appellants could not recover for a total loss, if, in fact, the loss was only partial. If limited to a recovery as for a partial loss, they would still be entitled to recover their whole loss, which would include cost of raising, repairing, net profits of pending voyage, and the value of the use of the vessel pending repairs. It was upon this basis that damages were assessed, and the appellants, the owners of the Siberia and Mather, have thus profited by the fact that the loss was partial, and not total. The amendment, so far as it set out the fact that the loss was not total, but partial, was possibly not necessary to permit a recovery of the partial loss under an averment that the loss had been total.

There remains the technical question as to whether the claim for demurrage had passed to the insurer as an effect of an abandonment to the underwriters, and an acceptance by them of such abandonment. We are inclined to the opinion that this abandonment was only for a constructive total loss, and should not have the effect of a sale, even though given effect by a formal assignment. The law would look deeper than mere appearances, and see the real fact lying at the bottom. But it is only necessary to suggest this, as we do not decide it. Whatever the effect of this technical abandonment upon this claim for demurrage, the difficulties were met when the libel was amended so as to show that the damages sought were such as had been sustained by both owners and underwriters, and that for the latter the suit was as trustees for the insurer. The underwriters were substituted to the claim of the owners against the wrongdoers for the partial loss actually sustained. This claim included demurrage. This action the underwriters might sustain in the name of the owners for their benefit, and so the owners may sustain such a suit as trustees for the insurer. It is not plain that it is necessary to aver that the suit is conducted for the benefit of the insurer, but any doubt was removed by the amendment of the libel. Hall v. Railroad Cos., 13 Wall. 367; Railway Co. v. Manchester Mills, 88 Tenn. 653–663, 14 S. W. 314. To award the whole damages to the libelants for themselves and as trustees for the insurers will not subject the appellants to the peril of a further suit, but will conclude the insurers.

Libelants filed an exception that the allowance for repairs was insufficient, and did not cover certain repairs made by the purchasers of the Ohio; and another, because the allowance for demurrage was insufficient. The commissioner regarded the proof as insufficient to sustain the contention covered by these exceptions. No such clear mistake of fact is shown as will justify the setting aside of the conclusions of the report. The Cayuga, 16 U. S. App. 577, 8 C. C. A. 188, and 59 Fed. 483.

The same rule must be applied to the remaining exceptions filed by the claimants of the Siberia and Mather. The report of Mr. Davison, the commissioner, who reported the damages, is a particularly clear and able one. Under the rule in the case of The Cayuga, supra, no sufficient reason has been shown for convicting the commissioner of any error of fact. The case must be reversed as to the Ohio, and remanded, with directions to enter a decree against the Siberia and Mather for all the damages and costs, including those of this appeal.

SMITH v. FIFIELD.

(Circuit Court of Appeals, Seventh Circuit. January 3, 1899.)

No. 503.

JURISDICTION OF FEDERAL COURTS — ALLEGATIONS OF CITIZENSHIP — SUIT BY ASSIGNEE.

A circuit or district court is without jurisdiction of a suit brought on a nonnegotiable contract by an assignee, where the declaration fails to show that the suit might have been prosecuted in that court if no assignment had been made.

In Error to the Circuit Court of the United States for the Western District of Wisconsin.

Ray S. Reid, for plaintiff in error.

M. G. Jeffries, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

PER CURIAM. The plaintiff in error, claiming title as assignee, brought this action in the circuit court of the United States for the Western district of Wisconsin to recover upon a nonnegotiable contract or chose in action; but the declaration, while alleging the diverse citizenship of the parties, fails to show that the suit might have been prosecuted in that court if no assignment had been made. If we may treat the averment of the complaint that the assignor of the plaintiff in error was at the date of the contract "of the city of Janesville, county of Rock, in the state of Wisconsin," to be an averment that he was a citizen of the state of Wisconsin, he could not have brought an action on the contract in a court of the United States. The court below, therefore, had no jurisdiction of the case. Railroad Co. v. Davidson, 157 U. S. 201, 15 Sup. Ct. 563. The judgment is reversed, at the cost of the plaintiff in error.

Judge SHOWALTER did not participate in the decision of this case.

GRAND TRUNK RY. CO. v. CENTRAL VERMONT R. CO.

(Circuit Court, D. Vermont. January 27, 1899.)

RAILROAD RECEIVERSHIP—INTERVENTION BY CREDITORS CLAIMING PREFERENCE —PLEADING.

Holders of claims against a railroad in the hands of receivers, who do not come within the terms of a general order requiring the receivers to pay claims for labor and supplies accruing within six months, have no standing to file a motion for payment of their claims in full, and can only be heard upon a petition of intervention setting out the facts on which their claim to preferential payment is based in accordance with the rules of pleading.

Hearing on petitions of intervention of the Ashton Valve Company and others, as creditors, asking preferential payment.