

but admits its sufficiency; by setting it down for argument he admits its truth, but denies its sufficiency. In this case the complainants have chosen the latter course. They have admitted the facts, and have, in legal effect, demurred to the plea. *Rhode Island v. Massachusetts*, 14 Pet. 210; *Myers v. Dorr*, 13 Blatchf. 22; *Birdseye v. Heilner*, 26 Fed. Rep. 147; *Cottle v. Krementz*, 25 Fed. Rep. 494; *Korn v. Wiebusch*, 33 Fed. Rep. 50; *Newton v. Thayer*, 17 Pick. 129; Walk. Pat. § 590; Story, Eq. Pl. § 697. The counsel for the complainants has, apparently, overlooked this rule. In contending that an examination of the file-wrapper will show an abandoned application and a return of the patent, he is unmindful of the fact that the complainants have expressly admitted that the proceedings are still pending, and that the patent is now in the possession and under the control of the commissioner.

The simple question presented by the plea is this: Can a party who has surrendered his patent for reissue as inoperative or invalid maintain an action upon it while it is in the hands of the commissioner of patents, awaiting his decision? It is thought that he cannot. No controlling authority has been produced by the counsel or found by the court. But the reasoning of the opinions delivered in causes decided prior to the act of 1870 are all in support of the view here taken. *Peck v. Collins*, 103 U. S. 660; *Moffitt v. Gaar*, 1 Fish. Pat. Cas. 610, affirmed, 1 Black, 273; *Forbes v. Stove Co.*, 2 Cliff. 385. It is true that under the present law the "surrender shall take effect upon the issue of the amended patent." Rev. St. § 4916. But this language should not be construed to mean that the *status* of the original patent undergoes no change after its return to the commissioner. To permit the patentee to surrender his patent as inoperative or invalid, and the next day commence an action upon it as a valid instrument, would lead to endless confusion and inconsistencies. The reissue may be granted, and all prior right of action be superseded. The patentees may have a contingent right of action depending upon the happening of some future event, but it is suspended during the time the commissioner retains jurisdiction upon the question of reissue. Having surrendered the patent, and having declared it to be inoperative or invalid, it is incumbent upon the patentee to present some proof that he has resumed control over it. The plea is allowed.

BURRELL *et al.* v. PRATT.

(Circuit Court, N. D. New York. August 9, 1888.)

COXE, J. As this cause involves the same question decided in *Burrell v. Hackley*, *ante*, 833, the plea must be allowed.

THE L'AMERIQUE.

COMPAGNIE GÉNÉRALE TRANSATLANTIQUE *v.* HOGUET *et al.**(District Court, S. D. New York. July 10, 1888.)***1. SHIPPING—GENERAL AVERAGE—STRANDED VESSEL—CARGO FORWARDED—SUBSEQUENT EXPENSE—FREIGHT.**

When a stranded vessel cannot be got off except at great expense and delay, and the cargo is unloaded by the master for the benefit of the ship and cargo, but without any intention of reloading it in the same vessel, and it is forwarded by other means to its destination, and delivered to the consignees at comparatively small cost, the common interest, as well as the common risk, between ship and cargo, ceases with the unloading; only the expense of unloading, not the subsequent expenditure in floating the vessel, is a general average charge against the cargo; and the cost of subsequent transportation is particular average against the cargo alone, and the ship is entitled to her whole freight.

2. SAME—BOND—CONSTRUCTION.

An average bond, executed in New York, provided for an adjustment "in accordance with the established usage and laws of this state." There being no statutes of this state, or practice under them, different from the general maritime law of this country, *held*, that this provision bound the parties to an adjustment in accordance with the general maritime law, so far as that determines the general rules of apportionment; and to the practice of adjusters, as respects those details which the law leaves to local custom; and that under such bond a cargo owner might inquire whether the rule of apportionment adopted was in accordance with our maritime law.

In Admiralty.

The above libel was filed by the owners of the French steam-ship *L'Amérique* to recover \$1,911.90, claimed as a general average charge assessed upon 16 bales of raw silk, part of her cargo consigned to the respondents. The steam-ship, being of about 3,000 tons register, and bound from Havre to New York, when about three miles south of Sandy Hook, and in charge of a pilot, on January 7, 1877, stranded on the beach at Seabright, on the Jersey coast, in thick weather, and in an easterly gale. On the following day Mr. De Bebian, the libellant's agent in New York, visited the steamer, and in conjunction with some of the underwriters employed the Merritt Coast Wrecking Company to unload and deliver the cargo, and get the ship off the beach. The wrecking company immediately commenced unloading, with the assistance of the master and crew. A part was landed on the beach; a part in lighters and schooners. That landed on the beach was carried by the railroad near at hand to Sandy Hook, and thence by steamer some 20 miles to New York, and delivered to the consignees. That loaded upon lighters was mostly put on board schooners and carried up to the port, and likewise delivered to the owners. All the cargo, except a very small amount that remained on board the ship, was thus unloaded and delivered by the 1st of February; the respondents' goods were all delivered by January 23d. Prior to the delivery of the cargo, the respondents and the