in this regard should be interpreted consistently, so far as possible, with this general purpose, as well as with its further presumed purpose to relieve the charterers from the responsibilities attending a discharge of cargo to purchasers in distant ports, where the ship, by means of the other provisions of the charter, having secured to her a lien upon the cargo for both freight and demurrage, has it in her power to enforce payment of her claims by means of that lien, without a resort to the charterers. In the cases of Clink v. Radford [1891] 1 Q. B. 625, and Hansen v. Harrold [1894] 1 Q. B. 612, the relation of these clauses to each other have been recently carefully considered in the English court of appeal; and the rule laid down is that these different clauses are to be applied and construed with reference to each other, and to the purposes above stated, and that, where 'the provision for cesser of liability is accompanied by the stipulation as to lien, then the cesser of liability is not to apply, in so far as the lien which, by the charter party, the charterers are enabled to create, is not equivalent to the liability of the charterers,' and that, 'where the provisions of the charter party enable the charterers to make such terms with the shippers that the lien which is created is not commensurate with the liability of the charterers under the charter party, then the cesser clause will only apply so far as the lien which can be exercised by the shipowner is commensurate with such liability.'

"This is substantially the construction that was given by this court to the cesser clause in the case of Hatton v. De Belaunzaran, 26 Fed. 780, where, notwithstanding the cesser clause, the charterer was held liable to pay demurrage because, under the right to effect a subcharter, he had required the ship to take a cargo of salt, not of sufficient value at the port of discharge to pay anything more than the freight stipulated for in the subcharter.

"In the present case the respondents, as charterers, had the right to require the master to sign bills of lading as presented, without prejudice to the charter. This does not mean that the bill of lading itself, or the consignee under it, should be subject to all the obligations of the charter. It means only that the charterers' obligations to the ship and owners should not be affected by the terms of the bill of lading thus signed on the charterers' requirement. Gledstanes v. Allen, 12 C. B. 202.

"The bill of lading for the lumber in question provided for 'paying freight for said lumber as per charter party dated 7th March, 1893, and average accustomed.' A bill of lading in this form imposed upon the indorsee of the bill of lading who received the goods under it none of the stipulations of the charter, except such as pertained to the payment of freight. Chappel v. Comfort, 10 C. B. (N. S.) 802; Smith v. Sieveking, 4 El. & Bl. 945; Fry v. Mercantile Bank, L. R. 1 C. P. 689; Dayton v. Parke, 142 N. Y. 391, 400, 37 N. E. 642. It was no notice to him of any other provisions of the charter, such as that he must discharge a certain quantity of lumber per day, or, in default thereof, pay a specified price per day for any further detention of the vessel. Under this bill of lading, the vendee was entitled to take the goods within a reasonable time, according to the circumstances, on arrival, and under the ordinary rules of law as to liability to damages for detention, such as apply in the absence of any specific agreement. This is a very different liability from that of a specific agreement that assumes all risks of detention, from whatever cause, and agrees upon a specified rate of damages.

"Had the bill of lading provided for the payment of freight and 'all other conditions as per charter party,' the latter provision would have been construed ejusdem generis, as imposing upon the consignee the payment of something more than freight, and would have included the obligations referred to in the charter party respecting the rate of delivery, and the payment of the demurrage specified, though not necessarily including independent provisions of the charter party relating to different subjects. Russell v. Niemann, 17 C. B. (N. S.) 162; Serraino v. Campbell, 25 Q. B. Div. 501; Id., [1891] 1 Q. B. 283; Wegener v. Smith, 15 C. B. 285; Porteus v. Watney, 3 Q. B. Div. 534.

"What the respondents, therefore, in this case, virtually required the master to do, was to give a bill of lading for this lumber that required the master to deliver it to the indorsee of the bill of lading without the payment of any charter demurrage at all, such as the respondents had agreed should be paid, but which bound the consignee to pay for such demurrage only as might arise through his own fault. Whether this was done inadvertently

or by design, is immaterial, as respects the ship. For the ship could only claim of the vendee according to the bill of lading. The H. G. Johnson, 48 Fed. 696. The bill of lading required the ship to deliver the cargo contrary to that provision of the charter which provided that the ship should have a lien on the cargo for the charter demurrage. The cesser clause and the lien clauses were dependent provisions; each was a consideration for the other; and when the charterers required the ship to forego the benefit of her lien on the cargo for the charter demurrage, by presenting, and taking from the master, under the bill of lading clause in the charter, a bill of lading which did not admit of a lien for charter demurrage on this cargo, the charterers could not claim the benefit of the cesser clause as a release of the previous general clause of the charter, which made them answerable for demurrage. The decisions above quoted sustain this construction, which will be followed by me, as a just and reasonable construction of these several clauses."

The third exception to the answer is to that part which sets up the defense that the detention of the vessel beyond the charter period of discharging was caused by the acts of the public enemy, and not by the default of the charterers. The provision in the charter that the cargo was to be discharged at the rate of a specified quantity per day is the equivalent of the one frequently incorporated into such instruments, conditioned for the discharge of the cargo within a specified time.

"When the time is definitely fixed, or is described so as to be calculable beforehand, there is an absolute obligation on the charterer to have the work completed within that period, whatever circumstances occur. He is answerable, although the completion may have become impossible, owing to causes which have arisen without any fault or omission on his part. Thus, he bears the risk of delay arising from the crowded state of the place at which the ship is to load or discharge (Randall v. Lynch, 2 Camp. 352); or from frost (Barret v. Dutton, 4 Camp. 333), or bad weather (Thils v. Byers, 1 Q. B. Div. 244), preventing access to the vessel; or from acts of the government of the place, prohibiting export, or preventing communication with the ship (Barker v. Hodgson, 3 Maule & S. 267; Blight v. Page, 3 Bos. & P. 295, note). And it is immaterial that the shipowner also is prevented from doing his part of the work within the agreed time, unless he is in fault. The charterer takes the risk." Carv. Carr. by Sea, §§ 610, 611.

The doctrine thus stated has been frequently declared in the adjudications. Thus, in Davis v. Wallace, 3 Cliff. 131, Fed. Cas. No. 3,657, it was said:

"The settled rule is that, where the contract of affreightment expressly stipulates that a given number of days shall be allowed for the discharge of the cargo, that such a limitation is an express stipulation that the vessel shall in no event be detained longer for that purpose, and that, if so detained, it shall be considered as the delay of the freighter, even where it was not occasioned by his fault, but was inevitable. Where the contract is that the ship shall be unladen within a certain number of days, it is no defense to an action for demurrage that the overdelay was occasioned by the crowded state of the docks, or by port regulations or government restraints. Detention of the vessel, for loading or discharging, longer than the time allowed by the contract, entitles the owner to the stipulated demurrage, although it was impossible to complete the work within that time, by natural causes."

To the same effect are the following authorities: Cargo ex Argos, L. R. 5 P. C. 161; Waugh v. Morris, L. R. 8 Q. B. 202; Davies v. McVeagh, 4 Exch. Div. 265; Postlethwaite v. Freeland, 5 App. Cas. 617; Leer v. Yates, 3 Taunt. 387; Grant v. Coverdale, 9 App. Cas. 470; Budgett v. Binnington, 25 Q. B. Div. 320.

The appellees cite several decisions holding that, where a failure to perform is caused by vis major, demurrage is not recoverable. Ford

v. Cotesworth, L. R. 4 Q. B. 127; Id., L. R. 5 Q. B. 544; Cunningham v. Dunn, 3 C. P. Div. 443; Riley v. Cargo of Iron Pipes, 40 Fed. 605; The J. E. Owen, 54 Fed. 185; Dahl v. Nelson, 6 App. Cas. 38; Carsanego v. Wheeler, 16 Fed. 248; The Spartan, 25 Fed. 44. It suffices to say that these were cases in which no specified time was fixed by the contract, within which the vessel should be discharged, but the contract provided for a discharge with customary dispatch, or for a discharge after a precedent condition, such as the arrival of the ship in a proper discharging berth. Undoubtedly, when the contract is silent on the subject of demurrage, it is only recoverable when made to appear that she was not discharged with customary diligence because of some fault or negligence on the part of the consignee, and in such a case the defense of vis major is a perfect answer to the action.

It is contended for the appellees that the charterers are not liable in the present case because, by the language of the charter party, demurrage is payable only "for each day of detention by default of the charterers or their agents"; that default means negligence, or willful omission; and that the facts alleged in the answer sufficiently excuse the charterers. In one sense, any failure is a default, whether it arises from the omission to perform a contract, or from a neglect of duty. In many reported cases the omission to pay a debt or to perform a contract is spoken of as a default. We think it was used in that sense in the present contract. In 1,600 Tons of Nitrate of Soda v. McLeod, 10 C. C. A. 115, 61 Fed. 849, it was decided by the circuit court of appeals for the Ninth circuit that a charter party which made the charterer liable for demurrage only when caused by his default did not relieve him from liability for delay caused by omission to perform his covenants, even though he was not guilty of negligence. The clause in the charter party in that case was expressed identically as in the present charter party.

The fourth exception is to that part of the answer which sets up payment of £515. 6s. 5d. to the agents of the libelants, when the cargo was delivered, in full satisfaction of all claims and demands under the charter party. The argument advanced to sustain this exception is that the answer does not aver that the agents of the libelants to whom the payment was made had authority to accept a sum which did not include the full claim for demurrage. It suffices, to meet this argument, and to dispose of the exception, that the 13th article of the libel states, by way of an anticipatory averment, that the agents had no authority to enter into any accord and satisfaction with the charterers, or to receive the sum paid for any purpose, except as a payment for freight, and the answer denies this statement. This denial is the equivalent of an affirmative averment. Upon the allegations in the libel and answer, the question whether there was an accord and satisfaction, made by those having authority to represent the libelants therefor, is a question of fact, to be determined upon a view of all the incidents of the transaction when the proofs are before the court.

We conclude that the second and third exceptions should be sustained, and the other exceptions overruled.

Ordered accordingly.

MISSOURI PAC. RY. CO. v. MEEH.

(Circuit Court of Appeals, Eighth Circuit. September 2, 1895.)

No. 611.

FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP—CORPORATION OF SEVERAL STATES.

A corporation formed by the consolidation of corporations of three different states, pursuant to the laws thereof, is, within each of such states, a corporation of that state; and the federal courts there held have no jurisdiction of a suit against it by a citizen of the state, on the ground of diverse citizenship.

In Error to the Circuit Court of the United States for the District of Kansas.

This was an action for personal injuries by George Meeh against the Missouri Pacific Railway Company. A demurrer to certain parts of the answer was sustained, and, upon trial before a jury, there was judgment for the plaintiff. Defendant brings error. Reversed.

B. P. Waggener, for plaintiff in error.

Thomas P. Fenlon (Thomas P. Fenlon, Jr., on the brief), for defendant in error.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge. The question for consideration in this case is whether a citizen and resident of the state of Kansas can maintain in the circuit court of the United States for the district of Kansas a suit against a railroad company for personal injuries sustained within the state of Kansas in consequence of the negligent conduct of the said railroad company, it appearing that, when the injuries were so sustained, said railroad company was duly incorporated under the laws of Kansas, and was operating a line of railroad in that state, and that it was also duly incorporated under the laws of the states of Missouri and Nebraska. The question arises in this wise: George Meeh, the defendant in error, sued the Missouri Pacific Railway Company, the plaintiff in error, in the circuit court of the United States for the district of Kansas, alleging that he was a citizen and resident of the state of Kansas, that the defendant company was a citizen and resident of the state of Missouri, and that he (the plaintiff) had sustained certain personal injuries, to his damage in the sum of $10,000, in consequence of the negligent operation by the defendant company of one of its trains near the town of Admire, in Lyon county, Kan. At the return term, on April 7, 1894, the defendant company appeared, and filed an answer to the complaint, which alleged, among other things, that it was a railway corporation "duly chartered, incorporated, and organized under and by virtue of the laws of the states of Kansas, Nebraska, and Missouri, and, as such corporation, operates a line of railway into and through the counties of Lyon and Leavenworth, in the state of Kansas." Later, on June 8, 1894, it filed a plea to the jurisdiction, alleging that the plaintiff was "a resident, citizen, and inhabitant of the state of Kan-