

an inclined stop, I, set upon the track J. A preferably elastic stop, H, receives the impact of the spring catch to arrest the car, and the inclined stop prevents the return. A handle, G, is fixed to the spring catch, so that it may be grasped by the hand and drawn down, the operator at the same time retaining his hold upon the handle to give the car the proper impetus."

The handle has, as it seems to me, two motions in releasing and propelling the car. It is moved, first, downward to release the curved end of the spring from the stop, and then immediately forward to propel the car. The device used by the respondents contains no catch for holding the car at the end of its path. It is there held by the friction of the spring carried by the car and bearing against the projection on the track; and a single horizontal motion imparted to the handle moves the car forward and at the same time depresses the spring so as to release the car. The same result is accomplished, but in a different way. I conclude that the respondents do not infringe this claim.

There will, therefore, be a decree for the complainant as to the first and second claims, and that the respondents do not infringe the fourth claim.

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THE ROSALIE.<sup>1</sup>

ENSIGN et al. v. DIMON.

(District Court, N. D. California. September 17, 1895.)

No. 11,007.

1. MARITIME LIENS—MATERIAL FURNISHED IN HOME PORT—OWNERS PRO HAC VICE.

Where materials were furnished for the use of a vessel, upon the order of a company which had possession of her under a contract of purchase, and which was, therefore, the owner pro hac vice, in the port where such company had its principal place of business, by material men who either knew the company's relation to the vessel, or were in possession of the avenues of information, and of facts sufficient to put them on inquiry, *held*, that credit must be considered to have been given to the company, and that, consequently, no lien was created. The *Alvira*, 63 Fed. 144, distinguished.

2. SAME.

The mere fact that persons furnishing materials in the home port, on the order of the owner pro hac vice, "suppose" that the vessel is good for the purchase price, is not of itself sufficient to create a lien.

This was a libel in rem, by E. J. Ensign and J. R. McGuffick, against the steamer *Rosalie*, for materials furnished for the use of the steamer.

H. W. Hutton, for libelants.

Walter G. Holmes, for claimant.

MORROW, District Judge. A lien in the sum of \$75.90 for oils and paints furnished by the libelants for the use of the steam-

<sup>1</sup> Rehearing pending.

er Rosalie is claimed under the admiralty law, and also of the state statute (section 813, Code Civ. Proc.). At the time materials to the amount of \$70.30 were furnished by the libellant, between August 19 and October 30, 1893, the steamer was in the possession and control of the Davie Ferry & Transportation Company, under an agreement with the owner, C. L. Dimon, Jr., to purchase her for \$75,000, to be paid for in certain stipulated installments. This agreement, it appears, was never consummated, for on October 30, 1893, the owner retook possession of the vessel. On October 30th and November 6th oil was furnished to the amount of \$5.60, making the total of \$75.90.

It may be assumed, for the purposes of this case, that the materials were necessary, and the amounts charged therefor reasonable. The real question in issue is whether credit was given to the vessel or to the Davie Ferry & Transportation Company. The company was a corporation organized under the laws of the state, and had its principal place of business at the port of San Francisco. During the period when the materials were furnished, the company was, to all intents and purposes, the owner pro hac vice of the steamer, and she was, therefore, at her home port. This fact alone would justify the presumption that the material man meant to give credit to the company personally, provided he knew the relation of the ostensible owner to the vessel. The *Stroma*, 41 Fed. 599, affirmed 3 C. C. A. 530, 53 Fed. 281; *Stephenson v. The Francis*, 21 Fed. 715; *Neill v. The Francis*, Id. 921; *The Aeronaut*, 36 Fed. 497; *The Samuel Marshall*, 49 Fed. 754, affirmed 4 C. C. A. 385, 54 Fed. 396; *Herreshoff Manuf'g Co. v. The Now Then*, 50 Fed. 944, affirmed 5 C. C. A. 206, 55 Fed. 523; *The Curlew*, 54 Fed. 899; *The Kong Frode*, 6 C. C. A. 313, 57 Fed. 224; *The Alvira*, 63 Fed. 144, 156. In the last case this language was used:

"Therefore, the general principle that the owner is deemed to consent to the accruing of liens where the entire possession, control, and management of a vessel is intrusted to another is qualified by this condition: If the supply or material man know of the charter, or the relation in which the ostensible owner holds, or if he be advised of the real status of such relation by the general owner or by the charterer, or is placed in possession of such facts as would put, or ought to put, a reasonably prudent man on inquiry, the presumption arises that the supplies, materials, or repairs were furnished upon the credit of the charterer himself, and there is no lien. And the onus lies on the supply or material man to remove this presumption. The reason for this is plain. Courts of admiralty do not favor secret liens. Otherwise, owners would often fall an easy prey to liens created by injudicious or unscrupulous charterers. Moreover, the supplies, materials, or repairs are generally furnished exclusively for the benefit of the charterer. At least, it may be said that he is the party primarily benefited thereby; the owner, as a general rule, being only incidentally benefited, if at all."

The *Alvira* was a vessel also in the possession and control of the Davie Ferry & Transportation Company as owner pro hac vice. Repairs and materials, amounting to the sum of about \$2,000, had been rendered that vessel, in order to fit and equip her for the passenger service in which the company was then engaged. The company went into insolvency after the materials and repairs had been rendered. Liens were claimed under the same section of the state

statute which is made the basis of the present suit in rem. That case, however, is to be distinguished from the case at bar. There I came to the conclusion, from the evidence, that the material men had no knowledge of the fact that the *Alvira* was under charter to the company, nor were they in possession of such facts which would charge them, as reasonable men, with the duty of inquiry. In the case at bar, the evidence does not justify me in so finding. On the contrary, it is difficult to escape the conclusion that the libelants must have known the actual relations that existed between the *Davie Ferry & Transportation Company* and the owner of the *Rosalie*; that is to say, that the company was simply owner pro hac vice. One of the strongest circumstances indicative of this knowledge is that the libelants held some stock in the company, and, presumably, were aware of the real state of facts. *Hawkins v. Glenn*, 131 U. S. 319, 329, 9 Sup. Ct. 739. If they were not, they, at least, were in possession of such avenues of knowledge which, if followed up with ordinary diligence, would have led to a knowledge of the true state of facts. The testimony of Joseph J. Ebert, the general manager of the company at the time these materials were furnished, is utterly inconsistent with the idea that the libelants gave credit to the vessel. He testifies, in a deposition taken in New York: That on or about the latter part of July or the 1st day of August, 1893, he went to the office of *Ensign & McGuffick*, and settled all the bills that were charged against the steamer *Rosalie*, and closed the account against the steamer. He then told some member of the firm—whom he does not now remember—that all oils furnished for the vessel of the company from the 6th day of July (1893) were to be charged to the *Davie Ferry & Transportation Company*, and “not to the steamer *Rosalie*, or her owners.” That subsequent purchases by the company were billed to the *Davie Ferry & Transportation Company*, and partly paid by the company, with its checks. That, at the time referred to above, he also informed the libelants that the steamer *Rosalie* had passed into the possession and under the control of the company. That after this interview no bills were ever sent to the steamer *Rosalie*, or to her owners. That, as general manager of the company, he had charge of the buying all supplies, etc., and giving orders to various departments where and how purchases should be made. That supplies purchased for the company were ordered on printed blanks, bearing the name of the company, filled out by the engineer or others in charge. The orders, introduced in evidence, bear out this testimony, and it is significant that the bills accompanying them are made out against the company. It is true that both of the libelants deny that Ebert ever called at their store and had the conversation. But this denial does not outweigh the evidence of Ebert and the circumstances of the case. They state that they supposed that the *Davie Ferry & Transportation Company* was the owner of the vessel, and that they “supposed” the vessel was good for the materials furnished. As to the first supposition, it appears from their own statements that before the *Rosalie* was controlled by the *Davie Company* they had furnished oils for the use of the steamer to her owner, C. L. Dimon,

Jr., whom Ensign says he knew slightly. When Dimon stopped ordering, and the Davie Company began to do so, this fact alone ought to have been sufficient to put them on inquiry. As to the second supposition, it is clearly insufficient to give a lien, any more than charging the materials against the vessel in the books of the material man, or making out the bills against the vessel, would be. While these may be circumstances in the case, yet, as a general rule, they are entitled to but little weight. The Samuel Marshall, 4 C. C. A. 392, 54 Fed. 399 (and cases there cited); The Alvira, supra. The case of The Curlew, supra, is directly in point. There the libelant supplied coal to the charterers of the British ship Curlew, at Baltimore, which was their place of residence. The charterers were charged personally on the books of the coal dealer. No reference was made to the ship as security, and no claim made against the vessel until after the failure of the charterers. It was held that the coal was furnished on the personal credit of the charterers, and not on the credit of the vessel. Judge Brown, of the Southern district of New York, said:

"The dealings of the libelants were with the charterers in person, at their place of residence, and without any reference to the ship as security for the supplies. They were presumably furnished, therefore, upon the personal credit of the charterers. The latter had no right to charge the ship, and evidently had no intention to do so. There was nothing that authorized the libelants to suppose the ship was intended to be charged, or that they had any right to charge the ship. In fact, they did not charge her. Upon their books, as well as in the bills rendered, Henry Bros. & Co. alone were charged individually. For the first portion of the bill a note was taken, and no claim was made upon the vessel until after Henry Bros. & Co. had failed. It is evident that in this case, both in law as well as in fact, the supplies were furnished upon the personal credit of the charterers. \* \* \* The libelants were chargeable with notice of the relations of Henry Bros. & Co. to the ship. They knew that the firm was in business in Baltimore. Any inquiry would have shown that they were charterers. If they made no inquiry, they took the risk of the fact. They could not have supposed the firm to be officers of the ship; and if they did not mean to deal with them as owners, or on their personal credit, it was their duty to inquire what the connection of the firm with the vessel was."

I do not think that the libelants in this case meant to give credit to the vessel. In the case of The Alvira, it appeared in evidence that the Davie Company became insolvent. It is my opinion that the libelants in this case, in view of the inability of the company to pay, now seek to get payment for their materials by attempting to impress a lien on the vessel itself. But this, clearly, cannot be done. Admiralty liens can only be enforced according to the principles of admiralty law. The Guiding Star, 18 Fed. 263; The Samuel Marshall, supra; Lighters Nos. 27 and 28, 6 C. C. A. 493, 57 Fed. 664; The Alvira, supra. The libel will be dismissed, with costs.

## SHEARING v. TRUMBULL et al.

(Circuit Court, D. Colorado. July 8, 1896.)

## REMOVAL OF CAUSES—RECEIVER OF FEDERAL COURT.

A receiver appointed by a federal court has not a right, by virtue of his personal standing as such, to remove from a state to a federal court a suit in which he is joined as defendant with a citizen of the state. *Landers v. Felton*, 73 Fed. 311, disapproved.

James H. Brown, for plaintiff.

Pattison, Edsall & Hobson, for defendants.

**HALLETT**, District Judge. Olive D. Shearing brought suit in the district court of Arapahoe county against Frank Trumbull, receiver, and the Denver Consolidated Tramway Company to recover damages resulting to her from the death of her husband, caused by the negligent acts of the defendants. The suit was removed into this court by Trumbull, receiver, alleging that it arises under the constitution and laws of the United States. An order was made on the 13th day of May last, remanding the case, on the ground that the court has not jurisdiction of it. Trumbull now moves to vacate the order and reinstate the case. He was appointed receiver of the Union Pacific, Denver & Gulf Railway Company in this court, and if the action had been brought against him alone, there would be no doubt as to his right to remove it. But the suit is against the Denver Consolidated Tramway Company, a Colorado corporation, which has no right of removal, and the question is whether all parties defendant must have such right, in order that it may be maintained by any of them. It is said that the case arises under the constitution and laws of the United States, but it is not of that character in the sense that there is any federal question to be decided. Whenever a question arises in a case as to the proper construction or effect of the constitution or some law or treaty of the United States, a federal court has jurisdiction of the cause, without regard to the citizenship of the parties. *Water Co. v. Keyes*, 96 U. S. 199. A suit by or against a federal corporation, or by or against a receiver appointed in a federal court, is not of that class. In such case, the suitor has a personal standing in a federal court, in virtue of the authority under which he proceeds. A receiver appointed in a federal court is personally qualified to sue or be sued in such court, because of his appointment. He has the personal standing of a citizen of another state, when the ground of jurisdiction is the diverse citizenship of the parties. In an action of tort against several, all defendants must have the requisite qualifications in order that the suit may be removed to a federal court. *Pirie v. Tvedt*, 115 U. S. 41, 5 Sup. Ct. 1034, 1161. In this instance, the defendant Trumbull, as an officer of a federal court, was competent to ask for the removal, but his co-defendant was not in the same situation. As the tramway company was not qualified to remove the cause, the defendant Trumbull is under the same disability. In my judgment, *Landers v.*

Felton, 73 Fed. 311, on which the defendant relies, was wrongly decided, and I am not able to follow it.

The motion to vacate the order remanding the case will be overruled.

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SUGAR CREEK, P. B. & P. C. R. CO. v. McKELL et al.

McKELL v. SUGAR CREEK, P. B. & P. C. R. CO.

(Circuit Court, D. West Virginia. May 28, 1896.)

1. REMOVAL OF CAUSES—CONDEMNATION PROCEEDINGS—DIVERSE CITIZENSHIP.

A proceeding the object and purpose of which is to enforce, between parties, a right to condemn lands, under the constitution and laws of a state, is a suit which may be removed to a federal court, when the parties are citizens of different states.

2. SAME—SEPARABLE CONTROVERSY.

Where an application is made, under state laws, to condemn a portion of a large tract of land, the whole of which is owned in fee by a defendant, who is a citizen of another state than the applicant's, and a small part of which, including some of the land sought to be condemned, has been leased by him to another defendant, who is a citizen of the same state as the applicant, there is a separable controversy between the applicant and such first-named defendant as to the land not leased, which can be removed to a federal court, on the ground of diverse citizenship.

St. Clair & Gaines, for the railroad company.

Brown, Jackson & Knight, for McKell and others.

JACKSON, District Judge. These cases are heard upon a motion to remand them to the state court. The application for the removal in the condemnation case was made in conformity to the statute, as is shown by the record, and is in fact conceded by counsel who make the motion to remand.

Two points are relied upon to support the motion to remand. First, that the trial of the right to condemn is only cognizable in courts of the state under whose laws and within whose boundaries proceedings are had, and that the courts of the United States are without jurisdiction; second, that a part of the defendants in the condemnation proceedings are citizens of the same state as the applicant, and that there is no separable controversy as to them.

As to the first point relied upon by counsel, that the federal court is without jurisdiction in this class of cases, I am clearly of the opinion that the question has been repeatedly well settled. This is a suit between the applicant, on the one side, and the defendants, on the other, in which is involved the right of the applicant to condemn lands, under the constitution and laws of the state, for a public purpose. It is in no sense an ex parte application; and, under the constitution and law of the state, a right is given to any one who desires to make application for the condemnation of land under the statute, and to enforce it. This proceeding, the object and purpose of which are to enforce this right between parties, has all the characteristics of a suit, and may be removed from a state to a federal court. Such, I hold to be the law in this case, and there-