

## HICKS v. OTTO and others.

(Circuit Court, S. D. New York. July 25, 1883.)

## PATENTS FOR INVENTIONS—AMENDMENTS.

Motion for an amendment to answer, and commission to take testimony in a foreign country to prove who is the original inventor of a patent, will not be allowed when the affidavits filed by plaintiff show that there is no evidence to sustain the amendment.

In Equity.

*Van Briesen & Steele*, for defendants.

*Frost & Coe*, for orator.

WHEELER, J. The motion of defendants, now heard, for an amendment of the answer, and a commission to take the testimony of Denton, in London, to show that he, and not Peroni, is the original inventor of improvements in thermometers, patented to the orator as assignee of Peroni, must be denied. While such motions are granted with liberality, some prospect is required that there is evidence to support the amendment which can be had. Here, the affidavit of Denton, filed by the orator in opposition to the motion, stating that he does not claim to be and is not, and that Peroni is, the original inventor, and his refusal to make an affidavit for the defendants to the contrary, on their application, show that there is no such prospect. Motion denied.

## URNER v. KAYTON and others.

(Circuit Court, S. D. New York. August 2, 1883.)

## PATENTS—INFRINGEMENT—MASTER'S FEES—ACCOUNTING.

Where defendants have been adjudged to be infringers, and decreed to account for the gains and profits and damages of their infringement, they must go forward in the accounting and bear the necessary expenses of so doing, including the master's fee.

In Equity.

*John A. Shields*, master, *pro se*.

*Andrew Comstock*, for orator.

*Wetmore & Jenner*, for defendants.

WHEELER, J. This cause has now been heard on motion of the master for payment of his fees on the accounting. It is agreed that his fees amount to \$150. Each party insists that the other should pay them. The question now is, not how the costs shall finally be allowed and taxed in favor of either party against the other, which can be determined properly only at the making of the final decree, but is, which party shall pay these fees in the first instance? As the defend-

ants have been adjudged to be infringers, and decreed to account for the gains, profits, and damages of their infringement, they are to go forward in the accounting and bear the necessary expenses of doing so, among which are the master's fees. This was so held in *Bridges v. Sheldon*, Dist. Vt. Oct. Term, 1879.

Let an order be entered that the defendants pay these fees within 15 days from the entry of the order.

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THE J. C. STEVENSON, now the Stanmore.

(District Court, D. Maryland. June 20, 1883.)

1. SHIPPING—LOSS OF CARGO OF CATTLE—STORM AT SEA—BURDEN OF PROOF—SUITABLENESS OF VESSEL.

Where respondents prove that a steam-ship, on which a lot of cattle were shipped by the libellant, encountered a storm of unusual severity, and show the character of the damage sustained by their vessel and by other steam-ships carrying cattle which encountered the same hurricane, the burden is put upon the libellant of proving that the losses sued for were occasioned by the want of due care in providing a proper ship, and suitable stalls and other fittings, for carrying the cattle.

2. SAME—EVIDENCE.

Upon the whole testimony, considering the contrivances then in use for carrying cattle, and the known risks and uncertainties of the business, and the character of vessels customarily used, it does not appear that the steam-ship in this case would have been considered unsuitable for the business at the time she was so used, or that the fittings were improperly constructed, and no damage can be recovered on that account.

3. SAME—DELAY IN COMING TO PORT FOR CARGO—DAMAGES.

Where a vessel is to arrive at a port and receive a cargo of cattle by a certain day specified, and she does not arrive for several weeks after the appointed time, the only damages that can be recovered on account of the delay, when the vessel is accepted and the cattle shipped, is such expense as may have been incurred for keeping the cattle during the period of delay, and the additional insurance the shipper may have had to pay by reason of the increased risk caused thereby.

4. SAME—DAMAGES A LIEN ON VESSEL.

Where the cattle were actually laden on board under the contract, and reference being specially made to it in the libel, and the ship has obtained the benefit of the contract, it seems that the shipper would have a lien on the vessel for such damages.

In Admiralty.

*Marshall & Hall*, for libellants.

*Brown & Brune*, for respondent.

MORRIS, J. This libel is filed to recover damages for the loss of a large number of cattle shipped by libellant on the steam-ship J. C. Stevenson, on November 13, 1879, to be carried to London, which were lost on the voyage, and for damages resulting from the delay of the steam-ship in arriving at the port of Baltimore to enter upon the voyage. The contract for the shipment of the cattle was as follows: