

URNER v. KAYTON.

(Circuit Court, S. D. New York. August 16, 1883.)

PATENTS FOR INVENTIONS—INFRINGEMENT—COSTS.

Where, in an accounting for profits and damages for infringement of a patent, the orator has recovered on the merits, and the defendant has not prevailed upon any issue upon any distinct item in the case, the costs will not be apportioned, but defendant held liable for the whole amount.

In Equity.

Mr. Comstock, for orator.

Mr. O'Callaghan, for defendant.

WHEELER, J. The defendant, on accounting for profits and damages for infringement of patent, has, under order of court, paid the master's fees, and moves for an apportionment of costs on the final decree for the orator for \$100 profits. The orator has a substantial recovery on the merits for the wrongful invasion of his rights by the defendant. The defendant has not prevailed upon any issue upon any distinct item made in the case, so far as is made to appear. The costs are all the consequence of his wrongful acts for which the orator has recovered, and should be borne by him.

Motion for apportionment denied.

GODDARD v. WILDE and others.

(Circuit Court, D. Rhode Island. May 10, 1883.)

1. PATENT—CONTRACT TO SELL.

Until a contract is set aside a party thereto may be restrained, at the instance of the other party, from selling his patent in violation of the terms of such contract, though the court may be unable to enforce a specific performance of it.

2. SAME—ADEQUATE REMEDY AT LAW.

As the equitable remedy is more practical and efficient to the ends of justice in such cases, an injunction may be granted, although plaintiff has a remedy at law.

3. SAME—REVOCATION OF AUTHORITY.

Such an instrument is a contract and not a power of attorney, revocable at the pleasure of the maker, and is good until set aside upon a proper proceeding.

In Equity. Motion for a preliminary injunction.

Wm. A. Macleod, for complainant.

Chas. A. Wilson, for defendant.

COLT, J. The plaintiff in this case claims the exclusive right to sell within the United States the Wilde patent button, under a contract under seal with the defendant Wilde, the patentee. Subsequent to the date of the contract, Wilde sold a half interest in the patent

to the defendant Bowen, and entered into partnership with him for the manufacture and sale of the button. Goddard now asks that Wilde and Bowen be restrained from selling the button until a full hearing can be had upon the merits of the case.

It is urged in defense that Goddard was guilty of fraud in obtaining the contract. According to the affidavits of Wilde and his wife, this contract was to have no force and effect, but was signed merely to show the good faith of the contracting parties. They claim that the real contract agreed upon was essentially different from this, and that Goddard agreed to have the real contract drawn up and sent to Wilde the next day, when this one was to be returned.

Without expressing any opinion upon the merits of the controversy at this stage of the proceedings, we think the plaintiff is entitled to protection under his contract until it is set aside, and that he may fairly claim that Wilde and his partner should be restrained from selling the button in violation of the terms of an existing contract. *Singer Manuf'g Co. v. Union Button-hole & Embroidery Co.* 6 Fisher, 480; S. C. 1 Holmes, 253.

The objection is also urged that the complainant has a plain and adequate remedy at law, but the equitable remedy is often invoked in cases of this character as more practical and efficient to the ends of justice. *Hill v. Whitcomb*, 1 Holmes, 322; *Wylie v. Cox*, 15 How. 415.

Nor is it true that Wilde can revoke the authority to sell. An instrument of this character is a contract, and not a power of attorney revocable at the pleasure of the maker. It is good until set aside upon a proper proceeding. *Burdell v. Denig*, 92 U. S. 716.

Nor is the objection sound that, because the court may not be able to decree a specific performance in this case, an injunction will not lie. In *Singer Manuf'g Co. v. Union Button-hole & Embroidery Co.*, before cited, this question was carefully considered by Judge LOWELL, and the conclusion reached that the court can restrain a party from selling in violation of his agreement, though it may be unable to enforce a specific performance of it. When speaking of the agreement as the grant of an exclusive license to sell the patented machine, the court observes: "And it has never yet been doubted that the court could restrain all persons, whether they were acting with or without notice, and whether bound by contract or not, from trespassing on such a title."

Injunction granted.

THE STATE OF ALABAMA.

(District Court, S. D. New York. September 7, 1883.)

1. ADMIRALTY—COLLISION—RULE 21—MODERATE SPEED—FOG.

The moderate speed required of steamers in a fog by rule 21, is something materially less than the vessel's ordinary full speed; it has reference to all the circumstances affecting the steamer's ability to keep out of the way, including her own power in backing, and requires a *reduction* of speed according to the density of the fog. Whenever the fog is sufficient to increase materially the dangers of navigation, a given speed may be moderate for a swift vessel, which would be excessive for a slow one having less power to stop and back quickly.

2. SAME—PROMPT BACKING.

Where there is danger of collision, prompt backing, as well as stopping the engines, is incumbent on the steamer, and any delay in ordering the engines reversed is at her risk.

3. SAME—MISTAKE OF SAILS—ERROR OF JUDGMENT.

An erroneous order to change the helm, owing to the lookout's mistaking the main try-sail for the head-sails when first dimly seen through the fog, the mistake being corrected as soon as it could be perceived, *held*, error of judgment and not a fault.

4. SAME—OVERTAKING VESSEL.

An overtaking vessel is one coming up astern of the proper range of the leading vessel's colored side-lights; *i. e.*, more than two points aft of abeam.

5. SAME—FLASH-LIGHT—REV. ST. § 4234.

The American law (section 4234, Rev. St.) requiring a flash-light to be exhibited to an overtaking vessel is not applicable, as the law of the forum, to a collision between vessels belonging to two different foreign nationalities, neither of which requires such a light, according to its own maritime law.

6. SAME—LIGHT—ENGLISH LAW.

No stern-light or flash-light was formerly required by the English regulations; and the maritime law, as construed by the English courts previous to the new rules of 1880, did not make the exhibition of such a light indispensable, but only one of various signals which might be adopted by the leading vessel to warn an overtaking vessel of her whereabouts. *Semble*, the French law is similar.

7. SAME—SIGNALS BY HORNS SUFFICIENT.

Where a fog was such that a steamer used her fog-whistles and a brig her fog-horn, *held*, the latter's blowing three fog-horns continuously from the time the steamer was observed, was a sufficient compliance with the former English and French maritime law as a signal to an overtaking steamer, if the latter were in fact astern of the range of the brig's lights.

8. SAME—CHANGE OF COURSE IN EXTREMIS.

Where a brig luffed less than half a minute before a collision, which seemed to be instantly impending amidsthips, in order to save her small boats, *held*, a change *in extremis*, and not a fault, though the change was useless and erroneous.

9. SAME—EVIDENCE—CREDIBILITY OF WITNESS.

Where the great preponderance of testimony showed the mode and conditions of the collision to be such that the steamer could not have been astern of the range of the brig's red light, if properly set and burning, and no red light was seen by an alert lookout on the steamer, or by her officers, who were all watching the brig, and a change of helm was made by the steamer upon a mistake of the brig's course, which mistake could not have been made had the red light been seen, and the evidence being also unsatisfactory as to the trimming and proper adjustment of the brig's colored lights, no screens being used, but the poop-rail used instead, *held*, that though most of the brig's witnesses testified that the red light was burning brightly, superior credit should be given to the steamer's witnesses that no red light was visible, and the brig was held in fault.