

thereof to be printed for labels. Four hundred of these were distributed as labels on cambrics, and as circulars, and 14,800 of them were subsequently found in the store in defendant's department, and in his possession or under his control. The court instructed the jury that under these circumstances the defendant was liable to a penalty of one dollar for every sheet of such copy found in his possession or under his control. The verdict was against the defendant for \$14,800, and 6 cents costs. Whereupon the defendant moved for a new trial. McKENNAN, J., was present at the argument of the rule.

H. P. Brown, Ass't Dist. Atty., and *John K. Valentine*, Dist. Atty., for the United States.

A. Sydney Biddle, for plaintiffs.

E. Hunn, Jr., for defendant.

The act of congress (section 4952) securing a copyright to the proprietor of a photograph, and in this case to a firm composed of several persons, and (section 4965) imposing a penalty for infringement, is unconstitutional, since by article 1, § 8, cl. 8, of the constitution, power is conferred upon congress "to promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries," and a mere proprietor is neither an author nor inventor, and a photograph of a natural object, as an elephant, is not a subject for such protection, within the meaning of the constitution.

BUTLER, J. The denial of constitutional warrant for the statute authorizing the plaintiff's copyright, raises an important question. To justify this court in declaring the statute invalid, however, the fact should be reasonably free from doubt. Under the circumstances, I think the question should be left to the court of review.

The other points made are not sustained, and judgment must therefore be entered on the verdict.

Rule discharged.

Vide Sarony v. Burrow-Giles Lithographic Co., ante, 591, [S. C. Daily Register, vol. 23, No. 132,] wherein COXE, J., sustains the constitutionality of the same act in an action for the infringement of a copyrighted photograph of Oscar Wilde.—[REP.]

AMERICAN BELL TELEPHONE Co. v. DOLBEAR and others.

(Circuit Court, D. Massachusetts. August 25, 1883.)

PATENTS FOR INVENTIONS—BELL TELEPHONE.

The Bell telephone is not anticipated by the Reis instrument, and is infringed by the Dolbear apparatus, in which a part of Bell's process is employed.

American Bell Telephone Co. v. Dolbear, 15 FED. REP. 448, affirmed.

In Equity.

Chauncey Smith and J. J. Storrow, for complainant.

Causten Browne and J. E. Maynadier, for defendants.

LOWELL, J. The final hearing in this case was hardly more than a form, because the two questions which are raised by the record have been decided in favor of the plaintiff on motions for preliminary injunction, which were prepared and argued with unusual thoroughness. These questions are: "Whether the telephone described by Reis anticipates the Bell telephone?" and, "Whether Dolbear's apparatus infringes Bell's patent?"

1. I decided in *American Bell Telephone Co. v. Spencer*, 8 FED. REP. 509, that Reis had not described a telephone which anticipated Bell's invention. The same point has since been decided in the same way in England. *United Telephone Co. v. Harrison*, 21 Ch. Div. 720. It is admitted in the present case that the Reis instrument, if used as he intended to use it, can never serve as a speaking telephone, because the current of electricity is constantly broken; and it is essential for the transmission of speech that the current should not be broken. The defendant now testifies that the Reis instrument can be made to transmit speech, under some circumstances, if operated in the way which Bell has shown to be necessary. In 1877 he several times expressed the opinion that Bell made the invention and that Reis did not make it. The experiment made in the presence of counsel, which was intended to prove the correctness of the defendants' present opinion, was an utter failure. But if it be admitted that the Reis instrument is capable of such use to a very limited extent and after a change in its proportions, and when used in a way which the inventor did not intend, still I am of opinion that it was not an anticipation of Bell. The case of *Clough v. Barker*, 106 U. S. 166, [S. C. 1 Sup. Ct. Rep. 188,] would apply to such a state of facts. That case, undoubtedly, is an exceptional one, and its doctrine must be applied with much reserve; but when so applied it will occasionally be useful. It is, that if a certain machine or organization is capable of a certain use only under unusual and, as I may say, abnormal conditions, so that a person of skill and knowledge in the art to which it relates, or a person using the machine, would not, unless by accident, discover that it was capable of such mode of operation, it shall not be considered an anticipation of a machine or organization which is founded upon such mode of operation.

2. At the former hearing in this case before Mr. Justice GRAY and me, we decided that the defendant, whatever the merits of his telephone may be, employs in it a part, at least, of Bell's process. No additional evidence has been given at the final hearing, unless a further explanation of that already given may be called additional; and I remain of the opinion expressed by the presiding justice at that time. *American Bell Telephone Co. v. Dolbear*, 15 FED. REP. 448.

Decree for the complainant.

THE HERCULES.

PHILADELPHIA & READING R. CO. v. WARREN FOUNDRY & MACHINE CO.

SAME v. PERKINS and others.

(Circuit Court, D. Massachusetts. August 14, 1883.

COLLISION—STEAMER—SCHOONER—TORCH—DAMAGES DIVIDED.

The evidence in this case held to sustain the judgment of the district court as to the fault of the steamer in not avoiding the schooner with which she collided, but that the failure of the schooner to exhibit a torch, as required by Rev. St. § 4234, "on the approach of a steam-vessel during the night-time," rendered her also in fault, and that the damages should be divided between the two vessels.

In Admiralty.

Morse & Stone, for claimants.*John C. Dodge & Sons*, for Warren Foundry & Machine Company.*John Lathrop and John C. Dodge*, for Perkins and others.

LOWELL, J. I agree with the district court that the steamer's people have not sustained the burden which rests upon them of proving a change of course on the part of the schooner. It is not easy to understand how they could have mistaken a green light for a red one; but it is still more difficult to believe in so sudden and complete a change by the schooner as would account for the collision. The "stereotyped excuse," as it has come to be called, from an energetic remark of GRIER, J., in *Haney v. Baltimore Steam Packet Co.* 23 How. 291, "always improbable, and generally false," that the sailing vessel changed her course, always seems probable to the persons on board the steam-ship; for, assuming as they do, that they have made no mistake in courses and distances, the necessary inference is that the other vessel has failed in the simple duty of keeping her course. My own observation has taught me that a great many of these accidents happen from a failure to see the approaching vessel, which may be due to a defect in her lights, or to a want of vigilance. In this case, there is no complaint of the side lights, and the vessels were approaching each other at the rate of about a mile in four minutes; and, if the schooner's lights had been seen from the first moment that they were visible, the time would have been short; and one possible explanation of the mistake is that the ships were so near each other when the light was seen that there was hurry and excitement on board the steamer. It is not necessary, however, to decide more than that the night was clear, the schooner had the side lights, and should have been avoided by the steamer.

Upon the other part of the case, I fail to agree with the district judge. The schooner showed no torch, as the statute orders every sailing vessel to do "on the approach of a steam-vessel during the night-time." Rev. St. § 4234. Our sailing rules have not the strict