comma). "Second, on any judgment recovered before any court in this state; third, for money lent; fourth, for money due on the settlement of accounts, from the day on which the balance is ascertained; and, fifth, for money received to the use of another." St. Cal. 1850, p. 92; Burke v. Carruthers, 31 Cal. 467, 470. Under these circumstances, I am of opinion that the punctuation in the amended statute of 1887 must give way to the sense and reason of the rule which must be supposed to have guided the legislative intent in the passage of the law. The statute was taken from California. It is identical with that statute, except it leaves out the words "first," "second," etc., and there is the punctuation of a comma (,) instead of a semicolon (;). Under these circumstances the interest will be allowed to remain. New trial denied.

LAUGHLIN et al. v. QUEEN CITY CONST. CO., Limited, et al.

(Circuit Court, N. D. New York. October 17, 1898.)

ATTACHMENT—GROUNDS—SUFFICIENCY OF AFFIDAVIT.

Under the statutes of New York, an affidavit sworn to on the same date the complaint was verified, and averring that plaintiff has performed labor and services for defendant from a time stated "down to the present time," does not show a breach of contract or a cause of action accrued which will support an attachment.

At Law. Motion to vacate attachment.

Baker, Schwartz & Dake, for plaintiffs.

Stern & Rushmore, William B. Hoyt, and W. Benton Crisp, for defendants.

COXE, District Judge. This action was commenced in the supreme court of the state of New York. It was removed to this court on the ground of diverse citizenship. An attachment was granted by the state court pursuant to sections 635 and 636 of the New York Code of Civil Procedure. The defendants move to vacate upon the ground that the affidavits on which the attachment was granted are defective and insufficient.

The complaint alleges, "that since the fore part of the year 1894 and down to the present time" the plaintiffs have performed divers work, labor and services for the defendants at their request. The principal affidavit in support of the attachment contains a precisely similar averment. It is insisted that upon these allegations the action was prematurely brought and the attachment improvidently granted. This question, relating as it does to the action of the state court under the state statute, must be determined by state law. This being so it is thought that the case is ruled by Smadbeck v. Sisson, 31 Hun, 582. In the Smadbeck Case the allegation was that the "said work, labor and services were performed during a period from September 1, 1882, to the time of the commencement of this action." The attachment was vacated for the reason that there was no statement of a notification to the defendants that the services were completed, no evidence of a demand, of a refusal to pay, of a breach of the con-

tract or, in fact, of any fact from which the court could draw the inference that the right of action was complete on the day when the action was commenced. The only difference between the two cases is that in the Smadbeck Case the allegation is that the services continued "to the commencement of the action" and in the case at bar "to the present time." The two statements are synonymous. Of this there can be no question. If there were any doubt on the subject it is removed by the further allegation of the affidavit that "the summons in this action has not been served upon the defendants. Said summons has been prepared to be served on the defendants concurrently with the execution of a warrant of attachment to be applied for herein." The papers also show that the complaint was verified and the affidavits sworn to upon the same day. When the affiant stated that the services sued for continued "down to the present time" he made a perfectly clear and intelligible statement. There is nothing ambiguous about it. It is not capable of two interpretations. The "present time" was the time then present—the time when the affidavit was made. It is contended that the expression "present time" includes a large and indefinite section of past time, and that the services extended down to the outlying boundary but did not extend into it or beyond it. In other words, it is asserted that the statement that the services extended down to the present time is equivalent to saying that they were performed since 1894 "and prior to the present time." This will not do. The plain import of the words cannot be so distorted.

Again, it is argued that the defect is cured by the following averment in another affidavit, namely:

"That at one time a representative of the defendants who represented them for the purpose of adjusting the claims of these plaintiffs * * * did promise to pay these plaintiffs the sum of $30,000 for the services mentioned."

This allegation in no way aids the plaintiffs. Their action is still one to recover $46,000 for services performed from the early part of 1894 down to the time the affidavit was made on July 11, 1898. The alleged promise did not in the least change the cause of action. The promise was not fulfilled and the account was not adjusted on the basis of $30,000. The plaintiffs never agreed to accept it in full payment. If the action were upon the promise to pay $30,000 there might be some force in the plaintiffs' position, but it is not.

It is true that this motion is based upon grounds somewhat technical, but, on the other hand, the remedy by attachment is a severe one and the courts unite in requiring a plain case and a strict compliance with the statute. The case has been examined in all its aspects but it seems impossible to distinguish it, in principle, from Smadbeck v. Sisson. The motion to vacate is granted.

THE INTERNATIONAL.

(Circuit Court of Appeals, Third Circuit. September 20, 1898.)

No. 5.

CUSTOMS DUTIES—DREDGES AND SCOWS.

A steam dredge and scows used in connection therewith are "vessels," within the meaning of Rev. St. § 3, and neither is dutiable under Act 1894, par. 177, as "manufactured articles," not specially provided for, and composed wholly or in part of metal.

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

This was a libel in admiralty by N. K. and M. Connolly against John R. Read, collector of customs for the district of Philadelphia, to recover possession of the steam dredge International and two scows used in connection therewith. There was a decree for libelants (83 Fed. 840), and the collector appeals. Affirmed.

Francis Fisher Kane and James M. Beck, for appellant.

Frank P. Prichard, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. The libel was filed in this case by Nicholas K. Connolly and Michael Connolly, trading as N. K. and M. Connolly, to recover possession of the steam dredge "International," and two scows used in connection therewith, known as "No. 1," and "No. 2," of which the libelants were owners, and which were alleged to be illegally detained by John R. Read, then collector of customs for the district of Philadelphia. The dredge and scows were built in Canada and were towed from Halifax to Philadelphia; the dredge arriving at the latter port October 2, 1896, and the scows November 27, 1896, respectively. The dredge and scows were seized by the collector of customs at the port of Philadelphia, and were held by him to enforce the payment of certain duties claimed to be due thereon under the tariff act of August 27, 1894 (28 Stat. 509). The court below sustained the libel, decreeing that possession of the dredge and scows be restored by the collector to the libelants. This is an appeal from that decree. It is contended by the appellant that the dredge and scows were dutiable as "an article" or "articles" enumerated in that act, and were embraced in paragraph 177, imposing a duty of 35 per centum ad valorem upon "manufactured articles or wares, not specially provided for in this act, composed wholly or in part of any metal, and whether partly or wholly manufactured." We are unable to adopt this view. The dredge, as well as each of the scows, must, in our judgment, be regarded, for the purposes of this case, as a "vessel" within the meaning of section 3 of the Revised Statutes of the United States, and, as such, not subject to duty under the tariff act of 1894. That section provides that "the word 'vessel' includes every description of water craft or other artificial contrivance used, or capable of being used, as a means of transportation on water."