

13FED.CAS.—10

Case No. 7,090.

THE ISAAC NEWTON.

{Abb. Adm. 588.}<sup>1</sup>

District Court, S. D. New York.

Dec. 27, 1850.<sup>2</sup>

ADMIRALTY—PRACTICE—REFEREE—CONTRACTS—WORK AND  
MATERIALS—PAYMENT—INTEREST.

1. Where a cause is referred to experts to ascertain and report upon facts appertaining to their calling or experience, it is the settled rule, both at law and in admiralty, to adopt the decision of the referees, unless there is a manifest preponderance of testimony against it.
2. Where, by the terms of a contract for work and materials, a part of the contract price is to be paid in instalments as the work advances, the employer is not entitled, on the adjustment of a decree for a balance remaining due

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on the work, to be credited with interest on the payments made by him while it was advancing.

3. Where a party contracting to furnish labor and materials has completely fulfilled the contract on his part in due time, he is entitled to recover in a suit for the compensation stipulated by the contract, interest on the amount due him, at least, from the commencement of the suit.
4. But where, in such case, the right of the party to recover his compensation under the contract is doubtful and contested on reasonable grounds, and the amount due him requires to be adjusted by the proceedings in the suit, interest is only recoverable after the right of the party to recover, and the amount of his recovery have been determined.

[Applied in *Shipman v. State*, 44 Wis. 462.]

5. If in such case the report of referees fixing the amount due to libellant is ultimately confirmed, he will be entitled to interest from the filing the report, although both parties have excepted to the report, and prosecuted their exceptions to a hearing with a view to have it set aside.

[Cited in *Young v. The Orpheus*, 119 Mass. 186.]

This was a libel in rem by "The Allaire Works," a corporation created under the laws of the state of New York against the steamboat Isaac Newton, to recover for an engine, &c, supplied to that boat. The cause was before the court in July, 1847, when a decree was rendered affirming the right of libellants to recover upon their demand, subject to certain deductions to be made in favor of the claimants. The proceedings had at that time are reported [Case No. 7,089]. By the decree then rendered, a special reference was directed to commissioners, to be selected by the parties and approved by the court, of several particulars embraced in the action. The commissioners were directed to ascertain what extra work was done by the libellants beyond that embraced by the contract, and what was the value thereof; what would be the cost of altering and improving the boilers so as to conform them to certain specifications prescribed in the contract; and also what payments were made by the claimants for wharfage, insurance, &c, on the boat, from May 15th to October 8; 1846. On February 20, 1849, by consent of parties, Hon. R. Hyde Walworth, William Kemble, and S. Bartlett Stone, were designated as such commissioners. The commissioners made up and signed their report May 11, 1849; and on July 3d, thereafter, it was filed in court. The findings of the commissioners were as follows:—That the labor and materials charged by the libellants as extra, beyond the contract in the account attached to their libel, for gallow frames and suspension frames, for additional boiler bearers, iron pans for holding cement, lengthening bolts for king posts, braces, white-washing, covering shafts, oil cups, passenger bell and fixtures, bands for casing of cylinder, mahogany for box, fixing chandelier, pawl-wrench and drills, and mercury, were not properly and fairly for appurtenances to the engine or boilers as modern improvements to approved boilers and engines known and used on the Hudson river in the year 1845, but were extra work. That the charges for tools, bells and fixtures, above mentioned, do not embrace any which were necessary tools, fixtures and bells for the said engine. That the fair and reasonable value and worth of the labor and materials so charged for, on October 8, 1846, was the sum of one thousand eight hundred and one dollars and sixty-eight

cents. That no other of the charges for extra work were for work that was extra. That the reasonable cost and expense on October 8, 1846, of so altering and improving the said boilers, according to the said decree, as that they should supply the said engine at least forty pounds of pressure of steam to the square inch of the piston of said engine, with the throttle wide open, and also so as to reduce the consumption of fuel proportioned to that consumed by boilers of approved construction with the modern improvements employed on the Hudson river anterior to November 1, 1845, is the sum of five thousand dollars. That the expense or value of braces or rims to the water-wheels sufficient to render the same secure when the said engine is worked with the power referred to in said decree, is the sum of seven hundred dollars; estimated at the value on October 8, 1846. And that the payments and disbursements actually and necessarily made or incurred by the claimants between the 15th day of May and the 18th day of October, 1846, for wharfage for said steamboat, for insurance on her, and for keeper's wages on board her, amount to the sum of seven hundred and fifty-four dollars and twenty-eight cents. Both libellants and claimants filed exceptions to the report; and the cause now came before the court upon these exceptions.

Mr. Moore, for libellants.

H. S. Dodge, for claimants.

BETTS, District Judge. The exceptions taken by both parties relate substantially to the allowance of \$5,000 made by the commissioners to the claimants, because of the insufficient or defective construction of the boilers by the libellants; the one party contending it is too high, and the other that it is insufficient and short of the injury proved. To this point, it appears, the main attention of the commissioners was directed in taking proofs, and on the argument before them.

The testimony taken in court on the hearing was laid before them, some of the same witnesses were reexamined by them, and additional ones were produced, to the end that this branch of the case might receive the most searching and detailed consideration.

Much of the evidence upon this point was necessarily hypothetical, and, as might be expected, widely variant in its suggestions and inferences. This difficulty was perceived and felt by the court on the hearing, and the reference in the case was directed chiefly in order to have facts of this character presented to men of practical experience,

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who could better appreciate the application and effect of the testimony than the court could hope to do, and whose judgment would be framed with higher advantages for accuracy than the court could expect to command on a hearing in its presence. The commissioners were selected with a view to their qualifications in respect to all matters which were to be brought before them. They have given, it seems, a full and patient hearing to the parties, and the result of their examination of the subjects is expressed in the report signed by them and on file. I do not feel that the argument on the exceptions has brought to my mind any well-grounded cause for disapproving that result.

The commissioners have not particularized the defects they discovered in the construction of the boilers, nor pointed out what changes they regarded as important to be made, nor designated the manner in which the sum of \$5,000, allowed by them on account of the deficiency of the boilers, could be applied to their improvement or alteration so as to produce the amount of steam required by the contract. The order of reference did not enjoin upon them the duty of so doing.

Their attention was most carefully called to the point, on the part of the libellants, that the head of steam demanded, according to the decree, could be readily and certainly secured without any alteration of the boilers, and the witnesses gave in full their theories upon that hypothesis. Their estimates brought the expenses, for any useful changes which could be proposed, down as low as three or four hundred dollars for each boiler.

These theories and estimates were combated by testimony on the part of the claimants, who considered it must cost six or seven thousand dollars for each boiler, to place them in a condition to supply the steam demanded by this engine.

The exposition of the reasons upon which the decree was founded, shows that it was not contemplated by the court to adjudicate the point, that an alteration in the shape or size of the boilers must necessarily be made. The decree indicated distinctly the object to be attained, and which this engine and apparatus (including the boilers) have failed to accomplish, and the advice of competent officers or commissioners was invoked to determine what expense would be necessary to effect that object. Two of them are men of extensive experience in these matters, and their opinions, after hearing all the proofs, both as to the necessity of changes in the construction of the boilers, and the cost involved in such changes, must necessarily have great weight in determining the judgment of the court on the subject. The inquiry related solely to matters of fact and mechanical expediences, and I should distrust any conclusions of my own in variance with the judgment of the commissioners on such particulars.

Had these gentlemen sat with the court in the capacity of auditors, on the hearing, I should have deferred to their judgment on facts of a professional character, as justly entitled to control my own when not palpably in conflict with the testimony. And although in re-perusing the proofs taken at the hearing, and reading over carefully that given before the

commissioners, I might regard it as tending to prove that a much greater outlay would be required to place this engine in the condition stipulated for in the agreement, yet if I had possessed the advantage of a personal conference with them, their explanations of matters merely mechanical, might well have convinced me that my impression was erroneous, and that their opinion was most to be relied upon.

In cases of reference, out of court, to experts to ascertain and report upon facts appertaining to their calling or experience. It appears to be the settled rule of law to adopt their decision, unless there is a manifest preponderance of testimony against it. *Doyle v. St. James' Church*, 7 Wend. 178. Such is also the established usage with maritime courts in reviewing the decisions of inferior tribunals upon matters of fact.

There are various ways, in consonance with the evidence, in which material alterations may be made in the apparatus for generating steam, without an expense exceeding \$5,000, and the judgment of the commissioners, whether these methods would be efficacious and sufficient, is more satisfactory to the court than its own opinion would be, not so aided, upon subjects so purely mechanical and professional.

The minor exceptions were not pressed on the argument and I discover no cause for departing from the conclusions adopted by the commissioners in the allowances made by them to the parties respectively in these particulars.

The report is accordingly confirmed in all its parts.

The libellants insist they are entitled to interest upon the balance which the court may decree them, from the delivery of the vessel and engine to the claimants. The question of costs is also involved in the decree to be finally rendered.

On the 8th of October, at which time the libellants claim their contract was fully performed, they had been paid from time to time, as the work progressed, according to the provisions of the agreement, the sum of \$35,000. The claimants contended, that if an interest account is raised, they are entitled to receive it on these advances.

This claim manifestly cannot be supported. The advances were to be made before the claimants could have any possession or use of the work, and accordingly interest on those advances, or their present value. In relation to the time of the completion of the

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contract, must have entered into the contemplation of the parties, and be deemed adequately provided for in the terms or consideration upon which the work was to be done. In effect, the interest on these payments as respectively advanced, in addition to the price named, \$46,000, would be the stipulated or contract price for the work and materials.

Had the claimants accepted the work on the 8th of October as a performance of the contract, there could be no question of the legal and equitable rights of the parties in respect to interest. It would become, from such delivery, a portion of the unpaid debt due the libellants, continuing to run with the debt until that was satisfied by the claimants. At least, interest would have run from the time the suit was commenced, which was only two days after, notwithstanding the contract was special. *Feester v. Heath*, 11 Wend. 478.

This is on the idea that the agreement is entirely fulfilled on the part of the libellants, and that they are justly entitled to the compensation stipulated; for, as a general rule, interest cannot be enforced on uncertain demands, or unliquidated damages, nor on damages demanded for non-performance of a contract. *Willings v. Consequa* [Case No. 17,766]; *Buckmaster v. Grundy*, 3 Gilman, 626; *Speer v. Van Orden*, 2 Penn. [3 N. J. Law] 652. Nor is interest allowed when more is demanded than is due, or upon uncertain demands which are to be settled by process of law. *Doyle v. St. James' Church*, 7 Wend. 178; *Still v. Hall*, 20 Wend. 51.

In this case, not only was the balance rightfully belonging to the libellants to be settled by process of law, but also a question vital to the right of recovery at all, was in contestation in the suit, with at least reasonable color of grounds of defence on the part of the claimants. They could not, accordingly, be justly required to recognize the demand or make any tender for its satisfaction until after the decree of the court had fixed the right of recovery, and the report of the commissioners had liquidated the amount.

It is true both parties dissent from the report, and by their exceptions appeal to the court to set it aside,—the libellants, because it awards them greatly less than their just dues, and the claimants, because it undervalues the damages they have sustained, and which were to be deducted from the contract indebtedment. Still, according to the ordinary usage of courts, the report of referees must be regarded as liquidating the uncertain damages so far as to afford prima facie evidence that the libellants were entitled to that amount, and to put the claimants to the election of tendering its discharge, or afterwards litigating its recovery at the hazard of interest thereon.

I shall, therefore, allow interest on the balance of \$6,347.40 so reported by the commissioners, at the rate of six per cent, per annum, from July 3, 1849, the day the report was filed in court, and thus became legal notice to the claimants. It is not made to appear upon any evidence before the court, that the very unusual delay in closing this case, which has intervened, since the decision upon the merits, is ascribable to any fault of

the claimants, and accordingly interest will not be carried back further than the term the report was brought into court.

The libellants, as actors, had the efficient control of the cause, and might have speeded its decision at their option. Had their efforts to do so been thwarted by acts of the claimants, an equity might then have arisen to interest on the balance ultimately adjusted, during the period of such interception or procrastination of their suit. Here the delay was either their own or was acquiesced in by them; and affords no equitable ground for the allowance of interest during its continuance.

I discern in this case no principle distinguishing it from those to which the ordinary rule in respect to costs, applies; which is, that the successful party recovers with the amount in his favor, the costs which have accrued in prosecuting his right.

The case has been litigated in good faith, no doubt, on both sides. Had the demand been defeated in toto, full costs would have been awarded in favor of the claimants, and the converse of the principle is properly applied to them when their adversaries are the successful party.

The defence put in issue the right of the libellants to any compensation, or to maintain a suit upon the contract. They may be fairly held to take the advantages of a defence so comprehensive and entire, together with its hazards. If it succeeds, they stand discharged of the suit with their costs; and if it fails, the balance justly reclaimable from them should be paid with the taxable costs created in enforcing its collection.

Decree accordingly.

[Upon appeal to the circuit court the decree was affirmed upon the merits, October 2, 1852. Case unreported.]

<sup>1</sup> [Reported by Abbott Brothers.]

<sup>2</sup> [Affirmed by circuit court. Case unreported.]