

that "the said Miller hereby sells, assigns, and conveys to the said American Cable Railway Company, its successors and assigns, each and all of said letters patent," etc. The defendant still insists, not only that the signatures to the assignments from Miller to Horton and from Horton to the Cable Construction Company are still insufficiently proved, but that the signature to that from Miller to Horton is a forgery. In view of all the circumstances, and especially of the recital in this later instrument of the ownership by the plaintiff of this patent, which would come by way of these assignments, their execution and the genuineness of this signature of Miller seem to be well enough proved. But, if the position of the defendants should be sustained and those assignments fail, the title would then be left remaining in Miller, and be conveyed by this latter instrument to the plaintiff. Objection is made that proof of an assignment from Miller directly to the plaintiff would be a departure from the bill, but the substance of the allegation of assignment from Miller by way of Horton and the Cable Construction Company to the plaintiff is proved by showing an assignment from Miller to the plaintiff, without following all the intermediate steps.

The defendants have also by leave introduced an Italian patent, dated December 31, 1868, and granted to Edmund Barnes, for lowering out of the way at grade crossings the high central rail of railways having such a rail to engage horizontal driving wheels on steep places, according to the English patent No. 277, dated January 26, 1863, and granted John Barraclough Fell. That is a different thing, however, from raising a limber cable on pulleys to bring it within reach of the grip, and it appears to have been contrived to be done in a different way. These patents do not affect the case, as now understood, sufficiently to vary the result.

The defendants now make question about the corporate existence of the plaintiff, principally with reference to the seasonable commencement of corporate business. The corporation was organized, and took the title to this patent, which seems to be within the scope of its corporate powers. No proceedings have been taken to terminate it. Under these circumstances, it seems to exist, so far at least as to be able to maintain this suit against wrongdoers for trespassing upon this corporate property. Decree for plaintiff as before.

THE EARNWELL.

MARSHALL v. THE EARNWELL.

(District Court, E. D. Pennsylvania. May 28, 1895.)

No. 10.

1. ADMIRALTY—PLEADINGS AND PROOF.

Where, in defense to a libel by a pilot to recover fees from a vessel which had rejected his services, it was pleaded that libellant, after signaling an offer of services, hauled down the signal, and sailed away, thus preventing the ship from taking him, *held*, that on failure of the evidence to sustain this claim, respondent was not entitled to prove that other pilots also offered their services at the same time, and that the vessel would have been subjected to serious inconvenience in order to take libellant.

3. PILOTS—OFFER OF SERVICES—OBLIGATION TO ACCEPT.

A vessel bound up the Delaware river to Philadelphia is obliged to accept the first available pilot who offers his services, and if she refuses him, and takes one who at the time was further away, she is nevertheless liable to the former for his fees. *The Clymene*, 9 Fed. 164, and *The Alzena*, 14 Fed. 174, followed.

This was a libel by William F. Marshall, a pilot, against the steamship *Earnwell*, for refusal to accept his services when offered.

Edward F. Pugh and Henry Flanders, for libelant.

Henry R. Edmunds, for respondent.

BUTLER, District Judge. No question of law is involved. The respondent was bound to accept the first available pilot who offered his services. *The Clymene*, 9 Fed. 164; *The Alzena*, 14 Fed. 174. She was not required however to go materially out of her way to meet him or stop and wait, if others were more convenient, because he first signaled, but simply to accept the services of the pilot first offering where she could do so without disadvantage. If several offered simultaneously she could accept the services of either.

The questions raised by the pleadings are first: Is the libelant a pilot? Second. Was the respondent required to take a pilot? Third. Was she excusable in refusing the libelant's services? That the libelant is a pilot, and that the respondent was required to take one is now conceded. The only question therefore is, was she excusable in refusing to take the libelant? The single excuse set out in the answer is, that he withdrew the offer of his services after having made it, and "thus prevented the respondent taking him." The answer says:

"At about 5:45 o'clock a. m. of the 3d day of February, A. D. 1894, the steamship *Earnwell* passed Fenwick's Island light, bound in, and her course was set for Cape Henlopen. At daybreak there were three pilot boats in sight: one about six miles to the eastward, another about four miles northeastwardly, and the third about north, distant about four miles. The latter standing directly across the track of the steamer. The libelant was on the boat, named above, as being northeastwardly, and was out of the track of the steamer. That shortly after sighting the said boats, libelant's boat signaled by hoisting her flag and continued coming towards the steamer, but when within about one and a half miles from the steamer, for some cause unknown to deponent, she hauled down her signal and sailed away, thus preventing the *Earnwell* from accepting the service. The steamer continued on her course until she intercepted the boat, whose course was above given as north, from which a duly-licensed pilot was taken."

Thus it is seen that the only issue presented by the pleadings is, did the libelant withdraw his tender of services, and thus "prevent the respondent accepting them?" The evidence shows that he did not; and the defense is now shifted to other grounds. It is asserted that two other pilots also offered their services at the same time, and that the respondent would have been subjected to serious inconvenience in taking the libelant. If this is true it should have been averred in the answer, and the defense put upon it. It is as important that the pleadings in the admiralty shall show the issue to be tried, as it is in other courts.

The truth, as I find it, however, is that the only offer of services which the respondent was bound to regard, was the libelant's. The offer from a boat several miles away in the rear was out of the question. The libelant's boat and the Bayard, from which the pilot was taken, were similarly situated; and alone were available. The respondent could have taken a pilot from one of them as readily as from the other. The former offered his services by the usual signal, which the respondent understood, as the answer shows, and the latter did not. He did not expect to be employed—recognizing the libelant's right, arising from his tender. The respondent chose however to run by the libelant and select a pilot from the other, which she had no right to do. She would not have suffered materially more delay in taking the libelant than she sustained in changing her course to come up with the Bayard.

The libelant must have a decree for the sum claimed.

THE SILVIA.

FRANKLIN SUGAR REFINING CO. v. RED CROSS LINE.

(Circuit Court of Appeals, Second Circuit. May 28, 1895.)

1. SHIPPING—DAMAGE TO CARGO—SEAWORTHINESS—NEGLIGENT MANAGEMENT.

The fact that ports only eight inches in diameter, situated eight or nine feet above the water, are closed at the commencement of a voyage only by heavy glass covers, set in brass frames, leaving open additional iron covers with which they are provided, does not constitute unseaworthiness; and if the failure of the officers to have the iron covers closed upon encountering rough weather is a fault or negligent omission, it is one occurring "in the management of said vessel," from the results of which the owner and vessel are freed from liability by section 3 of the act of February 13, 1893.

2. SAME—FOREIGN VESSELS.

Section 3 of the act of February 13, 1893, which relieves vessels and their owners from liability for loss or damage resulting from faults or errors in navigation or in the management of the vessel, if the owners have exercised due diligence to make her seaworthy, and have her properly equipped, manned, and supplied, applies to foreign vessels transporting merchandise to or from American ports as well as to American vessels.

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

This was a libel by the Franklin Sugar Refining Company against the steamship *Silvia* to recover for damage to cargo. The district court dismissed the libel (64 Fed. 607), and the libelant appeals.

Wing, Putnam & Burlingham, for appellant.
Convers & Kirlin, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The cargo for the injury to which this suit was brought was shipped at Matanzas for Philadelphia under a bill of lading which provided for the delivery in good order and well conditioned, "the dangers of the seas only excepted." It was injured