to reward the person wronged, the other to punish the offender; the punishment partaking of the character of a fine or penalty as an example to deter others. Field, Dam. § 615; Boyle v. Case, supra; Fotheringham v. Express Co., supra; Railroad Co. v. Prentice, 147 U. S. 103, 107, 13 Sup. Ct. 261. In my judgment, the action of the respondent deserves punishment. It would, indeed, be establishing a most dangerous precedent if his conduct in this case should be recognized as lawful, or justified as a measure of necessity. The law of necessity, whatever may be its extreme limit in authorizing the use of violence as a means of self-defense or for self-preservation, does not justify the infliction of an injury upon a third party who is a stranger to the situation. This was the position of the libelant in this case. He had no interest in the controversy between the captain and the deserting seaman, and was under no obligation to assist in the capture and return of the latter. The most that can be said is that he was not greatly damaged. The humiliation of being confined on board of a vessel in the uninhabited and inhospitable Arctic regions cannot be said to be a very serious matter. The law, however, extends to every foot of American territory, and to the deck of every American vessel, and must be enforced as well in the Arctic Sea as in the port of San Francisco. No claim is made for damages on account of the act of the master in arresting the libelant on land.

The libel is confined to the marine tort arising out of the imprisonment on board the vessel, that being the only part of the transaction within the jurisdiction of this court. For this injury I will allow, as full compensation, the sum of $500.

P. LORILLARD CO. v. PEPER.

(Circuit Court, E. D. Missouri, E. D. February 5, 1895.)

No. 3,672.

ASSIGNMENT—SUFFICIENCY OF EVIDENCE.

In a suit by P. Lorillard Co., incorporated in 1891, for an infringement commencing in 1886, of a trade-mark of P. Lorillard & Co., the allegation in the bill of the sale and transfer to complainant by P. Lorillard & Co. of its business, including right to sue for past infringements of trade-marks, being traversed by the answer, is not established by testimony of a witness that he had been connected with the business of complainant and its "predecessor" for over 20 years.

Suit by P. Lorillard Co. against Christian Peper for infringement of trade-mark.

Phillipp, Munson & Phelps, for complainant.
Smith P. Galt, for defendant.

PRIEST, District Judge. Since 1886 the defendant has used, among a multitude of other designs for the product of his tobacco factory, one called "Peper's True Smoke." It is contended by the complainant that the style of lettering and dress of this package constitutes an infringement upon a similar package of smoking tobacco put up by it and its predecessor since 1871, called "P. Lorillard & Company's Tuberose." The evidence shows the tuberose package was devised and adopted as early as 1871 by P. Lorillard & Co., and by that firm was continuously used down to July, 1891. Who constituted the firm of P. Lorillard & Co. is not disclosed by the evidence. The complainant was organized as a corporation under the laws of New Jersey in 1891, and began business in July of that year. The record shows that its capital stock is $5,000,000, divided into 50,000 shares, of which Pierre Lorillard, Jr., subscribed 49,997, and George D. Finley, Ethan Allen, and William Brankerhoff, one each; and that the objects for which the corporation was formed were "to manufacture, buy, sell, and deal in tobacco, cigarettes, cigars, and snuff, and all materials, rights, privileges, patents, trade-marks, and other property of every description, commonly or conveniently used, manufactured of, or sold in connection therewith, or necessary or convenient in and about the transaction of the said business of said company." There is no intimation in the articles of incorporation that this company was to succeed to any business already established, but, on the contrary, so far as appears from the record, it was to engage in an original business undertaking. The bill, however, avers: