

No. 8849

# Supreme Court of Illinois

Tug Montauk

---

vs.

Wm. H. Walker, et al,

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STATE OF ILLINOIS, } ss.  
CITY OF CAIRO, ALEXANDER COUNTY.

PLEAS before the Honorable Court of Common Pleas of the City of Cairo, held at the Court-House in said City, on Tuesday the Fourth day of June of the May Term, A. D. 1867, of said Court.

Present, the Hon. JOHN H. MULKEY, Presiding and holding said Court;

ALEXANDER H. IRVIN, Clerk;

John Hagan City Marshal;

H. WATSON WEBB, State's Attorney.

Be It Remembered

That herefore to wit: on Saturday the 28th day of June A.D. 1866  
there was filed in the Clerk's office of said the following proceedings were had and order  
made and entered of record by said Court, in the following styled cause, to-wit: Count - a precipes  
lib of rantouans and affidavit in attachment in the following styled cause  
which are in the words and figures following to-wit:  
William H. Walker Charles F. Steller &  
Isaac C. Caldwell doing business under the Suit by Harriet Leonard \$109.00  
firm name & style of W. H. Walker & Co

"The Sug Mountauk"

Precipes to wit:

State of Illinois } Co. Court of Common  
City of Cairo } Pls of the City of Cairo  
Alexander County } October Term 1866-

William H. Walker, Clerk  
Steller & Isaac C. Caldwell } Suit by  
doing business under the firm } Warrant  
name and style of W. H. Walker & Co } Demand  
"s" } \$109.00

"The Sug Mountauk"

The Court of said Court will issue a warrant  
in the above cause directed to the marshal  
of said court directing the seizure of the  
said Sug Mountauk or such part of  
her apparel, or furniture as may be necessary  
to satisfy the above demand, and to detain



the same until discharged by due course  
of law

O'Melroy & Hauck  
attys for plaintiffs

Bill of Particulars to wit

"Old Jug" "Moutank"

J. H. H. Walker & Co

May 31<sup>st</sup> 1866

To Docketing	\$ 75.00
" 25 lbs White Lead	4.00
" 1 Seam Brush	50
" 40 lbs Oakum @ 20¢	8.00
" 12 Gal S. Oil	1.50
" 4 days Caulking	20.00
	<u>\$ 109.00</u>

Affidavit to wit

State of Illinois  
City of Cairo  
Alexander County

Chas. F. Stellis one of the partners  
of the firm of W. H. Walker & Co, Campford  
of William H Walker, Charles F. Stellis and  
Doan St. Goldsmith State on oath  
that the foregoing bill of particulars  
is a true and just account of materials,  
supplies and labor furnished and bestowed  
by them in repairing and furnishing of  
said Jug "Moutank" at the request  
of J. P. McGuire as agent of said  
boat; and that the said Jug "Moutank"



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"is justly indebted to them in sum of  
"One Hundred and nine dollars therefor  
"Charles F. Heller  
"Sworn to before me this 27<sup>th</sup>  
"day of July A.D. 1866  
"Alfred H. Brown Clerk"

Whereupon there was issued out of  
the clerk's office of said Court a  
Warrant of attachment which is  
in the words and figures following to-wit:

"State of Illinois }  
"City of Cairo } ss:  
"County of Alexander }

"The People of the State of Illinois  
"To the City Marshal of said City. Greeting  
"Whereas Charles F. Heller one of the partners  
"of the firm of W. H. Walker & Co. Composed of  
"William H. Walker Charles F. Heller & Isaac  
"A. Gadsden. Hath complained on oath to  
"Alexander H. Brown Clerk of the Court  
"of Common Pleas of the City of Cairo,  
"Illinois, that The tug Montauk is justly  
"indebted to them the said W. H. Walker & Co.  
"in the sum of One Hundred and nine  
"Dollars. And the said Plaintiffs  
"having filed their precept and bill of  
"particulars of the above demand verified  
"by affidavit according to the act in such  
"case made and provided, - We therefore  
"Command you that you seize the said tug



'Mantank' to be found in your City, or so  
 'much of her tackle, apparel and furniture  
 'as shall be of value sufficient to satisfy  
 'the said debt and Costs, according to said Com-  
 'plaint. and such Tug tackle, apparel and  
 'furniture so seized in your hands to secure  
 'as so provide that the same be liable to  
 'further proceedings thereupon, according to law,  
 'at a term of the Court of Common Pleas of  
 'the City of Cairo, to be holden at Cairo within  
 'and for the City of Cairo on the First Mon-  
 'day of October next so as to compel the  
 'said Tug 'Mantank' to appear and answer  
 'the complaint of the said W. H. Walker & Co.  
 'and we further Command you that you sum-  
 'mon the said Tug 'Mantank' the owner or  
 'owners thereof if he or they shall be found  
 'in your City personally to be and appear before  
 'the Court of Common Pleas of the City of  
 'Cairo on the first day of the next term  
 'thereof to be holden at the Court House  
 'in Cairo, in said County on the First Mon-  
 'day of October next, to answer unto said  
 'W. H. Walker & Co. in a plea of ~~assault~~  
 'to the damage of said plaintiffs as is  
 'said in the sum of One Hundred & Six  
 'dollars. And have you that and there this writ  
 'with an endorsement thereon, in what manner  
 'you shall have executed the same  
 'Encl  
 'Witness Alexander H. Irons  
 'U S Her Stamp 50¢ Clerk of our said Court



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and the Seal thereof at Cairo aforesaid this  
28th day of July A.D. 1866

Chas H Brown  
Clerk

And thereupon said warrant of attachment  
was by the said City Marshal returned into  
the Clerk's office with the following endorse-  
ment thereon to wit

Executed the within warrant of  
attachment by reading the same to Thomas  
A. J. Withrow Captain and Master of the with  
"Dug Montauk" and also by attaching  
the "Dug Montauk" and all her apparel and  
tackel, which said Captain Thomas A. J. Withrow  
giving Thomas H. Halliday as bond and security  
for said "Dug Boat, Montauk" was thereby  
released from my custody this 28th day  
of July A.D. 1866

John Hagan City Marshal

Jun 2<sup>55</sup>

Bond to wit

Know all men by these presents that  
we Thomas A. J. Withrow Captain and  
Master of "Dug Montauk" as principal  
and Thomas H. Halliday as security are  
held and firmly bound unto John Hagan  
City Marshal of the City of Cairo, Illinois  
and his successor in office in the  
penal sum of Two Hundred and Eighteen  
Dollars, to which payment will and truly  
to be made our heirs, executors,



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"and administrators, finally by these presents,  
"Sealed with our seals and dated this 28th  
"day of July A.D. 1866

The Condition of the above  
"alligation is such that whereas, Charles F.  
"Kelly is one of the partners of the firm of W.  
"H. Walker & Co composed of William H Walker  
"Charles F. Kelly & Isaac St. Galdsmith did  
"on the 28<sup>th</sup> day of July A.D. 1866 Cause to be  
"issued out of the Court of Common Pleas  
"of the City of Cairo, a Warrant at the suit  
"of said W. H. Walker & Co and against said  
"Dug Montauk directed to the City Marshal  
"of said City of Cairo to execute: And  
"whereas said Marshal has this day executed  
"said warrant by attaching said Dug-  
"Montauk's her stock, machinery, apparel &  
"furniture and the said Captain is desirous  
"of releasing the same from said attachment

Now if said Dug Montauk her  
"stock, machinery, apparel and furniture  
"shall be forthcoming to answer whatever  
"judgment may be rendered in said suit  
"of W. H. Walker & Co against said Dug  
"Montauk under said seizure, then this  
"alligation shall be null and void otherwise  
"to be and remain in full force and  
"virtue

"That A. J. Withrow Capt  
"Shr Dug Montauk Esq  
"That W. Halliday Esq



And afterwards he wit: on Tuesday the  
Eleventh day of September A.D. 1866 there  
was filed in the Clerk's office aforesaid  
Court a declaration in Assumpsit which  
is in the words and figures following to wit

State of Illinois In the Court of Common  
City of Cairo 3 J. H. of the City of Cairo  
Alexander County 3 October Term 1886  
William H. Waller Charles J. Stelli Ed  
Loose & Galdenith doing business under  
the firm and partnership name of W. H.  
Waller & Co by Melbrey & A. A. Cook their attorneys  
Complain of the Dug Montauk defendant  
summoned &c of a plea of Dismissal on the  
Case on promises for that whereas the said  
defendant to wit on the 1<sup>st</sup> day of June 1886  
at to wit the City of Cairo and County  
aforesaid being indebted to the said plaintiff  
in the sum of \$109 dollars for divers  
goods wares and merchandise before that  
time sold and delivered by the plaintiff  
to the defendant at its request and in  
the further sum of \$109 dollars for the  
labor and services of the plaintiff by him  
before that done and performed in and  
about the business of the defendant at  
its master request and in the further  
sum of \$109 dollars for so much money  
before that time laid out and expended  
by the plaintiff for the use of the defendant



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at its request and in the further sum of  
\$109 dollars for so much money found to be due  
from the defendant to the Plaintiff upon an  
account then and there stated between them  
and being so indebted it the said defendant  
in consideration thereof afterwards to wit:  
on the day and year aforesaid at the City  
in the County aforesaid undertook and  
promised the Plaintiff to pay them the  
said sum of money when requested yet  
though often requested the said defendant  
hath not paid said sum of money but  
voluntarily neglects and refuses so to do to the  
damage of said Plaintiff of \$109 dollars  
wherefore they being suit &c

O'Meara & Hauck  
Plffs attys

Caps of account

The Sug Montauk

J. W. H. Macker & Co. Dr

To Goods sold &c delivered

" " Work &c Labor

" " Money laid out and expended

" " account stated

And afterwards to wit: on Tuesday  
the 2<sup>d</sup> day of October A.D. 1866  
there was filed in the Clerk's office  
of said Court a demand and motion  
which are in the words and figures following  
to wit:-



Demurrer to writ  
State of Illinois In the Ct of Com  
City of Cairo 3<sup>rd</sup> Pleas of 1<sup>st</sup> City  
Oct. T. 1866-

The Tugboat  
N. H. Haller & Co. 3<sup>rd</sup> Plaintiff

And the said deft comes and  
defends the wrong and injury taken  
and says that the said declaration and  
each and every count and part thereof are  
not sufficient in law

Leavin Marshall & Gilbert  
attys for Deft  
And do defend ant shows the following  
Special causes of demurrer-

Motion to wit

State of Illinois In the Court of Com  
City of Cairo 3<sup>rd</sup> Pleas of the City  
of Cairo Octo Term 1866

N. H. Haller & Co. 3<sup>rd</sup> Plaintiff  
The Tugboat 3<sup>rd</sup>

And the said defendant comes and moves  
the Court to dismiss said suit for variance  
between the writ Bill of particulars and  
declaration as filed in this cause



Wayne Marshal & Gilbert  
Attys for dft

Thereupon the following proceedings were had  
and order made and entered of record in  
Cause by said Court in the words and figures  
following to wit:

W. H. Walker & Co  
vs  
J. H. Walker & Co  
as  
Defendants

This day came the parties by their respec-  
tive attorneys and this Cause came on to be  
heard upon the motion of defendant to dismiss  
this Cause from the docket for variance between  
the writ and declaration, and upon the Cross  
motion of Plaintiff to amend the declaration  
herein by precept and the Court being now  
fully advised in the premises is of opinion  
that said motion ought to be and the same  
is hereby annulled and that said Cross  
motion ought to be and the same is hereby  
allowed and Cause continued.

And afterwards to wit on  
Friday the Tenth day December A.D. 1866  
the Plaintiff filed in the Clerk's office of  
said Court his amended declaration which  
is in the words and figures following to wit:



State of Illinois } In the Court of Common  
City of Cairo } Pleas October Term AD 1866  
Alexander County }

William H Walker Charles P. Kellogg Geo Isaac  
H Gardsmith doing business under the firm  
name of W.H. Walker & Co. Plaintiffs Complain of  
the "Jug 'em out" defendant of a Plea of Trespass  
on the Case on promises:

For that whereas the said defendant  
being a water Craft navigating the rivers border-  
ing upon this State bent upon to wit on  
the 4th of June AD 1866 at to wit the City  
of Cairo, County of Alexander the State of Illinois  
was indebted to the said Plaintiff in the  
sum of One Hundred and nine Dollars for  
materials supplied and delivered to the said  
water Craft defendant, and in the further  
sum of One Hundred and nine Dollars for  
work and labor done and performed at and  
about said Steamboat defendant at the  
instance and request of the said water  
Craft defendant by the request of said  
Steamboat defendant to wit J. P. McGinn  
and being so indebted if the said water  
Craft defendant in consideration of the  
premises on the day and year aforesaid  
by force of the Statute in such case  
made and provided became liable and  
thereunto undertook and promised to  
pay the said sum of One Hundred and  
nine Dollars when therunto requested.



"Yet the said defendant not regarding its said  
 "liability as aforesaid has not as yet paid  
 "the said sum of One Hundred and nine dollars  
 "or any part thereof to the said plaintiffs or  
 "either of them or any one of them although  
 "after requested so to do but has hitherto wholly  
 "neglected and refused so to do to the damage  
 "of said plaintiffs of One Hundred and nine dollars  
 "and therefore they sue &c

"O'Melroney & Hoack  
 "for plaintiffs

1866

"June 4

The Dry Mount

"J. H. N. Waller Esq

"On materials supplied. \$109 00

" " Work and Labor 109 00

"The defendant will take notice that the  
 "account heretofore filed on the 28th  
 "day of July A.D. 1866 is the one which  
 "only the plaintiff

"O'Melroney & Hoack  
 "for plaintiffs"

And afterwards to wit on Tuesday the  
 Eighth day of January A.D. 1867 there  
 was filed in the clerks office of said  
 Court a demurrer to the plaintiffs amended  
 declaration herein which is in the words  
 and figures following to wit;



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"State of Illinois } In the Court of Common  
"Alexander County } Pleas of the City of Cairo  
"City of Cairo } Term 1867  
"H. H. Walker & Co.

" } Suit by warrant  
"The Ing Montauk }

"And the said defendant by Haynie M<sup>rs</sup>  
"its attorney says that said amended de-  
"claration is not sufficient in law and for  
"Special Cause of demurrer defendant says  
"1<sup>st</sup> said declaration is informal, and def-  
"ective

Haynie Marshal & Githens  
"attys. for defts."

And afterwards to wit: On Wednesday the  
9th. day of January of the January Term  
A.D. 1867 at said Court the following proceed-  
ings were had and order made and entered  
of record in said Cause by said <sup>Court</sup> to wit,

"H. H. Walker & Co. } Attachment by  
" } Warrant  
"The Ing Montauk }

"This day came the respective parties by  
"their attorneys and the Cause came on  
"to be heard upon the demurrer of  
"defendant to the plaintiffs amended  
"declaration herein and the Court being now  
"fully advised in the premises overrules  
"said demurrer."



And therefore the defendant filed in the  
Clerk's office of said Court his pleas  
which are in the words and figures  
following to wit:

State of Illinois } In the Court of Common  
"City of Cairo" } Pleas of said City  
"Dated Term 1867-

"W. H. Walker & Co."

"The Tug Montauk" } suit by warrant

"And the said defendant by Haynie & Co.  
its attys comes and defends the wrong and  
injury where &c and says that said defendant  
did not undertake and promise in manner  
and form as the said plaintiffs have in  
this said declaration thereof complained  
against said defendant, and of this said  
defendant puts itself upon the Country &c  
Haynie & Co  
Attys for defts.

Said Plffs doth the like

"O'Melveny & Houck"

for plffs.

And for further plea in this behalf  
by leave &c the said defendant by Haynie  
& Co its attorneys comes and defends the  
wrong and injury where &c and says acts  
now because it says that the said defendant  
was not at the time when &c a water craft  
navigating the rivers bordering upon this State



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"in manner and form as in said declaration  
"alleged and of this the said defendant puts  
"itself upon the Country &c,

Hearne, M & S  
attys for deft.

"And the said plaintiff doth the like,

"O'Melvin & Bouck  
for plff."

And afterwards to wit: on Monday the 21<sup>st</sup> day of  
January A.D. 1867, of the January Term A.D.  
1867, of said Court, the following further proceedings  
were had and order made and entered on record  
in said cause by said Court viz:

"W. H. Walker & Co

"

S.

"The Day "Montauk"

Attachment

"This day again came the parties by their respective  
"attorneys and this cause, came on to be heard upon  
"the motion of defendant to continue this cause  
"until Court in course, and the court being now  
"fully advised in the premises is of opinion, that  
"said motion ought to be and the same is hereby  
"sustained,



And ~~thereupon~~<sup>afterwards</sup> to wit on Tuesday the 28<sup>th</sup> day of May of the May Term AD 1867 of said Court the following<sup>further</sup> proceedings were had and order made and entered of record in said Cause by said Court as follows to wit:

M. L. Walker & } Attachment  
vs }  
The J. M. Montauk } Warrant

This day came the parties by their respective attorneys and this cause came on to be heard upon the motion of defendant to continue this cause until Court in cause. and the Court being well fully advised in the premises is of opinion that said motion ought to be and the same is hereby overruled.

And afterwards on Wednesday the Twenty Ninth day of May of the May Term AD 1867 the following<sup>further</sup> proceedings were had and order made and entered of record in said Cause by said Court as follows to wit:

M. L. Walker & } Attachment  
vs }  
The J. M. Montauk } Warrant  
This day again came the parties by their respective attorneys and ~~they~~ by consent of the parties and leave at the Court the



plea of defendant heretofore filed herein  
<sup>are by said defendant withdrawn</sup>  
and leave ~~to the court~~ given the defendant  
to move the Court to dismiss this Cause  
from the docket for want of jurisdiction  
which motion is therupon entered,

And afterwards to wit on  
Thursday May Thirtieth of the May  
Term 1867 of said Court the follow-  
ing <sup>further</sup> proceedings were had and order made  
entered of record in said Cause by said  
Court as follows to wit

W. H. Waller Esq. Attachment  
vs  
The Sug Montauk Esq. Warrant

This day again came the parties by their  
respective Attorneys and this Cause came  
on to be heard upon the motion of  
defendant to dismiss this Cause from  
the docket for want of jurisdiction  
and the Court having heard the argument  
of Counsel and being now fully advised  
in the premises is of opinion that  
said motion ought to be and the  
same is hereby accorruled

And now to wit at the time and place  
first herein aforesaid the following  
further proceedings were had and order  
made and entered of record in said Cause  
by said Court as follows to wit:



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William K. Waller  
Charles P. Nellis  
Isaac H. Giddens  
Jr of W. H. Walker  
I  
Attachment  
by  
Warrant

"The Jug Montano"

"And now on this day again came the  
"Plaintiffs by O'Melroy & Coack their  
"attorneys, and the defendant being now  
"three times solemnly called came not but  
"made default, and the Court having heard  
"the evidence and being now fully advised in  
"the premises, finds the issue for the plain-  
"tiffs and assesses their damages in the  
"premises at the sum of One Hundred  
"and Nine (\$109) and thereupon the defendant  
"by its Counsel <sup>comes and</sup> moved the Court in arrest  
"of Judgment herein, and the Court after  
"hearing the argument of Counsel and being  
"now fully advised in the premises is of  
"opinion that said motion ought to be <sup>and</sup>  
"the same is hereby overruled. It is there-  
"fore considered by the Court that the  
"said Plaintiffs have and recover of the  
"said Defendant the aforesaid sum  
"of One Hundred and Nine (\$109) Dollars  
"their damages so assessed as aforesaid  
"together with their costs in this behalf  
"expended and that in default of pay-  
"ment Special Execution may issue and  
"and the property seized be sold to—



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satisfy this judgment. The defendant  
thereupon prayed the Court for an appeal  
to the Supreme Court, which is allowed  
upon the said defendant's entering into  
bond in Thirty days from this date in the  
sum of Two Hundred (\$200) Dollars, with  
security to be approved by the Clerk.

And afterwards to wit on Friday  
the Twenty Eighth day of June A.D. 1867  
the defendant filed in the Clerk's office of  
said Court an appeal Bond which is  
in the words and figures following to wit -

Know all men by these Presents, That  
We William S. Hareday Secours of the  
Tug Ottantank as principal and  
Thomas W. Hareday as security are  
held and firmly bound unto William H.  
Walker, Clark P. Stells and Isaac Galt-  
Smith partners doing business under the  
name and style of W. H. Walker & Co.  
in the penal sum of Five Hundred Dollars  
for the payment of which sum well and  
truly to be made to the said W. H. Walker &  
their administrators, executors or assigns  
the said obligors bind themselves their ad-  
ministrators and executors, jointly severally  
and firmly by these presents signed and  
sealed and dated the 27th day of June  
A.D. 1867



Page 20.  
The Condition of the above obligation  
is such that whereas the said W. H.  
Walker Esq at the May Term A.D. 1867  
on the 4th day of June A.D. 1867 of  
the Court of Common Pleas of the  
City of Cairo, in the State of Illinois,  
in a certain cause then and there pen-  
ding wherein said W. H. Walker Esq  
were plaintiff and the said J. M. Montauk  
was defendant did render a judgment  
against said J. M. Montauk for the sum  
of One Hundred and Nine Dollars and  
Costs of suit from which judgment the  
said William P. Halliday owner of said  
J. M. Montauk has prayed an appeal  
to the Supreme Court of the State of  
Illinois. Now if the said William P. Halliday  
shall well and truly pay or cause to be  
paid the said judgment costs interest &  
damages in case said judgment shall  
be affirmed, and shall also prosecute said  
appeal to effect then this obligation shall  
be null and void otherwise to remain in  
full force and virtue.

William P. Halliday Esq

Thomas H. Halliday Esq

Approved by us this 27th day of June  
1867

Alex H. Froin  
Clerk



STATE OF ILLINOIS, }  
CITY OF CAIRO, } SS.  
ALEXANDER COUNTY. }

I, ALEXANDER H. IRVIN, Clerk of the Court of Common Pleas of the City of Cairo, hereby certify that the foregoing is a true transcript of the proceedings had and ordered made and entered of record in said cause, by said Court, as copied by me from the records in my office.



In Testimony Whereof, I have hereunto set my hand and affixed the Seal  
of said Court, this Fifth  
day of July A. D. 1867.

A. H. Irvin Clerk.

*Fee for Record \$10.  
Pd by Alex. Irvin*



# Errors assigned.

1. The Court erred in overruling Defendants motion to dismiss said Cause for want of jurisdiction
2. The Court erred in entering a default against Defendants
3. The Court erred in ~~entering~~ ~~default~~ overruling defendants motion in arrest of judgment
4. The Court erred in rendering judgment against ~~Defendants~~
5. The Court erred in not dismissing said action for want of jurisdiction.

W. J. Allen & Green & Gelbert  
for Appellants.

and ~~now~~ Court agree by ~~J. Allen & Green & Gelbert~~  
for Appellants & finding in error & stay in  
said proceeding & hence there is no error in  
O. Henry & Green & Gelbert for

Filed June 2, 1868.  
At St. Louis Mo.  
Wm. J. Green & Co.

30/2

The City of St. Louis  
Wm. H. Walker

W. H. Walker  
The City of St. Louis  
Record



~~Beane & Co.~~ This was an action of  
assumpsit brought to the Court of Common  
pleas of the City of Ohio at the October term  
1866, by William H. Walker and company,  
against the Steam Eng "Montauk", under  
~~the direction of the court in the form of a~~  
~~judgment in the case of~~ the act of  
the General Assembly of February 16<sup>th</sup>  
1857, called the <sup>Steam Boat</sup> "Wauont act". Notes Supp.  
789.

A motion was made by defendants,  
to dismiss the cause for want of jurisdiction  
which was overruled, and the defendants  
saying nothing further in bar of the action,  
judgment was rendered against the  
Plaint by default, and damages assessed  
to be hundred and nine dollars, the  
amount of the Plaintiffs' demand.

The principal error relied on  
to remove the judgment, is, ~~that~~ in sustain-  
ing the jurisdiction of the Common Pleas.

It is contended by the appellant, that  
the contract, to which these promissory  
were had, was a maritime contract, and  
the remedy exclusively committed to the  
Courts of Admiralty and Maritime Jurisdiction.

We had occasion to examine and discuss  
this question in the ~~late~~ Case of Williams <sup>vs.</sup> ~~appellant~~  
Rogan decided at January term 1868, and decided



At some extent, the decisions of the Supreme Court of the United States thereon, which we found to have fluctuated very much, the early cases concerning the jurisdiction of the State Courts, whilst the later cases, that of the Baker Taylor & Wallace 411, and the R. D. Rice vs Treavor id. 555, denied such jurisdiction.

We have no inclination to <sup>go over again</sup> ~~traverse~~ the ground we ~~traversed~~ <sup>transacted</sup> in that case, and will merely state the conclusion at which we arrived.

The pleadings therein, shewed upon their face, that the steamer Wounded against, was a domestic vessel, and the supplies, for which the action was brought, were furnished her at her home port.

On the authority of the case, The Gunner Smith & Wheeler 438, which holds that the jurisdiction of the Admiralty in cases where the repairs have been made or repairs furnished to a foreign ship, or to a ship in the ports of the State to which she does not belong the general maritime law gives a lien on the ship as security, and the claimant can maintain a suit in the Admiralty to enforce his right, but as to repairs or supplies in the port on State to which the ship belongs, the case was governed altogether by the local law of the State, as no lien is implied unless it is recognized



igned by that law, and as <sup>by</sup> one ~~provision~~  
~~provision~~ statute, no lien was expressly  
created by the contract for furnishing sup-  
plies, and as none could be implied, it  
would follow, as other supplies were furnished  
to a domestic vessel at the same port, a  
Court of Admiralty had no jurisdiction, and  
consequently the case was within the  
jurisdiction of the State Courts for them.  
Must be a remedy ~~there~~ <sup>there</sup>, and our  
Act of 1857, was framed to give one,  
and of a summary character. The  
Commissioner, that the provisions of that  
Act were but an application of the prin-  
ciples of the ordinary attachment laws,  
to the case of vessels upon owners was  
unknown, and <sup>was</sup> ~~is~~ rather a mode of ser-  
vice of process on the owners through his  
property. He could not then sue, nor  
can we now why it ~~was~~ <sup>is</sup> not competent  
for the Legislature of the several States,  
to make service on the property equivalent  
to service on the person, and as objections  
for jurisdiction.

The reason of the ruling of the Supreme  
Court of the United States on this question, seems  
to be founded on that clause of the Constitution  
of the United States, which gives to the Congress  
the power to regulate Commerce with foreign



actions and among the several States. Sec. 8  
Article 1. This is apparent from the case of  
The New Jersey Steam Navigation Co. vs. The  
Merchants Bank of Howard 392, where it  
was said that the exclusive jurisdiction  
of the Court, in Admiralty cases, was conferred  
on the National government, as closely con-  
nected with the grant of the Commercial  
Power, in being a Maritime Court institu-  
ted for the purpose of administering the  
Law of the Seas, and the Court says, "there  
seems to be ground therefore, in extending  
its jurisdiction, in some measure, within the  
limits of the grant of the Commercial Power."  
And in Allen et al. vs. Stearns 21 Ch.  
246, it was held the admiralty jurisdiction  
did not extend to a case where there was  
a shipment of goods from a port in one State  
to another port in the same State, both  
being in this country. The Chief in that  
case stated, that the goods in question,  
were shipped at the port of Two Rivers  
in the State of Wisconsin, to be delivered  
at the port of Milwaukee in the same State.

In another case from California,  
which was a proceeding in Remedy in the District  
Court of that State against the Steamboat  
Salish to recover a balance of an amount  
for coal furnished the boat under the



law of California, the Steamboat being engaged, exclusively, in trade within that State the Court said, "We have determined to leave all these cases depending upon State Laws, and not arising out of the Maritime Contract, to be enforced by the State Courts. As in respect to the completely internal Commerce of the State which is the subject of regulation by their Municipal Laws; contracts growing out of it, should be left to be dealt with by its own tribunals." Maguire vs. Card. 110 251.

Now it is distinctly announced as the ~~sound~~ doctrine, that ~~in~~ contracts, strictly relating to the purely internal Commerce of a State, <sup>are</sup> not ~~a~~ subjects of admiralty jurisdiction, but are left to be enforced by the State Tribunals.

If the vessel be a foreign vessel, and such is its character if it plies between this State and another State, then ~~these~~ <sup>are</sup> contracts made with it ~~are~~ Maritime Contracts, and must be enforced in the Admiralty; if she is a domestic vessel, and the Contract is made with her in her home port, admiralty has no jurisdiction, and must must be had for its enforcement to the State Tribunals. What the judge



Assumption of seafaring are connected with the  
Commerce between the States, and are <sup>entitled</sup> ~~entitled~~  
to the rights, <sup>and</sup> ~~and~~ privileges of such Commerce,  
~~and~~ the last are not, and in their  
movements, do not affect such Commerce.  
~~They are~~ Engaged <sup>as they are</sup>, wholly, in the domestic  
Commerce of a State, ~~and~~ contracts with  
them, are cognizable by the Courts of the  
State.

The act of the Legislature of 1857,  
is not therefore obnoxious to the objection  
raised against it, but is a legitimate  
exercise of the legislative power of the  
State, on a subject entirely domestic, and  
in no way affecting the Trade or Com-  
merce with other States or foreign nations.

We have <sup>now</sup> ~~no~~ doubt of the authority  
of our Legislature to ~~to~~ enact a Law giving  
Material-men a lien, to be enforced  
in rem against domestic vessels ~~the~~  
engaged in Commerce wholly within  
the borders of the State. Now we have, that  
they have power and authority to grant to  
Material Men and Purchasers, a lien  
on the building they may erect, by a  
promising <sup>in rem</sup> against the building. Both  
are a proper exercise of State legislative  
functions, and <sup>not</sup> ~~not~~ in conflict with the  
Constitution of the United States, and no



in preference with the exclusive jurisdiction  
of the Admiralty Court, was confining, in  
any manner, concurrent jurisdiction on  
the State Courts, and was not opposed  
to the doctrines announced in the cases  
cited of the Moses Taylor and Ed  
Line Sopra, and <sup>in</sup> full harmony with  
repeated divisions of the Supreme Court  
of the United States.

~~As~~ The question remains, <sup>had the</sup>  
~~therefore~~ <sup>Court,</sup> in view of the principles here  
announced, jurisdiction?

In the case of Williamson  
vs Rogan Sopra, the proceedings  
showed on their face that the vessel  
was a domestic vessel and that the  
supplies were furnished to her in her  
home port. The jurisdiction was  
therefore apparent.

In the case before us, there  
is no such showing. There is no  
admission in any part of the record  
that the "Jay Mastick" was a domestic  
vessel ~~and~~ or that the supplies were  
furnished her at her home port, or  
that port was her home port.

It is insisted by appellee,  
that the Court will make every presumption  
that the Court below had jurisdiction, and



unless the Court presume, the "Tug" to be a  
foreign vessel, the judgment must stand,  
and further, he insists, that unless some thing  
appears in the record, or some thing is argued  
why the Court had not jurisdiction, this Court  
~~will~~ will not examine the Court below had  
not jurisdiction, and if there be a state of  
case conceivable or possible, consistent with  
jurisdiction this Court will sustain the judg-  
ment, and particularly so, where a motion  
is made, argued and overruled, and no  
file of exceptions, or other matters preserved  
for review.

The general principle is  
undoubtedly <sup>truly</sup> stated ~~thus~~ by appellate\*,  
that the ~~presumption~~ every presumption is to  
be made in favor of the jurisdiction of a  
Court of general jurisdiction, as is the  
Court of Common Pleas of the City of Coles,  
is a Court of general, yet limited jurisdic-  
tion, and the presumption applies to that  
Court. ~~But~~

In this case, the question of jurisdic-  
tion was distinctly <sup>by motion to dismiss</sup> made by appellant, in  
that Court and <sup>the motion</sup> ~~that~~ is fully preserved  
in the <sup>record</sup> Court. The Court, <sup>in considering</sup> ~~overruling~~ the motion,  
had, necessarily, to inquire into the facts  
material to the action; and the papers filed  
in it, from the process to the declarations

\* when the question comes up  
collaterally.



Certain no agreement that the "Fry" was a domestic vessel and that the supply was furnished in the home port, consequently, jurisdiction did not appear in the proceedings to let the Court in motion. To that Court it should have been made to appear, by the proceedings, affirmatively, that ~~it~~ it was a case cognizable by the State Tribunal. Had the rule action avowed the fact that the "Fry" was a domestic vessel, and the supplies furnished her at her home port, in the absence of all evidence to the contrary, the jurisdiction would have been established, and the finding of the Court, then being no bill of exceptions, could not be enquired into by this Court, and jurisdiction would be preserved.

In cases like this where on a given state of facts, jurisdiction is acquired by a State Court, to the exclusion of an Admiralty Court, those facts must be affirmatively stated on the Principles that he who claims a right, must assert it, and establish the right. ~~Morgan~~  
~~Morgan~~ looking at these proceedings improper to be a case of criminal jurisdiction that is not <sup>from</sup> a fact rather ~~a matter~~ to have established. It had been brought his case, by proper answers,



within the law. This he has not done and  
consequently, the property must be  
recovered.



50 - 44

The Tug Montauk  
vs

Halker et al.

opinion

Pres. Ch. J.

✓

A. J. E.

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# IN THE SUPREME COURT,

FIRST GRAND DIVISION.

JUNE TERM, A. D., 1868.

THE TUG "MONTAUK," Appellant,  
vs.  
WILLIAM H. WALKER, et als, Appellees. } APPEAL FROM CAIRO COURT OF COMMON PLEAS.

## BRIEF.

### I.

This is a suit under "Steamboat Warrant Act," of February 16 1857, (*vide Seate's Comp.*, 799,) against a water craft *itself*, navigating "the navigable waters of the United States," for repairs made by the appellees, at the request of *the Master of the boat*.

### II.

In *The Hine vs Trevor*, 4 Wallace, 568-572, the U. S. Supreme Court decide:

1st. That the Admiralty Jurisdiction given to the Federal Courts by the Constitution, extends over and covers the entire navigable waters of the United States.

2d. That where the U. S. District Courts have original cognizance of Admiralty causes, by virtue of the act of 1789, *that cognizance is exclusive*, and no State Court can exercise it, with the exception of such concurrent remedy as is given by the *common law*.

3d. That the remedy pursued in the case now before this Court, "is in no sense a common law remedy," &c.

### III.

If the "repairs" in question were made at other than the "*home port*" of the vessel, it must be conceded that the court had no jurisdiction in the premises, and such a proceeding as the one in question could not be sustained; for, it is well settled law, that all *such* contracts are *maritime* and of Admiralty cognizance; Admiralty providing a remedy, both *in rem* to enforce the lien, AND *in personam* against the owners.

*Conkling's Admiralty*, chap. 2, pgs. 73-79; *Abbott on Snipping*, 143, and notes; *the brig Nestor*, 1, *Sumner*, 74; *the Hinde vs. Trevor*, 4, Wallace, 555, &c.

### IV.

The authorities cited establish these propositions, to-wit:

First, That all contracts of material men for repairs, made at the request of the master, to a vessel navigating "the navigable waters of the U. S.," are, as a *general rule*, maritime contracts; and that repairs made at the "*home port*" form the *exception*, (if exception there is.)

Second, That (saving to State Courts their common law remedies) the Federal Courts have *exclusive* original Jurisdiction in Admiralty over all such contracts for repairs, *except*, (if exception there is,) in cases where the repairs are made at the "*home port*."

Third, That (saving their common law remedies) the State Courts have no jurisdiction over suits for material men for such repairs, *unless*, (if at all,) the repairs were made at the vessel's "*home port*."

It was therefore necessary for the appellees, who contend for "the exception," to bring their case *within* "the exception" by proper averments, showing that the repairs in question were made at the "*home port*," before the State Court could assume jurisdiction. *This*, they failed to do. The record no where shows that the repairs were made at the "*home port*," and the Court could not *assume* that said repairs were so made, in the absence of any averment to that effect. Hence, this proceeding not being "a common law remedy" and the State Court having no jurisdiction to proceed in the premises, or oust the Federal Court of its *exclusive* jurisdiction, *unless* the repairs were made at the "*home port*;" and plaintiffs (below) having failed to show that the repairs were made at the "*home port*," there was nothing in the record to justify this proceeding in the State Court against the vessel itself, *in rem*, and the Court should have dismissed the proceedings.

### V.

But, we insist that whether the repairs in question were made at "the home" or a "foreign" port, in either case, it was a *maritime* contract—"a cause of Admiralty cognizance," and the State Court had no jurisdiction to proceed in the premises. While it could undoubtedly have entertained a suit against the owners of the boat, as at common law, it could not enforce any *new* remedy given by statute against the boat itself and *unknown* to the common law.



1

It may be true that Admiralty implies no *lien* and furnishes no remedy *in rem.* in favor of the material man making repairs at "the home port": but because of this, it does not follow that such contracts are not *maritime*, or the subject of admiralty cognizance.

2

In order to solve the problem we are not called on to decide what are the material man's *rights*, in admiralty, under such a contract, viz: whether or not the Admiralty law gives him a *lien*, and if so, the nature and character of that *lien*; nor are we called on to decide what particular *remedy*, or *remedies* the admiralty affords in such cases; but, totally disregarding the peculiar *rights and remedies* under that law, after it takes hold of the contract, the simple subject of enquiry is *this*, viz: "Is the contract such a one as Admiralty will assume jurisdiction over and enforce?" The *manner* of enforcing it—the peculiar *remedy* provided and the *rights* of the respective parties in the enforcement thereof, are *all* questions foreign to the enquiry. We need not pause to enquire whether the Admiralty law will imply a *lien* in such cases or *not*: nor is it necessary for us to ask the *particular kind of remedy* afforded, whether it be *in rem.* or *in personam*, or *both*. The *only* question should be "Will the Courts of Admiralty enforce this contract?" "Does the Admiralty law recognise such a contract and provide a remedy for its enforcement?" If so, then it is the subject of Admiralty cognizance, and, *being* the subject of Admiralty cognizance, it *must* be a maritime contract for, of *such contracts only* can courts of Admiralty entertain jurisdiction.

3

In the "*Adam Hine*" case above cited, the U. S. Supreme Court, the Court of final resort in all cases of conflict of authority between State and Federal laws, say "If the facts of the case before us in this record constitute a *cause of Admiralty cognizance*, then the remedy by a direct proceeding against the vessel belonged to the Federal courts alone, and was excluded from the State tribunals." Thus we see that the simple and only enquiry for this court, in the case now before it, is *this*, viz: "Is the repairing of a vessel, navigating the navigable waters of the United States, by a material man, at her "*home port*," at the request of her *master*, "*a cause of admiralty cognizance*?" Will Courts of Admiralty assume jurisdiction over it? Does the admiralty law provide a remedy? Can the material man go into our Courts of Admiralty and enforce this contract? If so, then the State courts can not enforce the same in any manner except by such proceedings as are known at common law.

4

It may be true that the Admiralty law, assuming jurisdiction over a certain class of contracts, attaches to *one* a right, a *lien*, that it does not to *another*; and gives an *additional* remedy in the one case which is not permitted in the other; but still it will *enforce* both in its own peculiar manner, attaching to each the rights and incidents belonging to it.

But, to hold that, *because* Admiralty withholds certain rights as incident to the contract in the one case, and gives but *one* remedy for the enforcement of that contract, *therefore* the States can, by attaching to that contract incidents unknown to Admiralty, and by creating a *new* remedy peculiar to admiralty, but not allowed by the rules of admiralty for the enforcement of such contract, confer upon the State court jurisdiction over what was heretofore considered admiralty cases, would be to sap the very foundation of Admiralty jurisdiction.

If permitted so to do, there is no branch of admiralty jurisdiction, no subject matter now resting exclusively within the cognizance of the courts of Admiralty of this country, but what the State courts could in the course of time acquire jurisdiction over. The States, by changing the established rules of admiralty, by enlarging the rights of individuals as defined by the general admiralty law, by providing new and different remedies than those given by the courts of admiralty, by allowing suits *in rem.* in *all* cases, where the admiralty law says the proceedings shall only be by proceeding *in personam*, and by conferring upon the State courts the power to enforce such newly recognized rights by administering such newly created remedies, could soon exercise complete control over every subject matter now conceded to be exclusively of admiralty cognizance.

"That a case of collision between two steamboats is an admiralty cause, has never been doubted," say the Supreme Court in "*Adam Hine*" case; yet, in such a case, the admiralty law requires that the collision must have been caused by the fault of the opposite party, and *there must have been no want of ordinary care* to avoid it on the part of the complainant, before the injured party can recover in admiralty. Supposing then our State Legislature enacts that the injured vessel *shall* recover although there was want of ordinary care on the part of the complainant, &c., and that the State courts might enforce the same by a direct proceeding against the vessel causing the injury. Here, then, would be a case in which the State would create a right and provide a remedy which admiralty law failed to recognize, and as a natural consequence of this enlarged right and remedy, State courts would assume jurisdiction over cases of collisions, and so on *ad infinitum*.

We think, upon the principle decided in "*Adam Hine*" case, that the only true enquiry in order to determine whether a cause is the subject of admiralty cognizance, is, "Does the admiralty law take cognizance of the subject matter thereof, and afford a remedy." If so, then the State courts may exercise concurrent jurisdiction to the extent of their *common law remedies*, but can not go beyond this, and enforce any *new* remedy *unknown* to the common law.

5.

In the late cases before the Supreme Court of Missouri, the record shows *affirmatively* that the "supplies," &c., were furnished at the "*home port*," and by request of the owners of the boat.

From the reasoning of the Court in those cases, it would *seem* that the Court concluded that such contracts were maritime, because Admiralty implied no *lien* and afforded no remedy *in rem.* Whereas, the true test is "Does Admiralty take *any* cognizance and provide *any* remedy for the enforcement of, such contracts.



6.

That the subject matter of this suit, the making of repairs by a material man to a vessel navigating the navigable waters of the U. S., is a cause of general Admiralty cognizance, seems to us well established by the authorities, as also by the practice of our Admiralty Courts from their first establishment in this country. Such contracts could *always* be enforced in an Admiralty Court.

7.

"The nature and character of the contract or service decide whether they are within the Jurisdiction of Admiralty, and *not* the place of performance, whether on land or water." (3 *Blatchf. C. C. R.*, 528.)

But whatever general rule may be laid down on the subject, we must concede that the *best*, and perhaps the only reliable test, is the general and uniform practice of the Courts of Admiralty themselves. There certainly is no better criterion by which to determine whether or not a contract is maritime and of Admiralty cognizance, than the simple fact that Courts of Admiralty do now, and have *always*, enforced such contracts.

8.

It matters not whether the supplies or repairs were furnished in "the home" or "the foreign" port; in both cases Courts of Admiralty in England and in America have always assumed cognizance of the contract and enforced the same.

"The maritime law of Continental Europe makes no distinction between cases of domestic and foreign ships nor between supplies furnished in a home port and abroad." (*Vide Conklin's U. S. Admiralty, hereafter cited.*)

The tendency of the Admiralty Courts, however, of England and America, appears to be to create a distinction. While they take cognizance of *both* class of cases, as maritime contracts, they recognize two remedies where the repairs are made abroad, viz: one *in personam* and one *in rem*, and only one remedy where the repairs are made at the "home port, viz: a suit *in personam* against the owners or master upon the contract. The only distinction made, is that the Admiralty law implies a lien in the one case and not in the other. How could they even entertain a suit *in personam*, unless the contract were maritime, and the subject of Admiralty cognizance?

9.

Even in *this* country it has repeatedly been decided that wherever the State law creates a lien in favor of the material man furnishing supplies or making repairs at "the home port," then our Courts of Admiralty have jurisdiction over, and *can* and *will* enforce that lien. And the Admiralty jurisdiction over such liens has been always placed upon the ground, "Not that the State law can confer jurisdiction on the Courts of the United States; but, if they give a lien, and the contract be *maritime*, then the lien, being attached to it, can be enforced according to the mode of administering remedies in Admiralty. The State law furnishes the rules to ascertain the rights of the parties; and thus assists in the administration of the proper remedies, *where the jurisdiction is vested by the laws of the United States.*" (*Vide vol. 1, Conkling's Ad., and authorities hereafter cited*.) How could our Admiralty Courts enforce such lien, unless the subject matter, the contract itself, in respect to which that lien is created, were maritime? It is only *because* the contract itself is *maritime*, Courts of Admiralty enforce the lien.

10.

The "Admiralty Rules" adopted for the U. S. District Courts, in respect to Admiralty causes of civil and maritime jurisdiction, expressly provide that suits *in personam* may be brought in those Courts, in all cases, even where the supplies, &c., are furnished and performed at the "home port." These Courts certainly have no jurisdiction over such cases, except as Courts of Admiralty. That they do now, and have, since their establishment, entertained such suits, is an undisputed fact.

11.

We conclude that the uniform practice in this country, and a review of the authorities justify us in saying that the contract sued on in the case before the Court, is a *subject of Admiralty cognizance*; that Admiralty does assume jurisdiction over it and afford a remedy—that it is therefore a *maritime* contract, and the State Courts can not enforce the same by any direct proceeding against the vessel itself. And in support of our views, we cite:

*Conkling's Admiralty*, vol. 1, chap. 1, pgs. 19, 20, 21, &c.; *Conkling's Admiralty*, vol. 1, chap. 2, pgs. 73, 74, 75, 76, 77, 78, 79, 82, &c.; (*Conkling reviews the whole subject.*); *Perox et al. vs. Varian*, 7, *Peters*, 339-341; *Orleans vs. Phabus*, 11, *Peters*, 183; *Gen. Smith*, 4, *Wheaton* 438-443; *brig Nestor*, 1, *Sumner*, 74-79; *schooner Marion*, 1, *Story*, C. C. 68; *Read vs. Hull*, &c., 1 *Story*, C. C. 246; *Harper vs. New Brig*, 1, *Gilpin*, 536; *Stephen vs. The Sandwich*, 1, *Peters' Admiralty*, Dec. 233, and *no.e.*; *Woodruff et al. vs. The Levi Dearbourne*, 4, *Hall's Am. Law Journal* 97; *De Lovio vs. Boit*, 2 *Gallison's Rep.* 398-406, 461 and 467-475; *Abbott on Shipping*, p 2, ch 3, secs. 9-13; also pgs 162-3; *Ben. Ad.*, sec 362 and 364; *Newb Ad.* 305. *Rules of Practice for the U. S. Dist. Courts in Admiralty*. Rule 12, as originally adopted and afterwards amended in 1858.

WM. J. ALLEN and GREEN & GILBERT.  
Attorneys for Appellant.



44  
The Lieg. "Montauk"

vs

Wm H Walker et als

Brief, Appellant

abr. of 775  
and of. of appn  
all together

Filed 4th July 1888  
R. H. Williams  
clerk



# Supreme Court of the State of Illinois.

## FIRST GRAND DIVISION.

June Term, A. D. 1868.

### ABSTRACT.

THE TUG MONTAUK, *Appellant*,  
vs.  
WILLIAM H. WALKER, *et als.*, *Appellees* } Appeal from Cairo *Court of Common Pleas.*

Page 1 Appellees, plaintiffs, under the firm name of W. H. Walker & Co., commence their action under the Steamboat Warrant Act, against the tug "Montauk," by filing in the "Court of Common Pleas, of the city of Cairo," on the 27th day of June, 1866, their precipe, bill of particulars and affidavit.

<sup>1</sup> *Precipe* duly entitled in the cause. "*Suit by Warrant. Demand \$109,*" and requesting the clerk to issue warrant therein to the marshal of said court "directing the seizure of the said tug "Montauk," or such part of her apparel, &c., as may be necessary to satisfy the above demand, and to detain the same, until discharged by due course of law."

<sup>2</sup> *Bill of Particulars.* Account in the usual form—"The Tug Montauk to W. H. Walker & Co., Dr."—and setting out various items of account, for docking, caulking, materials, &c., amounting to \$109.

<sup>2 & 3</sup> *Affidavit* of plaintiff, entitled, "State of Illinois, city of Cairo, Alexander county," setting forth "that the foregoing bill of particulars is a true and just account of materials, supplies and labor furnished and bestowed by them, in repairing and furnishing of said tug Montauk, at the request of S. P. McGuire, as agent of that boat; and that the said tug Montauk is justly indebted to them in the sum of \$109, therefor."

<sup>3 & 4</sup> *Warrant* of attachment, issued out of said court, dated July 28, 1866, in unusual form employed under the Steamboat Warrant Act, commanding the marshal to seize said tug Montauk, or so much of her apparel, &c., "as shall be of value to satisfy said debt and costs," &c., and to summon said tug Montauk, "the owner or owners thereof," &c., in a plea of assumpsit, damages \$109.

<sup>5</sup> *Officer's Return*, showing that he had executed said warrant, July 28, 1867, by reading the same to Thomas Withron, "captain and master of said tug," and attaching said tug, her apparel, &c.; and that said tug was released, on same day, on bond of said captain.

<sup>5 & 6</sup> *Bond*, mentioned in the officer's return, and in usual form under the Warrant Act.

<sup>7 & 8</sup> Declaration filed by plaintiffs, vs the tug "Montauk," defendant, September 11, 1866, containing usual counts for "goods, wares and merchandise," "labor and services," "money counts," and "account stated;" and, in all respects, similar to an ordinary declaration filed against an individual. The tug Montauk being therein declared against as an individual, and her existence as a steamboat or water craft being entirely ignored.

<sup>8 & 9</sup> Special demurrer filed October 2, 1866, by defendant, "*The Tug Montauk,*" to said declaration.

<sup>9</sup> Motion filed October 2, 1866, by defendant, to dismiss suit for variance between writ, bill of particulars and declaration.

<sup>10</sup> Order of the court, October 2, 1866, overruling defendant's said motion to dismiss and sustaining plaintiff's cross-motion to amend declaration by precipe, and cause continued.

<sup>10</sup> Amended declaration filed December 7, 1866, by plaintiffs, in the words and figures following, to-wit:

<sup>11</sup> "STATE OF ILLINOIS, } SS.

CITY OF CAIRO. }

In the Court of Common Pleas, October Term, 1866.

William H. Walker, Charles F. Nellis, and Isaac N. Goldsmith, doing business under the firm name of W. H. Walker & Co., plaintiffs, complain of the tug 'Montauk' defendant, of a



plea of trespass on the case of promises: For that, whereas, the said defendant, being a water craft, navigating the rivers bordering upon this State, heretofore, to-wit: on the 4th of June, 1866, at, to-wit: the city of Cairo, county of Alexander and State of Illinois, was indebted to said plaintiffs in the sum of \$109, for materials supplied and delivered to the said water craft, defendant; and in the further sum of \$109, for work and labor done and performed at and about said steamboat, defendant at the instance and request of the said water craft, defendant, by the request of said steamboat, defendant, to-wit: S. P. McGuire; and being so indebted, it the said water craft, defendant, in consideration of the premises, on the day and year aforesaid, by force of the statute in such case made and provided, became liable, and, then and there, undertook and promised to pay said sum of \$109, when thereunto requested. Yet, said defendant, not regarding its liability as aforesaid, has not as yet paid said sum of \$100," &c., in usual form, and copy of account sued on.

12 & 13 Demurrer (special) filed by defendant, January 8, 1867, to plaintiff's amended declaration.

13 Order of court, overruling said demurrer, January 9, 1867.

14 Pleas filed by defendant, January 19, 1867, "general issue" and special plea, denying that defendant was a water craft, navigating the rivers bordering upon this State.

15 Order of court, January 21, 1867, continuing cause on application of defendant.

16 Order of court, May 28, 1867, overruling motion of defendant for continuance.

16 Order of Court, May 29, 1867, in words and figures following, to-wit:

"W. H. WALKER & CO.,  
vs.  
THE "TUG MONTAUK." } Attachment by Warrant.

"This day again came the parties by their respective attorneys, and by consent of the parties and leave of the court, the pleas of defendant, heretofore filed herein, are withdrawn, and leave given the defendant to move the court to dismiss this cause from the docket for want of jurisdiction; which motion is thereupon entered."

17 Order of the court overruling said defendant's said motion to dismiss for want of jurisdiction, May 30, 1867.

18 Order of court, May 30, 1867, showing that defendant is called and makes default. Court hears proof, "finds the issue for the plaintiffs, and assesses their damages at \$109." Defendant moves in arrest of judgment. Motion overruled. Judgment rendered vs. defendant for \$109 and costs, and special execution ordered to issue, and property seized, sold, &c., in default of payment. Appeal prayed by defendant, and allowed upon filing bond in sum of \$200, in thirty days, to be approved, &c.

19 & 20 Appeal bond filed and approved, June 27, 1867.

#### ERRORS ASSIGNED.

First. The court erred in overruling defendant's motion to dismiss said cause for want of jurisdiction.

Second. The court erred in entering a default against defendant.

Third. The court erred in overruling defendant's motion in arrest of judgment.

Fourth. The court erred in rendering said judgment against defendant upon said declaration of plaintiffs.

Fifth. The court erred in not dismissing said action, and refusing to entertain further cognizance of the same, for want of jurisdiction.

Sixth. Neither the plaintiff's precipe, bill of particulars, warrant or declaration, showed plaintiff's action to be such a one as said court could assume jurisdiction over; but on the contrary, thereof, the record in the case showed affirmatively that said court had no jurisdiction in the premises; and it was error in said court to assume jurisdiction thereof. Wherefore appellant prays that said judgment may be reversed, and said action dismissed for want of jurisdiction.

ALLEN and GREEN & GILBERT,  
for Appellant, Defendant below.



For Appellant Defendant below

ALLEN and GREEN & GILBERT,

must not be reversed, and said action dismissed for want of jurisdiction.  
it was error in said court to assume jurisdiction thereof. Wherefore appellant prays that said judgment be reversed and said action dismissed for want of jurisdiction in the premises; and action to be such a one as said court could assume jurisdiction over; but on the contrary, thereof.

Sixth. Neither the plaintiff's prayer, bill of particulars, warrant or declaration, showed plaintiff's

of the same for want of jurisdiction.

Seventh.

First. The court erred in not dismissing said action and refusing to entertain further proceedings

Fourth. The court erred in rendering said judgment against defendant upon said declaration of

Third. The court erred in overruling defendant's motion in arrest of judgment.

Second. The court erred in entering a default against defendant.

Respectfully submitted

First. The court erred in overruling defendant's motion to dismiss said cause for want of jurisdiction.

Second. The court erred in rendering said judgment against defendant upon said declaration of

Third. The court erred in overruling defendant's motion in arrest of judgment.

Fourth. The court erred in entering a default against defendant.

Fifth. The court erred in not dismissing said action and refusing to entertain further proceedings

Sixth. Neither the plaintiff's prayer, bill of particulars, warrant or declaration, showed plaintiff's

of the same for want of jurisdiction.

Seventh. The court erred in rendering said judgment against defendant upon said declaration of

Eighth. The court erred in overruling defendant's motion in arrest of judgment.

Ninth. The court erred in entering a default against defendant.

Tenth. The court erred in not dismissing said action and refusing to entertain further proceedings

Eleventh. Neither the plaintiff's prayer, bill of particulars, warrant or declaration, showed plaintiff's

of the same for want of jurisdiction.

Twelfth. The court erred in rendering said judgment against defendant upon said declaration of

Thirteenth. The court erred in overruling defendant's motion in arrest of judgment.

Fourteenth. The court erred in entering a default against defendant.

Fifteenth. The court erred in not dismissing said action and refusing to entertain further proceedings

Sixteenth. Neither the plaintiff's prayer, bill of particulars, warrant or declaration, showed plaintiff's

of the same for want of jurisdiction.

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Nineteenth. The court erred in entering a default against defendant.

Twentieth. The court erred in not dismissing said action and refusing to entertain further proceedings

Twenty-first. Neither the plaintiff's prayer, bill of particulars, warrant or declaration, showed plaintiff's

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Twenty-second. The court erred in rendering said judgment against defendant upon said declaration of

Twenty-third. The court erred in overruling defendant's motion in arrest of judgment.

Twenty-fourth. The court erred in entering a default against defendant.

Twenty-fifth. The court erred in not dismissing said action and refusing to entertain further proceedings

Twenty-sixth. Neither the plaintiff's prayer, bill of particulars, warrant or declaration, showed plaintiff's

of the same for want of jurisdiction.

The Judge of the Court

Wm. H. Walker

Abstract

8849

Filed June 2. 1868  
Wm. H. Walker, Clerk



# Supreme Court, First Grand Division.

JUNE TERM 1868.

THE STEAM TUG MONTAUK, *Appellant*,  
vs.  
WALKER & COMPANY, *Appellee*.

## Brief for the Appellee,

1st. The question of jurisdiction of the Court involving the Constitutionality of the Act of 1857, is settled by the case of Williams vs. Hogan, decided at January term of this Court, 1868. The law is Constitutional for supplies in the home port.

2nd. The boat is substituted for the persons of the owners, and our attachment boat law for supplies in the domestic port, is an amplification of our statutory attachment proceeding. See Loy vs. F. X. Aubay, 28th Illinois, p. 415 and 416; and also Williamson vs Hogan, not yet reported.

3d. The "pleadings must be as in other cases of process served." See laws of 1857, p. 105, sec. 6.

This Court will make every presumption that the Court below had Jurisdiction.

Service, appearance pleas, and subject matter are within the Act of 1857.

Unless this Court presumes the 'Tug' to be a foreign vessel, then the judgment, we think, must stand. See law 1859, page 8, Court Common Pleas, Cairo. See Wells vs. Mason, 4 Scam. 84.; Kennedy vs. Greer, 13 Ill. 432.

Unless something appears in the record, or something is averred why the Court had not jurisdiction, this Court will not assume the Court below had not jurisdiction. If there be a state of case conceivable or possible, consistent with jurisdiction, this Court will sustain the judgment, and particularly so, where a *motion* is made, argued and overruled, and no bill of exceptions or other matters preserved for review.

O'MELVENY & HOUCK,  
For Appellee.



Supreme Court, First Grand Division

JUNE TERM 1898

THE STATE OF NEW YORK  
IN SENATE

Report for the Session

of the Board of Regents of the University of the State of New York  
for the year ending June 30, 1898.

ALBANY: J. B. LIPPINCOTT & CO. PRINTERS.  
1898.

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1898.

June 24<sup>th</sup> July 1898  
W. H. Lippincott



# Supreme Court, First Grand Division.

JUNE TERM 1868.

THE STEAM TUG MONTAUK, *Appellant*,  
*vs.*  
WALKER & COMPANY, *Appellee*.

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O'MELVENY & HOUCK,  
For Appellee.



Supreme Court of the United States

THE STATE OF TEXAS

THE STATE OF TEXAS

WALKER & COMPANY

Brief for the Appellee

The question at issue in this case is whether the Comptroller of the Public Land Office is entitled to the benefit of the statute of 1857 in relation to the sale of public lands.

The case is submitted to the Court for its consideration. The Comptroller of the Public Land Office is entitled to the benefit of the statute of 1857 in relation to the sale of public lands.

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Filed 4<sup>th</sup> July 1868  
R. B. Williams  
Att. Gen.



# Supreme Court of the State of Illinois.

## FIRST GRAND DIVISION.

June Term, A. D. 1868.

### ABSTRACT.

THE TUG MONTAUK, *Appellant*,  
vs.  
WILLIAM H. WALKER, *et als.*, *Appellees* } Appeal from Cairo *Court of Common Pleas.*

Page 1 Appellees, plaintiffs, under the firm name of W. H. Walker & Co., commence their action under the Steamboat Warrant Act, against the tug "Montauk," by filing in the "Court of Common Pleas, of the city of Cairo," on the 27th day of June, 1866, their precipe, bill of particulars and affidavit.

<sup>1</sup> *Precipe* duly entitled in the cause. "*Suit by Warrant. Demand \$109,*" and requesting the clerk to issue warrant therein to the marshal of said court "directing the seizure of the said tug "Montauk," or such part of her apparel, &c., as may be necessary to satisfy the above demand, and to detain the same, until discharged by due course of law."

<sup>2</sup> *Bill of Particulars.* Account in the usual form—"The Tug Montauk to W. H. Walker & Co., Dr."—and setting out various items of account, for docking, caulking, materials, &c., amounting to \$109.

<sup>2 & 3</sup> *Affidavit* of plaintiff, entitled, "State of Illinois, city of Cairo, Alexander county," setting forth "that the foregoing bill of particulars is a true and just account of materials, supplies and labor furnished and bestowed by them, in repairing and furnishing of said tug Montauk, at the request of S. P. McGuire, as agent of that boat; and that the said tug Montauk is justly indebted to them in the sum of \$109, therefor."

<sup>3 & 4</sup> *Warrant* of attachment, issued out of said court, dated July 28, 1866, in unusual form employed under the Steamboat Warrant Act, commanding the marshal to seize said tug Montauk, or so much of her apparel, &c., "as shall be of value to satisfy said debt and costs," &c., and to summon said tug Montauk, "the owner or owners thereof," &c., in a plea of assumpsit, damages \$109.

<sup>5</sup> *Officer's Return*, showing that he had executed said warrant, July 28, 1867, by reading the same to Thomas Withron, "captain and master of said tug," and attaching said tug, her apparel, &c.; and that said tug was released, on same day, on bond of said captain.

<sup>5 & 6</sup> *Bond*, mentioned in the officer's return, and in usual form under the Warrant Act.

<sup>7 & 8</sup> Declaration filed by plaintiffs, vs the tug "Montauk," defendant, September 11, 1866, containing usual counts for "goods, wares and merchandise," "labor and services," "money counts," and "account stated;" and, in all respects, similar to an ordinary declaration filed against an individual. The tug Montauk being therein declared against as an individual, and her existence as a steamboat or water craft being entirely ignored.

<sup>8 & 9</sup> Special demurrer filed October 2, 1866, by defendant, "*The Tug Montauk,*" to said declaration.

<sup>9</sup> Motion filed October 2, 1866, by defendant, to dismiss suit for variance between writ, bill of particulars and declaration.

<sup>10</sup> Order of the court, October 2, 1866, overruling defendant's said motion to dismiss and sustaining plaintiff's cross-motion to amend declaration by precipe, and cause continued.

<sup>10</sup> Amended declaration filed December 7, 1866, by plaintiffs, in the words and figures following, to-wit:

<sup>11</sup> "STATE OF ILLINOIS, } SS.

CITY OF CAIRO. }

In the Court of Common Pleas, October Term, 1866.

William H. Walker, Charles F. Nellis, and Isaac N. Goldsmith, doing business under the firm name of W. H. Walker & Co., plaintiffs, complain of the tug 'Montauk' defendant, of a



plea of trespass on the case of promises: For that, whereas, the said defendant, being a water craft, navigating the rivers bordering upon this State, heretofore, to-wit: on the 4th of June, 1866, at, to-wit: the city of Cairo, county of Alexander and State of Illinois, was indebted to said plaintiffs in the sum of \$109, for materials supplied and delivered to the said water craft, defendant; and in the further sum of \$109, for work and labor done and performed at and about said steamboat, defendant at the instance and request of the said water craft, defendant, by the request of said steamboat, defendant, to-wit: S. P. McGuire; and being so indebted, it the said water craft, defendant, in consideration of the premises, on the day and year aforesaid, by force of the statute in such case made and provided, became liable, and, then and there, undertook and promised to pay said sum of \$109, when thereunto requested. Yet, said defendant, not regarding its liability as aforesaid, has not as yet paid said sum of \$100," &c., in usual form, and copy of account sued on.

12 & 13 Demurrer (special) filed by defendant, January 8, 1867, to plaintiff's amended declaration.

13 Order of court, overruling said demurrer, January 9, 1867.

14 Pleas filed by defendant, January 19, 1867, "general issue" and special plea, denying that defendant was a water craft, navigating the rivers bordering upon this State.

15 Order of court, January 21, 1867, continuing cause on application of defendant.

16 Order of court, May 28, 1867, overruling motion of defendant for continuance.

16 Order of Court, May 29, 1867, in words and figures following, to-wit:

"W. H. WALKER & CO.,  
vs.  
THE "TUG MONTAUK." } Attachment by Warrant.

"This day again came the parties by their respective attorneys, and by consent of the parties and leave of the court, the pleas of defendant, heretofore filed herein, are withdrawn, and leave given the defendant to move the court to dismiss this cause from the docket for want of jurisdiction; which motion is thereupon entered."

17 Order of the court overruling said defendant's said motion to dismiss for want of jurisdiction, May 30, 1867.

18 Order of court, May 30, 1867, showing that defendant is called and makes default. Court hears proof, "finds the issue for the plaintiffs, and assesses their damages at \$109." Defendant moves in arrest of judgment. Motion overruled. Judgment rendered vs. defendant for \$109 and costs, and special execution ordered to issue, and property seized, sold, &c., in default of payment. Appeal prayed by defendant, and allowed upon filing bond in sum of \$200, in thirty days, to be approved, &c.

19 & 20 Appeal bond filed and approved, June 27, 1867.

#### ERRORS ASSIGNED.

First. The court erred in overruling defendant's motion to dismiss said cause for want of jurisdiction.

Second. The court erred in entering a default against defendant.

Third. The court erred in overruling defendant's motion in arrest of judgment.

Fourth. The court erred in rendering said judgment against defendant upon said declaration of plaintiffs.

Fifth. The court erred in not dismissing said action, and refusing to entertain further cognizance of the same, for want of jurisdiction.

Sixth. Neither the plaintiff's precipe, bill of particulars, warrant or declaration, showed plaintiff's action to be such a one as said court could assume jurisdiction over; but on the contrary, thereof, the record in the case showed affirmatively that said court had no jurisdiction in the premises; and it was error in said court to assume jurisdiction thereof. Wherefore appellant prays that said judgment may be reversed, and said action dismissed for want of jurisdiction.

ALLEN and GREEN & GILBERT,  
for Appellant, Defendant below.



50-44  
The Luz Montauk

by  
J. M. Walker

Abstract

80	
15	
430	
80	
1290	2500
9080	20
4180600	

Filed June 2, 1868.  
R. A. McBurnie cly

For Attorney Defendant before  
ATTEN and GREEN & GILBERT,

most may be returned, and said action dismissed for want of jurisdiction.

it was error in said court to assume jurisdiction thereof. If proper objection had been made and judgment in the case showed affirmatively that said court had no jurisdiction in the premises; and action to be such a one as said court could assume jurisdiction over; but on the contrary, the court Sixth. Neither the plaintiff's master, bill of particulars, warrant of execution, showed judgment, or the same for want of jurisdiction.

Fifth. The court erred in not dismissing said action, and refusing to entertain further proceedings thereon.

Fourth. The court erred in refusing, and judgment against defendant upon said declaration of

Third. The court erred in overruling defendant's motion in arrest of judgment.

Second. The court erred in entering a default against defendant.

KNOWNS ASSIGNED.

A check paid the said defendant, June 25, 1867.

First in check paid to be returned, etc.

of \$100 and costs and charges, according to order to issue and property seized, sold, etc., in the said motion to arrest of judgment. Motion overruled. Judgment rendered for defendant for costs of court, \$129.00, 1867, showing that defendant is called and makes default. Court then May 30, 1867.

Order of the court overruling said defendant's said motion to dismiss for want of jurisdiction.