

## 2. SAME—AMENDMENT OF JUDGMENT—PATENT No. 21,026.

In an action at law for an infringement of letters patent No. 21,026, (reported in 4 FED. REP. 415,) containing two claims, after the evidence was in, plaintiff abandoned the first claim and a verdict was rendered for the plaintiff for six cents damages and costs, and judgment entered thereon. It appearing that no disclaimer of the first claim of the patent had been filed, the court, upon motion, amended the judgment by striking therefrom the words "with costs."

This was a motion to amend a judgment, entered upon a verdict, by striking therefrom the words "with costs."

In an action at law for infringement of letters patent No. 21,026, (reported in 4 FED. REP. 415,) containing two claims, upon the trial, after the evidence was in, plaintiff abandoned the first claim, and a verdict was rendered for the plaintiff for six cents damages and costs. On February 20, 1883, judgment was entered upon the verdict, and costs assessed at \$322. On March 1, 1883, the court entered this rule to show cause why the judgment should not be amended by striking therefrom the words "with costs;" it having appeared that the plaintiff had not filed a disclaimer of his first claim before suit brought, in accordance with section 973 Rev. St., which provides as follows:

"When judgment or decree is rendered for the plaintiff, in any suit at law or in equity, for the infringement of a part of a patent, in which it appears that the patentee, in his specification, claimed to be the original and first inventor or discoverer of any material or substantial part of the thing patented, of which he was not the original and first inventor, no costs shall be recovered unless the proper disclaimer, as provided by the patent laws, has been entered at the patent-office before the suit was brought."

*Walter George Smith and Francis Rawle*, for the rule.

*N. H. Sharpless*, contra.

THE COURT (McKENNAN and BUTLER, JJ.) made the rule absolute, and ordered that the judgment should be amended by striking therefrom the words "with costs."

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### THE VENUS, etc.

(District Court, S. D. New York. June 5, 1883.)

## 1. COLLISION—ERIE CANAL—STOPPING

In a collision on the Erie canal between the steam-boat V. and the canal-boat M., which was the third boat in a tow on a hawser from a steam-cable tug-boat, where the V. claimed to have rubbed along the port quarter of the boat ahead of the M. through want of room to avoid her, and the V.'s bows

were drawn by the suction of that boat under her stern, so as to throw her in the way of the *M.*, held, upon the facts, that there was sufficient room for the *V.* to avoid the middle boat of the tow, and that she was also in fault for not stopping, if there was in fact any danger of collision with the tow.

2. SAME—MOTION OF STERN.

In heavily-laden boats, under a change of wheel, the motion of the stern in the direction of the wheel held slight and immaterial.

3. SAME—LIABILITY.

Also held, on the facts, that the rubbing of the *V.* against the middle boat was intentional, and that the *V.* was responsible for not taking due care to avoid the *M.*, which followed.

In Admiralty.

*E. D. McCarthy*, for libellant.

*Beebe, Wilcox & Hobbs*, for respondent.

BROWN, J. This libel was filed to recover damages sustained by the canal-boat *Midland*, through a collision with the steam-boat *Venus*, on the Erie canal, in the forenoon of August 13, 1880. The *Midland* was the rear boat of three canal-barges in tow of the steam-cable tug-boat No. 11, attached to each other by hawsers from 120 to 150 feet long. The boats were each nearly 100 feet long, so that the whole fleet was about 800 feet in length. The place of collision was about two miles west of Canestota, where the canal broadens on the heel-path side to about 130 feet in width, the tow-path being unchanged. The tug and tow were coming east; the *Venus* going west. The day was clear and still, and there were no other obstructions in the canal. The *Venus* was proceeding on the tow-path side, *i. e.*, on the right, at about two or three miles per hour, but slackened, as is claimed, to one or two miles on reaching the tow; the tow was going about two to three miles per hour. The *Venus* passed the tug No. 11 with a clear space between of 10 to 12 feet, and the *Independence*, the first of the three boats in tow, by about the same clear space. The second boat in the tow, the *Maine*, is alleged to have been out of line, and on the tow-path side; so that in passing her the *Venus* rubbed along the *Maine*'s port quarter. It is claimed by those in charge of the *Venus* that they shouted to the *Maine* to keep off; that the latter did port her helm; that the first effect of that was to throw her stern still further towards the tow-path, and in the way of the *Venus*; that after the *Venus* struck and rubbed against the *Maine*, the suction of the water in the canal was such as to prevent the *Venus* from getting her bows away from the *Maine*, and that as she rounded the latter's stern the suction was still greater, so as to bring the stem of the *Venus* heading somewhat across the line of the canal; and that although the *Midland* was from 120 to 150

feet astern, and in line with the tow, yet that the Venus could not come round in time to avoid the Midland, but that her stem struck the port bow of the Midland about three feet from her stem, from which blow the latter sank a few minutes afterwards.

When the Venus was seen coming upon the Midland the latter cast off her hawser and her helm was ported. She was in her proper place in line, was properly navigated, and no effort was spared on her part to avoid the collision. She cannot, therefore, be held in fault.

The claimants insist that the general cause of the collision was the unmanageable nature of the cable navigation, the Maine's being out of line, and her unchecked speed; and that the immediate cause was the Maine's port helm throwing her port quarter against the Venus, and the suction then changing the course of the Venus, from which she could not in time recover. The obvious answer to these excuses of the Venus is, as it seems to me, that all these circumstances and causes, whatever they were, in fact, were in full view and well known to those aboard the Venus beforehand, and would all have been avoided by her stopping in due time. If the Maine was so far out of line towards the tow-path as to leave insufficient room for the Venus to pass, that could be clearly seen long before she was reached. If porting her helm tended to throw the stern of the Maine still further towards the tow-path, that tendency was known to those on the Venus when they shouted to the Maine to keep off. I doubt, however, whether there was any appreciable effect of this kind in the case of this loaded tow-boat. A sudden and strong port helm on a small, light boat, having little draught of water and a rudder very large in proportion, would no doubt thus throw the stern at first to port, though this would speedily be offset by the progress of the boat; but in large, heavy boats, with a deep draught of water and comparatively small rudder, this effect of porting upon the stern is inappreciable, as daily observation shows.

All the evidence on the part of the libellant is to the effect that there was plenty of room and to spare for the Venus to pass the Maine without touching her, and that there was room for two boats between the Maine and the tow-path. Several of their witnesses testify that the Venus took a sheer towards the Maine, as though on purpose, after shouting to her to keep over or she would "rib her down."

From the evidence of the respondents themselves, however, I am satisfied that there was no lack of room for the Venus to pass the

Maine without touching her, had there been any *bona fide* endeavor to do so. Their own evidence is that when the Venus struck the Midland the starboard side of the Venus was 35 feet from the tow-path. The port side of the Midland was, therefore, 38 feet from the tow-path, and by their testimony she was in line with the Independence and No. 11, and had not, when struck, gone any to starboard. The width of the canal-boats was about 16 feet; that of the Venus about the same. The respondent's witnesses do not claim, and there is no endeavor to show, that the Maine was at most more than 8 or 10 feet out of line towards the tow-path. If she were 10 feet out of line, the port side of the Maine would have been 28 feet from the tow-path, and there would have still remained this 28 feet space for the Venus to pass; or, allowing 6 feet for the margin by the bank, there would have been a space of at least 6 feet to spare between the Maine and Venus in passing; and this agrees very nearly with Chadwick's estimates. It is claimed on the part of the Venus that she was hugging the tow-path, and that at one time her stern was in the mud of the bank. Precisely when this was is not fixed, nor do I place much reliance upon it. The fact that she passed the first two boats with a space of 10 or 12 feet clear between them, is very strong probable evidence that she was not at that time close in by the tow-path bank. She would naturally take the middle of the open space; and if she did so, so that there was 11 feet on each side of her, that would make the distance of No. 11 and the Independence from the tow-path 38 feet, which accords almost exactly with the position of the Midland, as stated by the witnesses from the Venus, at the time of collision, when, as they say, she had not changed out of line.

No satisfactory reason is given why the Venus did not stop, if there was any difficulty apprehended in passing the Maine. It is said that on backing her propeller would carry her stern out into the canal; but this affords no reason why she should not have been brought to a stand-still (which would not have carried her stern round) before reaching the Maine, if the space to pass her was insufficient. That she did not stop, as required by the rule, is presumptive evidence that there was in fact sufficient space; and if the suction, as she was passing the Maine, was as great as claimed in throwing her bows to port, reversing the propeller was precisely the movement needed to counteract that effect.

Upon the whole evidence I am satisfied the Maine was somewhat out of line, but not enough to interfere with the Venus had she chosen to avoid her; that the Venus designed to inflict a little chas-

tisement upon the Maine for thus being out of line, and purposely ran against her port quarter; and in the excitement of this maneuver she did not take care by backing, as she might have done, to keep out of the way of the Midland; and that she must, therefore, be held answerable for the damage, with costs.

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THE SAMUEL J. CHRISTIAN. (Seven Cases.)\*

(District Court, E. D. New York. April 25, 1883.)

1. PRIORITY OF LIENS—SEAMEN'S WAGES—LIEN FOR DAMAGES—DISTRIBUTION OF FUND.

A claim against a tug for damage to a brig caused her by being run against a pier while in tow of the tug, through negligence of the tug, is not entitled to priority of payment out of the proceeds of the sale of the tug over the claims of the crew of the tug for wages earned prior to the accident.

2. SAME—MATERIAL-MEN'S LIENS.

Claims of material-men for repairs and coal, which were subsisting liens upon the tug at the time of the accident referred to, are superior in rank to a claim for damage arising out of the accident.

3. SAME—PRIORITY IN FILING LIBEL.

This conclusion was not affected by the fact that the libel for damages was filed before the libels of the material-men, the processes in all the cases having been served at the same time.

4. DEMURRAGE—INTEREST.

Interest on demurrage is not allowed.

The decision in the case of *The Maria and Elizabeth*, 12 FED. REP. 627, disapproved.

In Admiralty.

Seven libels were filed against the steam-tug Samuel J. Christian, one of which was that of the crew of the tug for wages, five for claims of material-men for repairs and coal, and one a claim for damage done to a brig, caused her by being run into a pier while in tow of the tug. The tug having been sold at marshal's sale, the question of the priority of the payment of these claims out of the proceeds was settled as appears in the first opinion following. In the case of McNab against the tug, the commissioner in his report disallowed the following items: (1) \$59.90 for a new hawser; (2) \$68.60 for repairs to pumps; (3) \$80 for commissions of J. W. Parker & Co. on advances made to pay for the repairs on the brig, on the ground that the proof was not satisfactory that payment of all the bills was made, and on advances;

\*Reported by R. D. & Wyllys Benedict.