

deck, it is difficult to see any ground upon which to hold that negligence has been proved.

It is said that the deals were so placed as to create the belief in any one required to go into the between-decks that a deck had been constructed there, and that the responsibility is therefore the same as if an improper and unsafe deck had in fact been constructed there. But, whatever might be the responsibility in such a case, no such case is made out by the evidence. The deals were not so placed as to justify the libellant in believing that he was proceeding upon a deck. The deals were rough, they were laid loosely without any fastening whatever, and, according to the evidence, were not evenly laid, but in some places lapped one upon another; moreover, the spaces between the stanchions were open. These openings were plainly visible, and were notice to all who might go upon the deals that they were not upon a deck.

The case is that of a use, by the libellant, of the deals for a purpose for which they were not intended, without necessity, and with fair notice from the manner in which they lay that they were not intended to be so used.

Such a case is not one in which it can be held that the injuries to the libellant were caused by negligence on the part of the ship owner, or of those entrusted with the care and management of the ship.

The libel must therefore be dismissed, and with costs.

KEROSENE LAMP HEATER COMPANY v. FISHER.

(*Circuit Court, D. Massachusetts.* January 20, 1880.)

PATENT CASE—PRACTICE.—Modes of proceeding before a master to whom a patent case has been referred.

LOWELL, J. Some questions are raised relating to the modes of proceeding before a master to whom a patent case has been referred, in certain particulars in which the practice of different masters is said to differ, and I have consulted with Judge Nelson as to the answers which should be given.

We consider that the practice adopted by Mr. Stetson harmonizes better with the rules than that which was adopted in this case. The practice which we approve is this: The master appoints a day for proceeding with the reference, and gives notice, by mail or otherwise, to the parties or their solicitors. We think the solicitor should be notified, whether the party is or not; though, probably, under rule 75, notice to the party is a good notice. If the defendant does not appear, the master proceeds, *ex parte*, and makes out the profits and damages, if he can, from the evidence produced by the plaintiff. If it appears that an account of profits is necessary to a just decision of the cause, and is desired by the plaintiff, he makes an order that the defendant furnish an account by a certain day, and adjourns the hearing to that day. The defendant should be served personally with a notice of this adjournment, and of the order to produce his account, if it is intended to move for an attachment in case he fails to appear. The service may be made by any disinterested person, and need not be by the marshal. If the defendant then fails to appear and account, he will be in contempt.

The mode of proceeding which we do not approve, is for the plaintiff to take out a notice, in the first instance, before any hearing has been or can lawfully be had, requiring the defendant to furnish an account by a certain day on pain of punishment for contempt. We doubt the power of the master to make such an order upon a mere inspection of the record, and we consider the practice inexpedient if it is lawful.

The defendant's first objection is sustained. His objection, which is of more real importance in most cases, that the service must be by the marshal, we overrule.

HAYDEN v. THE ANDROSCOGGIN MILLS.

HAYDEN v. THE BATES MANUFACTURING COMPANY.

(Circuit Court, D. Massachusetts. November 20, 1879.)

FOREIGN CORPORATION—JURISDICTION.—A foreign trading corporation may be sued in the circuit court for the district of Massachusetts, although the property of the defendant has not been attached, where such corporation is doing business within the state, and the summons has been duly served upon an officer of the company.

The plaintiff in the case first above named, by his writ, commanded the marshal to attach the goods or estate of the Androscoggin Mills, "a corporation duly established by the laws of the state of Maine, and doing business in Boston," to a certain value, and "to summon the defendant." The declaration was in trespass, for damages for the alleged infringement of a patent granted to the plaintiff. The return of the marshal was that he had attached a chip as the property of the defendant, and had delivered a summons to T. W. Walker, the president of the company.

The defendants appeared specially, and moved to dismiss. The second case was in all respects like the first.

Henry D. Hyde and *Elmer P. Howe*, for the defendants, distinguished *Ex parte Schollenberger*, 96 U. S. 369; *Williams v. Empire Transportation Co.* 14 Off. Gaz, 423; *Packing Co. v. Hunter*, 7 Reporter, 455, in that the service in those cases was precisely such as the state courts required to be made upon foreign corporations, while in Massachusetts an effectual attachment of property must be made in such cases. *Andrews v. Mich. C. R. Co.* 99 Mass. 534; *Peabody v. Hamilton*, 106 Mass. 217.

R. Lund and *D. F. Crane*, for plaintiff.

LOWELL, J. The important point of jurisdiction intended to be raised by the defendants cannot be decided in their favor, upon a motion to dismiss, because it is entirely consistent with this record that the defendants should have an agent here expressly authorized to accept service, or that some other fact should exist which would prove the defendants to