

wages, under the peculiar circumstances of the case as presented to the court below, we cannot say, in view of the fact that we have not the evidence itself before us, that the court erred in holding that the rule was inapplicable. A court of admiralty, while not a court of general equity, yet acts upon equitable principles. *Dean v. Bates*, 2 Woodb. & M. 87, Fed. Cas. No. 3,704; *Petrie v. The Coal Bluff* No. 2, 3 Fed. 533; *The Eclipse*, 135 U. S. 599-608, 10 Sup. Ct. 873. See, also, *The Juliana*, 2 Dod. 521. Under the circumstances of this case, we think that the decision of the district court should be affirmed. Our decision must, of course, be understood as being limited to the peculiar state of the case as presented by the record. The judgment of the district court is affirmed.

THE EUGENE.

JACOBI et al. v. THE EUGENE.

(District Court, D. Washington, N. D. October 23, 1897.)

ADMIRALTY—JURISDICTION IN REM—BREACH OF CONTRACT OF CARRIAGE.

A suit in rem is not maintainable for breach of an executory contract to carry a passenger on a particular vessel, where the vessel has never entered on the performance thereof. The lien upon which the right to proceed in rem depends does not attach until the passenger has placed himself within the care and under the control of the master.

In Admiralty. Libel in rem by Gaston Jacobi and Charles Ruff against the steamer Eugene, to recover passage money, and damages for breach of contract to carry the libelants, with their baggage, from Seattle, via St. Michaels, in Alaska, to Dawson City, in the Northwest Territory. Heard on exceptions to the libel.

John C. Hogan, for libelants.

J. C. Flanders, for claimant.

HANFORD, District Judge. Each of the libelants alleges that the Portland & Alaska Trading & Transportation Company, a corporation, being at the time owner of the steamship Eugene, entered into a contract to carry him, with his baggage, on board the steamer Bristol, from the city of Seattle, in the state of Washington, to St. Michaels, in Alaska, and thence on board the steamer Eugene to Dawson City, and thereupon issued two tickets, one being for passage from the city of Seattle to St. Michaels, for which he paid \$100, and the other for passage from St. Michaels to Dawson City, for which he paid \$200. A breach of the contract is alleged, in this: that the steamer Eugene wholly failed to go to St. Michaels to receive the libelants, as agreed. The libelants allege that they have been injured and damaged by loss of the amount paid for their passage, and the cost of a miner's outfit, and loss of time, for which they each claim damages in the sum of \$1,000.

The authorities are conflicting on the point as to whether a suit in rem can be maintained for breach of an executory contract to carry

a passenger on board a particular vessel, where the vessel has not entered on performance. In the case of *The Pacific*, Fed. Cas. No. 10,643, it was held by Mr. Justice Nelson that, in the case of a contract maritime in its nature and subject, it is not essential, to give jurisdiction to an admiralty court in a suit in rem, that the vessel should have entered on the performance, or that the breach should have occurred in the course of the voyage, and that, when the contract has been entered into for the conveyance of goods or persons in a particular ship, the liabilities of the owner and of the ship attach at the same time. In the case of *The General Sheridan*, Fed. Cas. No. 5,319, Judge Blatchford held that the decision by Mr. Justice Nelson in *The Pacific* Case had been overruled by the supreme court in the cases of *The Freeman v. Buckingham*, 18 How. 182, and *Vandewater v. Mills*, 19 How. 82. These two cases may be regarded as the leading cases on opposite sides of the question. In a dictum by Judge Lowell in *Oakes v. Richardson*, Fed. Cas. No. 10,390, which was a suit in personam, the decisions of the supreme court supposed to overrule *The Pacific* Case are treated as dicta, not having the force of decisions. In the case of *The Williams*, Fed. Cas. No. 17,710, in an elaborate opinion showing a careful examination of the numerous authorities, Judge Emmons sustained and followed the ruling of Mr. Justice Nelson. In the case of *Scott v. The Ira Chaffee*, 2 Fed. 401, Mr. Justice Brown, then sitting as district judge for the Eastern district of Michigan, and who appears, by the report of *The Williams* Case, to have successfully argued for the jurisdiction before Judge Emmons, denied the authority of that decision. Referring to the decisions of the supreme court in 18 and 19 How., he says:

"Those cases cannot be said to have definitely fixed the measure of liability. They seem, rather, to have announced in general terms a doctrine from which the supreme court has not as yet shown any disposition to recede."

Then, after reviewing at length the American and foreign authorities, he reaches the conclusion that the owner of a cargo has no lien on the vessel for the breach of a contract of affreightment until the cargo, or some portion, has been laden on board, or delivered to the master. In the case of *The Monte A.*, 12 Fed. 331, Judge Brown, of the Southern district of New York, carefully reviews the decisions, and in his conclusion sustains the ruling of his predecessor in the case of *The General Sheridan*. In subsequent decisions the supreme court seems to have regarded the declarations contained in the decisions in 18 and 19 How. as expressing the doctrine of that court, and not as mere dicta. Mr. Justice Davis, in the opinion of the court in the case of *The Lady Franklin*, 8 Wall. 325-329, says:

"The doctrine that the obligation between the ship and cargo is mutual and reciprocal, and does not attach until the cargo is on board, or in the custody of the master, has been so often discussed, and so long settled, that it would be useless labor to reiterate it, or the principles which lie at its foundation. The case of *The Freeman v. Buckingham* (decided by this court) 18 How. 182, is decisive of this case. It is true, the bill of lading there was obtained fraudulently, while here it was given by mistake, but the principle is the same; and the court held in that case that there could be no lien, notwithstand-

ing the bill of lading. The courts say, "There was no cargo to which the ship could be bound, and there was no contract for the performance of which the ship could stand as security."

And again, in an opinion by Mr. Justice Davis in the case of *The Keokuk*, 9 Wall. 517-521, he reiterates:

"It is a principle of maritime law that the owner of the cargo has a lien on the vessel for any injury he may sustain by the fault of the vessel or the master; but the law creates no lien on the vessel, as a security for the performance of a contract to transport a cargo, until some lawful contract of affreightment is made, and the cargo to which it relates has been delivered to the custody of the master, or some one authorized to receive it. *The Freeman v. Buckingham*, 18 How. 188."

In an opinion by Mr. Justice Clifford in the case of *The Delaware*, 14 Wall. 579-606, the case of *The Freeman v. Buckingham*, 18 How. 182, is cited as an authority supporting the proposition that bills of lading, duly executed in the usual course of business, bind the owners of the vessel, if the goods were laden on board, or were actually delivered into the custody of the master; "but it is well-settled law that the owners are not liable if the party to whom the bill of lading was given had no goods, or the goods described in the bill of lading were never put on board, or delivered into the custody of the carrier or his agent."

These authorities are conclusive upon the point that the right to proceed in rem for breach of a contract of affreightment does not exist unless the cargo, or a portion of it, has been delivered to the master of the vessel, or to his authorized agent. The authorities also hold that ships engaged in carrying passengers on the high seas stand on the same footing of responsibility, according to the maritime laws, as those engaged in carrying merchandise. 1 Am. & Eng. Enc. Law (2d Ed.) pp. 661, 662. The weight of authority bears so strongly against the position of the libelants that I am unwilling to set up my judgment in opposition. According to the authorities, it is not the making of a contract, nor the payment of the consideration therefor, which renders the vessel liable. The lien upon which the right to proceed in rem depends does not attach until the goods or passenger have been placed within the care and under the control of the ship's master. In the argument of the exceptions it was insisted that, the contract being entire, both vessels became liable from the time libelants started on their journey from Seattle to St. Michaels; but the libel fails to allege that they ever rendered themselves, or placed their baggage, on board the steamer *Bristol*, or that performance of the contract on the part of the owner of the vessels was ever commenced. Exceptions sustained.

NATIONAL MASONIC ACC. ASS'N OF DES MOINES v. SPARKS.

(Circuit Court of Appeals, Eighth Circuit. October 6, 1897.)

No. 859.

1. **FEDERAL JURISDICTION—ALLEGATIONS OF CITIZENSHIP—BURDEN OF PROOF.**
Where a plaintiff's pleading, in the federal courts, sets out the necessary diverse citizenship of the parties, the burden of both allegation and proof to the contrary rests upon the party who seeks to defeat the jurisdiction.
2. **SAME—EFFECT OF GENERAL DENIAL.**
A general denial, in a federal court, is a plea to the merits, and does not put in issue averments of citizenship, upon which the jurisdiction depends. The matter of jurisdiction is waived unless it is challenged by a special plea.
3. **APPEAL AND ERROR—REVIEW—BILL OF EXCEPTIONS.**
To enable the circuit court of appeals to review the action of the circuit court upon the admission or exclusion of evidence, the evidence to which the exception is directed must be incorporated in the bill of exceptions.
4. **SAME—HARMLESS ERROR.**
It is not error to exclude, upon a trial, cumulative evidence of a state of facts which is not controverted.
5. **SAME—TRIAL TO COURT—SPECIAL FINDINGS.**
In order that the opinion of the court, in a case tried without a jury, may be treated as a special finding of facts, so that assignments of error may be based thereon, its statement of the facts found should not be mingled with the evidence, or with discussions of law or the reasons for the court's conclusions.
6. **SAME—ASSIGNMENTS OF ERROR.**
Upon a writ of error the objection that the circuit court made neither general nor special findings of fact cannot be considered, unless raised by the assignment of errors.

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

Clark Varnum, for plaintiff in error.

Carroll Wright, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and RINER, District Judge.

RINER, District Judge. This was an action at law brought by Nannie R. Sparks, the defendant in error, against the National Masonic Accident Association of Des Moines, Iowa, the plaintiff in error, in the circuit court of the United States for the Southern district of Iowa, to recover the sum of \$5,250, with interest and costs, upon a judgment obtained by her against the association in the circuit court sitting within and for the county of Johnson, in the state of Missouri. The petition filed in the circuit court for the Southern district of Iowa averred, in substance, that the plaintiff was a citizen of the state of Missouri; that the defendant was a citizen of the state of Iowa; that the amount involved in controversy exceeded the sum of \$2,000, exclusive of interest and costs; that on the 25th of November, 1893, she recovered a judgment against the defendant in the circuit court within and for the Seventeenth judicial district of the state of Missouri, held in the county of Johnson, in said state, in the sum of \$5,225, with costs and interest from that date; that the court rendering such judgment was a court of general jurisdiction, and a