bility must depend, therefore, upon a special agreement on his part so to do. The question is whether the evidence shows any such agreement on his part. The seller, Lewis, is not called as a witness. The claimant denies his liability, and denies any agreement to pay the brokerage. The brokerage in the first instance was charged by the libelant to Lewis, and I find no evidence in the case which would justify finding that Ackerly assumed that debt. The fact that, when the boat was sold, the present libelant charged the brokerage to Lewis, and rendered him a bill therefor, is adverse to the contention that there was then an agreement by Ackerly to pay brokerage. A man named Mitchell appears to have had much to do with the sale of the yacht to Ackerly, but he is not called as a witness, nor is there evidence that, if he had authority to bind the claimant, he ever did so. It is true that the libelant rendered to Ackerly some bills in which the $200 was credited on the demand for brokerage, to which Ackerly paid no attention, but the liability for this brokerage he had always denied. Bills rendered under such circumstances do not bring the case within the rules applied to accounts stated.

In my opinion the $200 was improperly disallowed as a credit, and should be credited upon the bill for wharfage, which was the only stated account then existing between the parties. The report is confirmed, except as to the $200, and a decree may be entered for the sum of $1,025.75.

THE MAYFLOWER.

MENDELSSOHN PARK EXCURSION & AMUSEMENT CO., Limited, et al. v. HEWITT et al.

(Circuit Court of Appeals, Third Circuit. April 5, 1897.)

No. 11, March Term, 1897.

COLLISION—STEAMER WITH WHARF BOAT.

Where a wharf boat sunk immediately after being struck by a steamer, and when she was raised it was found that a new and strong plank connected with the knee which received the blow was split a distance of many feet, and opened so as to admit water freely, *held*, on the weight of the evidence, that the sinking was due to the blow, so as to make the steamer liable, though the wharf boat was previously in bad condition and sometimes leaked.

Appeal from the District Court of the United States for the Western District of Pennsylvania.

This was a libel in rem by Isaac Hewitt and James Hewitt, doing business as the McKeesport Wharf-Boat Company, against the steamboat Mayflower (the Mendelssohn Park Excursion & Amusement Company, Limited, claimant), to recover damages for an alleged collision. The libelants were the owners of a wharf boat which was moored at McKeesport, on the Monongahela river, and was used by them as a landing for packets and as a produce and provision store. They alleged that on the evening of October 31, 1894, the Mayflower, in attempting to land at McKeesport, struck a knee of the wharf boat, thereby causing a long split in one of her bottom planks; and that from the effects of this injury she sank the same night, and a lot of their produce was lost or dam-

aged. The respondents deny the fact of collision, and assert that, if it be found in fact to have occurred, the libelant's watchman was negligent in not promptly discovering the injury, and taking steps which would have prevented the boat from sinking. The evidence was very conflicting, but the court below found, after a careful examination of it, that "the Mayflower must be adjudged to have struck the wharf boat, and that her subsequent sinking was the result of the blow"; and also that the facts did not warrant the conclusion that the subsequent conduct of libelant's watchman was such as to charge them with the loss caused by the sinking of the boat. The court, however, permitted libelants to submit further testimony to show damage resulting from the loss of the use of the boat, and thereafter, to wit, on January 4, 1897, filed the following additional opinion (per Buffington, District Judge):

"We have re-examined the proofs submitted on the former hearing, and also those taken subsequent thereto. The last-mentioned testimony, and the forcible argument of counsel thereon, go a long way towards challenging the correctness of the conclusion arrived at on the former hearing; but, after careful consideration of the entire proofs, we will adhere to the one then reached. The proofs, however, satisfy us that respondents should not pay all the bills claimed for repairs. A substantial portion of these repairs was necessitated, not by the collision, but by the condition the boat was in prior thereto. The claim for prospective profits is not allowable under the proofs."

Marcus W. Acheson, Jr., for appellants.

Samuel McClay, for appellees.

Before DALLAS, Circuit Judge, and BUTLER and KIRKPATRICK, District Judges.

BUTLER, District Judge. The district court found the Mayflower responsible for the loss sustained by the wharf boat; that the latter sank in consequence of a blow inflicted by the former, as charged in the libel. The very able argument presented on behalf of the Mayflower has not satisfied us that this finding is wrong. It seems to be fully sustained by the proofs. No doubt the wharf boat was in bad condition, and sometimes leaked; but this does not appear to have had anything to do with her disaster. She was afloat and safe when struck, and directly after sank. When raised, a plank, new and strong, connected with the knee which received the blow, was split a distance of many feet, and forced open sufficiently to admit water freely. It cannot well be doubted that this was the cause of sinking, notwithstanding some testimony to the contrary. Nor do we find anything that would justify us in interfering with the damages awarded. The subject appears to have been examined with care by the court, and, while there may possibly be room for doubt respecting some of the items allowed, we think the decree cannot safely be disturbed. It is therefore affirmed.

FOX v. SOUTHERN RY. CO. et al.

(Circuit Court, W. D. North Carolina. May 20, 1897.)

1. REMOVAL OF CAUSES—TIME OF APPLICATION.
The requirement in Judiciary Act 1887–88, that the petition and bond for removal shall be filed at or before the time the defendant is required by the state law or rules of court to plead, is an imperative limitation, which cannot be extended by stipulation of the parties, or by the discretionary action of the judge in each particular case.

2. SAME—REMOVAL PAPERS—PRESENTATION TO STATE COURT.
The cause must be remanded where it appears that the petition and bond were filed in the clerk's office of the state court in vacation, and there is nothing to show that they were ever presented to the court in session. No implied presentation at the ensuing term can be inferred where, by previous stipulation, the cause has been continued beyond that term, and is therefore not open to judicial notice or action.

This was an action by W. A. Fox, administrator, against the Southern Railway Company and others. The case was heard on a motion to remand to the state court.

B. F. Long and L. S. Overmon, for plaintiff.
Charles Price and G. F. Bason, for defendants.

DICK, District Judge. The transcript of record filed by the defendant at this term shows the following facts and proceedings:

This civil action was commenced in the state court by a writ of summons duly issued on the 8th day of October, 1896, returnable to the November term, 1896, of Iredell superior court. This writ was duly served on the Southern Railway Company on the 22d of October, 1896. At the said November term no pleadings were actually filed and entered of record, but the following stipulation of counsel was filed on the 10th of December, 1896, and was agreed to be entered of record:

"In this case it is agreed between the attorneys for the plaintiff and the defendants that the plaintiff have to the 26th of December, 1896, to file complaint, and the defendants till February term to file answer as of the November term of this court."

The complaint was filed December 21, 1896, and the answer was filed January 28, 1897, and both pleadings were entered as of the preceding November term. On the 20th of January, 1897, the following stipulation of counsel was filed in the office of the clerk of the state court:

"In this case it is agreed by the counsel of the plaintiff and for the defendants that this cause be continued to the May term of Iredell superior court."

On the 28th of January, 1897, a petition and bond, with sufficient surety, were filed by the Southern Railway Company in the office of the clerk of the state superior court of Iredell county, alleging facts and asserting principles of law in conformity with the provisions of the act of congress of August 13, 1888. It does not appear of record that this petition and bond were ever presented to said state court while in session, or were accepted or refused by a judge of said court. On the 29th of January, 1897, the plaintiff caused a

writ of summons to be issued against the Western North Carolina Railroad Company, returnable to May term, 1897, of the superior court of Iredell county, which was duly served on the 5th day of February, 1897.

The third section of the act of congress of March 3, 1887, corrected by the act of August 13, 1888, provides that a nonresident party defendant desiring to remove a cause from a state court to a federal court for trial must file his petition and bond "at the time, or any time before the defendant is required by the laws of the state, or the rule of the state court in which such suit is brought, to answer or plead to the declaration or complaint of the plaintiff." The legislation of congress in regard to the removal of causes from state to federal courts has at different times varied in statutory provisions. The framers of the constitution of the United States apprehended that local influences, sectional prejudices, and state pride and jealousy would render state courts partial, unsatisfactory, and unsafe tribunals for the trial and determination of suits and controversies between citizens of different states; presuming that a citizen of a state in which a suit was brought would have in his home court an unfair and unjust advantage over a nonresident defendant. In order to guard against this apprehended mischief, the constitution extended the judicial power of the United States to controversies between citizens of different states, to be exercised and applied in common and impartial national tribunals, equally related to both parties, competent and ready to do prompt, equal, and exact justice between them, as citizens of the United States, and under legal obligation to administer the laws of the states in all respects, when applicable. Similar considerations induced the enactment of the twelfth section of the judiciary act of 1789. That section conferred upon a nonresident defendant sued in a state court the personal privilege of removing such suit for trial to the next term of the federal court held in said state, if a petition and bond for such purpose were filed in the state court at the time of entering his appearance. He was required to act promptly, and as soon as possible. If he filed a demurrer, plea, or answer, or otherwise recognized or submitted to the jurisdiction of the state court, he would have waived the benefit of his personal privilege of removal. The disturbed and inharmonious condition of public affairs brought about by the antagonisms and conflicts engendered and aroused by the late Civil War induced congress to extend the time for making application for the removal of causes from state courts to federal courts on the grounds of diverse citizenship of the parties. Numerous decisions of state and federal courts were made, construing such removal statutes, in which there were diversity and conflict, resulting in dissatisfaction and discontent among the people and the courts of some of the states, as they regarded the extension and exercise of national judicial power as unjust aggressions upon the constitutional and inherent rights of the states. The third section of acts of March 3, 1887, and August 13, 1888, was manifestly intended to remedy the evils arising from diversities of procedure and decisions in the courts, and to contract the jurisdiction of the courts of the United States,

and restrict it more nearly within the limits of the earliest statute. Martin's Adm'r v. Railroad Co., 151 U. S. 673, 14 Sup. Ct. 533. This statute was intended as a substitute for previous legislation on the subject, and expressly repealed all laws and parts of laws in conflict with its provisions. The rule of limitation as to the time of application for the removal of a cause from a state court to a federal court on the grounds of diverse citizenship of the parties is positive, and was intended to be imperative, so as to make certain, fixed, definite, and uniform the time of application for removal in accordance with the positive laws of the state, and the uniform and established rules of court, and not leave the matter to be regulated by the stipulations of parties, or the discretionary action of a trial judge, in each particular case. This act, being so clearly remedial in its nature, should be liberally construed, with a view to effectuate the beneficent public purposes for which it was intended, and thus advance the comity between state and federal courts; produce more harmony of judicial decisions, and greater regularity and certainty of procedure in the administration of justice. The Code of Civil Procedure of this state, in sections 206 and 207, requires a plaintiff to file his complaint in the clerk's office on or before the third day of the term to which the action is brought, and the defendant is required to appear and demur or answer at the same term to which the summons is returnable. Section 283, Code Civ. Proc., provides that:

"The time for filing the complaint, petition or of any pleading whatever may be enlarged by the court for good cause shown by affidavit, but it shall not be enlarged by more than ten additional days, nor more than once, unless the default shall have been occasioned by accident over which the party applying had no control, or by the fraud of the opposing party."

In the case now before this court the transcript shows that the defendant petitioner was duly served with process to appear at November term, 1896, of Iredell superior court. It was conceded on the argument that petitioner at that term was represented by properly authorized attorneys. From the entry made of record of the agreement of counsel, it may be inferred that no pleadings were actually filed at said term, but were subsequently filed as of said term. The defendants were sued as joint tort feasors. In such action their liability was joint and several, and each party had a right to offer a separate defense. The Southern Railway Company, on its appearance at November term, was required by state laws to demur or answer, and was entitled to a motion to dismiss the action for the want of complaint, although the other defendant had not been served with process. It also had the right at that term to file a petition and bond for removal of the action, and have their merits adjudged by the court. If the same had been presented, and been refused or disregarded, the case would have been removed to this court by operation of law, if the petition and bond were sufficient in law to authorize removal. The stipulation extending the time for filing pleadings, made by counsel of both parties for their mutual convenience, and by agreement entered of record, did not have the force and effect of dispensing with the requirements of positive law, and extending