

ship, and makes it plain that no coal dust from the bunkers could have reached them while so stowed; but this fact, taken with the fact that the filberts, when landed, were covered with coal dust, would warrant the inference that the filberts were permitted to come in contact with coal dust while discharging. But the case is not left to depend upon this inference. There is positive proof in the case that the filberts, while discharging, were placed by the bunkers of the ship where the coal was put down, and that coal dust blew right through the bags of filberts. It must therefore be found that the filberts were damaged by negligence on the part of the ship. For such negligence as this the ship is not absolved by the terms of the bill of lading, under the law of this country. Let there be a decree for the libelants, with an order of reference to ascertain the amount.

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The VICTORIA.

DAVI v. The VICTORIA.

(District Court, E. D. New York. July 8, 1895.)

SHIPPING—PERSONAL INJURY TO STEVEDORE—FELLOW SERVANTS.

Where a stevedore engaged in discharging cargo was injured by being struck by a sling which the winchman, employed by the vessel, started too rapidly, *held* that the doctrine of fellow servants did not apply, and that the ship was liable.

This was a libel by Antonio Davi against the steamship Victoria to recover damages for personal injuries.

Francis L. Carrao, for libelant.

Convers & Kirlin, for claimants.

BENEDICT, District Judge. This is an action for personal injury sustained by the libelant. The libelant was a stevedore, engaged in discharging the steamship Victoria at the time he was hurt. The immediate cause of the injury was the swinging of a sling of fruit against the end of a board which the libelant was at the time adjusting in the hold, whereby one of his fingers was cut off and serious injury was done him. There is a conflict of testimony as to which sling did the injury, but the weight of the evidence seems to me to support the allegation of the libel in that particular. The evidence further shows that the libelant's injury was caused by negligence on the part of the winchman in not heeding the direction to "go easy," and in starting the winch so rapidly as to cause the sling of boxes to swing past the center of the hold, and against the board which the libelant was at the time adjusting. The owner of the ship furnished the power, machinery, and winchman to hoist the cargo out of the hold. The doctrine of fellow servant does not apply in such a case (see *Johnson v. Navigation Co.*, 132 N. Y. 576, 30 N. E. 505), and the ship is liable for the injury caused by the negligence of the winchman.

Let there be a decree for the libelant, with an order of reference to ascertain the amount of the damages.

## In re THE JARNECKE DITCH.

(Circuit Court, D. Indiana. July 30, 1895.)

No. 9,225.

**1. FEDERAL COURTS—EFFECT OF STATE DECISIONS—REMOVAL OF CAUSES—STATUTORY PROCEEDINGS.**

Decisions by a state supreme court that a special statutory proceeding under the state laws (such as a proceeding to establish a drain, and assess the benefits and damages thereof) is not a civil suit or action, are not controlling upon the federal courts, when the question is whether the proceeding is a civil suit in law or equity, within the meaning of the acts relating to the removal of causes.

**2. REMOVAL OF CAUSES—REMOVABLE CONTROVERSIES—SPECIAL STATUTORY PROCEEDINGS FOR THE ESTABLISHMENT OF DRAINS.**

Under the Indiana statutes relating to the establishment of drains (2 Burns' Rev. St. §§ 5622-5664) the proceedings are commenced by a petition of landowners, after which the drainage commissioners locate the route of the proposed drain, ascertain the cost, assess benefits and damages, and then file their report in the circuit court. Thereafter any landowners opposed to the drain may file remonstrances putting in issue the questions whether the drain will promote public health or be of public utility; whether the scheme is practicable, and can be accomplished for the aggregate amount of benefits assessed; and whether the assessment of benefits to the lands of the remonstrant is too large. These issues are to be tried by the court without a jury, and each party aggrieved has a right of appeal from its decision. *Held* that, within the meaning of the removal acts, this proceeding presents a controversy of a "civil nature," in which the petitioners for the drain may be regarded as complainants, the remonstrants as defendants, and the report of the commissioners as a complaint stating the cause of action.

**3. SAME—DIVERSE CITIZENSHIP—SEPARABLE CONTROVERSY.**

In such a proceeding there is no separable controversy which will authorize a removal by some of the remonstrants, who are citizens of other states, for all the parties to the proceeding are inseparably interested in the main issue, namely, the right of the petitioners to have the drain established; to which issue the question as to the amount of benefits assessed to each remonstrant is merely incidental.

**4. SAME—SEPARABLE CONTROVERSIES—SEPARATE DEFENSES.**

There are no separable controversies within the meaning of the removal acts unless the case as made by the complaint embraces controversies which are separate. The cause of action is not made separable because one defendant sets up a separate defense, peculiar to himself, which may defeat the entire cause of action.

These were applications by the Tolleston Club of Chicago, James Stinson, the Michigan Central Railway Company, and John Gunzenhauser for leave to file in this court a transcript of certain proceedings had in the circuit court of Lake county, Ind., in relation to the establishment of a drain, and to docket the said proceeding herein as a removed cause.

J. Kopelke, for petitioners.

J. W. Youche, Winston & Meagher, and W. C. McMahon, contra.

BAKER, District Judge. On September 9, 1892, John F. Jarnecke and 72 others, owners of land in the county of Lake, in the state of Indiana, filed their petition in the circuit court of that county, alleging that a large amount of land in said county would be benefited by drainage, which could not be accomplished without affecting the