

Case No. 3,738.
[10 Ben. 628.]¹

THE DEER.

District Court, S. D. New York.

Nov. Term, 1879.

MOTION FOR EXECUTION—LACHES—SETTLEMENT.

A suit was brought by a married woman as owner of a canal-boat against a steamboat to recover the value of the boat and her cargo, lost by negligence of the steamboat. A decree was made in her favor on March 4, 1871, for \$2,737.69 damages and \$331.61 costs. In May, 1871, an agreement to compromise was made between the proctors, and the stipulators paid \$2,000 in settlement. The owners of the cargo were parties to the settlement and the husband of the libellant was present and consented to it and also her proctor, who has since died. In March, 1879, a motion for leave to issue execution against the stipulators was made on behalf of the libellant, on her affidavit that she did not authorize the settlement and received no part of the \$2,000: *Held*, that the facts as to the settlement created so strong a presumption of acquiescence on the part of the libellant that it was not overcome by her affidavit, and that in any event she could only enforce the decree for the amount of her interest in it, and, as she had not shown what that was, her motion must be denied.

T. C. Campbell, for libellant

J. Langtree, for stipulators.

CHOATE, District Judge. This is a motion for leave to issue execution to enforce a

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decree against stipulators. The suit was brought by the libellant, Mary A. Corwine, to recover the value of a canal-boat and her cargo, lost through the fault of the Deer. [See Case No. 3,737.] A final decree was entered in favor of the libellant on the 4th day of March, 1871, for \$2,737.69 damages and \$331.61 costs. An appeal was taken but never proceeded further than the giving and filing of notice of the appeal. In the month of May, 1871, negotiations for a compromise of the suit were pending between the proctors representing the parties, and on the 18th day of said month the stipulators paid in settlement of the suit \$2,000. It is proved that the owners of the cargo of the canal-boat, or those who had succeeded to their interest, were parties to this settlement: that it also was consented to by the proctors for the libellant, the law firm of Platt, Gerard & Buckley, and that the husband of the libellant, who had been the master of the canal-boat, was present at and consented to the settlement. The final decree does not show what part of said damages, if any, was awarded for the value of the canal-boat. The pleadings in the case cannot be found and there is no evidence produced to show what amount of damages this libellant claimed in her own right. Enough appears to show that she was suing on behalf of the owners of the cargo on board the canal-boat as well as on her own behalf. This motion was not made until the 28th day of March, 1879. The libellant has sworn that she did not authorize the settlement and received no part of the \$2,000.

Under these circumstances the motion must be denied. It clearly would be improper and unjust towards the stipulators, even if the settlement was unauthorized by the libellant, to enforce the decree for any sum beyond the amount recovered by the libellant on her own account. Moreover, the extraordinary delay on her part in connection with the facts that her husband was present at the settlement and that her proctors, especially through Mr. Buckley, now dead, took part in it creates so strong a presumption of acquiescence on her part that I think it is not overcome by her testimony. In any event the burden is on her of showing what interest she had in the decree.

¹ [Reported by Robert D. Benedict, Esq., and Benj. Lincoln Benedict Esq., and here reprinted by permission.]