

that those who have not joined have had notice of the application, and have either refused or neglected to join. *Beardsley v. Railway Co.*, 158 U. S., at page 127, 15 Sup. Ct. 786; *Estis v. Trabue*, 128 U. S., at page 229, 9 Sup. Ct. 58; *Hardee v. Wilson*, 146 U. S. 179, 13 Sup. Ct. 39; *The Columbia*, 15 C. C. A. 91, 67 Fed. 942. Formerly, a formal writ or summons and judgment of severance was required. Now, it is enough to show that the parties had been notified in writing by due service, and notwithstanding do not join. *Hardee v. Wilson*, supra. But this rule evidently applies only to the parties on the record. Sureties to a stipulation are not parties to the record. When a vessel is attached by proceedings in rem, the owner, or some one on his behalf, files his claim to her, and thenceforward becomes a party to the record, and conducts and controls the defense. *Lane v. Townsend*, 1 Ware, 289, Fed. Cas. No. 8,054. If he be minded to release her from the arrest, he enters into a stipulation, with sureties, either before or after he files his answer, and thenceforward this stipulation represents the vessel. But the sureties in the stipulation do not become parties. Her subsequent fate does not concern the suit. The stipulation having been returned to the court, judgment thereon against both the principal and the sureties may be recovered at the time of rendering the decree in the original cause. Rev. St. U. S. § 941.

The twenty-first rule in admiralty says:

"In all cases of a final decree for the payment of money, the libellant shall have a writ of execution in the nature of a fieri facias, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands, tenements or other real estate of the defendant or stipulator."

So, also, by the terms of the stipulation, the sureties consent and agree to pay into court the full amount of the stipulation upon notice of the order or decree of the court, or that execution may issue against their goods, chattels, and lands. Ben. Adm. 649.

This is also the rule as laid down in *Clerke's Practice in Admiralty* (title 64):

"Decree having been entered against the principal, it should be executed against his sureties without any other process."

In *Williams & B. Adm. Jur.* p. 286, the rule is thus stated:

"The sureties are only liable to answer the judgment of the court, and they cannot be called upon to pay more than the sum recovered in the suit, together with costs adjudged against the defendant. To this extent, as soon as the defendant has made default, their liability is absolute, because the security is not a mere personal security given to the plaintiff, but it is a security given to the court as a pledge or substitute for the property proceeded against. But the sureties are not parties to the suit, and they are not entitled to interfere in any stage of the proceedings, although, if the defendant be guilty of fraud or there is any collusion between him and the adverse suitors, the sureties are entitled to apply to the court alleging such fraud or collusion."

For an exhaustive and learned discussion of this matter, see *Lane v. Townsend*, 1 Ware, 289, Fed. Cas. No. 8,054.

In other words, the sureties, in great measure, stand in the position of bail to the action. They are not parties to the cause. They

are represented by the claimant; they covenant to pay such decree as may be made against him; and the decree against him binds them. *The Belgenland*, 108 U. S. 153, 2 Sup. Ct. 864. See *The Ann Caroline*, 2 Wall. 549; *The Wanata*, 95 U. S. 600; *The Alligator*, 1 Gall. 145, Fed. Cas. No. 248. The form of decree entered in the district court is strictly within the law and practice of courts of admiralty.

If questions arise between the stipulators as to their relative liability, they may, it seems, come in and be made parties actively. See *The Elmira*, 16 Fed. 133. The invariable practice in this circuit certainly, and it is believed in other courts, is that the claimant in cases like this takes upon himself the whole defense, both in the lower courts and in the supreme court, and the sureties on his stipulation are bound by the result.

The next ground for the motion is that the record does not contain any of the evidence taken at the trial in the district court. This is strictly correct. The affidavits taken by the respondent after the trial of what the witnesses say they testified at the trial are in no sense evidence taken at the trial. We fully concur with the district judge that there is no law or practice which would justify him in granting the certificate asked by proctors for the claimant. The rule 14 of this court (clause 6)<sup>1</sup> requires that the record in cases of admiralty and maritime jurisdiction shall be made up as provided in general admiralty rule No. 52 of the supreme court. This rule No. 52 requires that the record shall contain the testimony upon the part of the libellant and the testimony on the part of the defendant, unless the parties agree, by their proctors, by written stipulation, that it may be omitted. There is no such stipulation here. Clearly, the record is incomplete. This court cannot pass on the merits of the case. Nor, in the absence of a stipulation by counsel, is it possible to supply the omission. We must have the evidence taken at the trial. It is impossible to obtain this. The judge who tried the case cannot recall it. The proctor for claimant is unable to furnish it in such shape as will meet the approval of the other side. Nor can it be imputed as a fault to any one that this evidence is not forthcoming. There is no rule or practice in this district court requiring the reduction to writing of evidence used at the trial. Yet, without such evidence, great injustice may be done. If the appeal be dismissed on this ground, then the claimant will bear all the results of an omission for which he is not responsible. If we go on and hear the appeal, the appellee will be put at a great disadvantage, guiltless as he is of any default. This is an anomalous condition of things. But in a court of justice there should be no default of justice if it can by any possibility be prevented. It has been suggested that the case could be tried here *de novo*. We concur with the court of appeals in the Second circuit in *The Havilah*, 1 C. C. A. 77, 48 Fed. 684, and 1 U. S. App. 17, and with the circuit court of appeals of the First circuit in *The Philadelphian*, 9 C. C. A. 54, 60 Fed. 424, that this court can by the practice in admiralty

<sup>1</sup> 11 C. C. A. cv., 47 Fed. vii.

hear this case *de novo*. But this practice is one to be used cautiously, and in cases of extreme necessity. Besides this, there is much force in the objection taken in *The Philadelphian*, supra: "In any case in which all the proofs are not reduced to writing in the district court, and no equivalent is found in the record, we have no power except to decline to try the facts anew."

There being no precedent for or against the course which suggests itself to us, we will pursue it. That is to remand the case without prejudice to the court below, with instructions to grant a new trial. We have no right to prescribe any rule for the district courts, and have no desire to dictate to them. It is suggested, however, as a convenient practice, that some rule be made requiring the testimony, or at least the substance of the testimony, taken at the trial in a cause of admiralty and maritime jurisdiction, to be reduced to writing. Parties to such cases are notified that the present case cannot be relied on as a precedent, and that in the future the party through whose omission or neglect the testimony or any part of it taken at the trial is not before this court, when the cause comes up on appeal, must suffer the consequence. Cause remanded, without prejudice, for a trial *de novo* in the district court.

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BLACKSHERE v. PATTERSON et al.

(Circuit Court of Appeals, Fourth Circuit. February 13, 1896.)

No. 161.

CONTRACTS—CONSTRUCTION AND EFFECT—OCEAN FREIGHTS.

In April, 1894, a cattle shipper contracted with the agents of a steamship line to ship cattle from Baltimore to Liverpool, during the four months beginning with the 1st of September following. The rate of freight per head was to be "the average rate of freight received by the Boston-Liverpool steamers, month by month, during the existence of this contract." During the four months of the contract there were but two lines of steamers carrying cattle from Boston to Liverpool, and the only cattle carried by them were taken under contracts previously made, with two shippers, who paid, respectively, 46 and 50 shillings per head. Before the 1st of September, however, rates for cattle from other ports had very materially declined, and the shipper claimed that he was only bound to pay the average rate from such ports during the four months of the contract. *Held* that, as the terms of the contract were entirely clear, the shipper was bound to pay the average rate from Boston, namely, 48 shillings per head, notwithstanding the fact that such rate was fixed in advance by the contracts mentioned.

Appeal from the District Court of the United States for the District of Maryland.

This was a libel by George F. Patterson and Robert Ramsey against Elias A. Blackshere to recover freight alleged to be due upon certain shipments of cattle. The district court rendered a decree in favor of libelants, and the respondent appeals.

The libelants, appellees here, are the agents of the Johnston Line of steamships between Baltimore and Liverpool, England. The respondent, appellant here, is a large shipper of cattle from this country to Europe. In April, 1894, the appellant made a contract with the appellees to ship cattle by their