

THE JENNIE B. GILKEY.

LOUD and others v. LORING and others.

(Circuit Court, D. Massachusetts. April 28, 1884.)

LIEN ON SHIP—NONE ATTACHES IN FAVOR OF ONE CO-OWNER.

A part owner has no lien or right of priority in equity upon the ship itself for balance of account which may be due him.

In Equity.

C. T. & T. H. Russell, for complainant.

C. M. Reed, for defendant.

LOWELL, J. The plaintiffs, citizens of New York, bring this bill against certain citizens of states other than New York, for an adjustment of accounts between the parties as common owners of the schooner Jennie B. Gilkey. The plaintiffs allege that they made certain advances for the benefit of the defendants, to enable the vessel to perform her last voyage and earn her freight; and made certain other payments in defending and compromising an action brought against the owners in New York for the wages of the mate. They now move for a preliminary injunction to restrain the defendants from receiving from the registry of the district court their several shares of the proceeds of the vessel, amounting, after payment of the privileged debts, to about \$2,900. The plaintiffs admit that they have no privilege in admiralty, nor any right as creditors at large, having recovered no judgment, to intercept these proceedings; but they insist that, in equity, one part owner has a lien upon the ship for advances which he may have made for supplying her needs for a voyage, or for the benefit of his co-owners in any other respect. This brings up the question whether the decision of Lord HARDWICKE in *Doddington v. Hallett*, 1 Ves. Sr. 497, is to be taken as law here. It was long since overruled in England. See *Ex parte Young*, 2 Ves. & B. 242, and 2 Rose, 78, note; *Ex parte Harrison*, 2 Rose, 76; *Ex parte Hill*, 1 Madd. 61; *Green v. Briggs*, 7 Hare, 279, per WIGRAM, V. C.; Lindl. Partn. (4th Eng. Ed.) 67. In this country it has been held in the courts of New York and Kentucky to announce a sound rule of equity. *Mumford v. Nicoll*, 20 Johns. 611; *Hewitt v. Sturdevant*, 4 B. Mon. 453; *Pragoff v. Heslep*, 1 Amer. Law Reg. 747. In some other courts the later English rule has been thought the more sound. *Merrill v. Bartlett*, 6 Pick. 46; *The Randolph*, Gilp. 457; 3 Kent, Comm. 40; Story, Partn. §§ 442-444, and notes; Story, Eq. § 1442, and note. In this circuit, two judges of the supreme court have said that a part owner has no lien or right of priority in equity upon the ship itself for a balance of account which may be due him. *Macy v. De Wolf*, 3 Wood. & M. 193; *The Larch*, 2 Curt. C. C. 427, 434. And while Mr. Justice STORY, in one of the works above cited, seems to

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approve of the decision of Lord HARDWICKE, in the other he gives the objections to it an apparent preponderance. In a question of granting a preliminary injunction, which is rather a matter of convenience for the plaintiffs than at all essential to the maintenance of their rights, I feel bound to follow the opinion of the justices of this circuit, until a more deliberate and solemn decision shall show that they were mistaken.

Motion denied.

WOOSTER v. MUSER and others.

(Circuit Court, S. D. New York. April 23, 1884.)

EQUITY PLEADING—WAIVER OF FAULTS.

In a suit for the infringement of a patent, although an answer denying information as to the infringement and denying damages is wholly insufficient, the orator, by replying to it, admits its sufficiency, and takes upon himself the burden of proving the infringement.

In Equity.

Frederic H. Betts, for orator.

Edmund Wetmore, for defendants.

WHEELER, J. The bill states the issuing of a patent to one Douglass, the assignment and a reissue of it to the orator; that the defendants, in order to deprive him of profits, infringed it and derived profits to themselves, and greatly injured him; and prays an account of profits and damages. One of the defendants answers for himself and in the name of the others, by himself as attorney for each, and states that they are not informed as to the issuing and assignment of the patent, and therefore deny the same, and leave the orator to make such proofs thereof as he shall be advised; and, further answering, denies "that they have deprived the complainant of any profits or inflicted upon him any damages," and prays for dismissal, with costs. The orator, by replication in usual form, traversed the answer, put the reissued patent in evidence, and examined two witnesses as to infringement. The cause has been heard on these pleadings and proofs. The principal questions are as to where, on these pleadings, the burden of proof rests; and if upon the orator, whether he has made out his case. An answer in equity is required for discovery and evidence as well as for grounds of defense, and evidence cannot be given by attorney; therefore an answer cannot be made by attorney, and this answer is, as to those answering in that way, wholly irregular. And then the gist of the charge in the bill is the infringement. The answer does not meet that, but denies resulting damages and deprivations of profits, which, if true, would not defeat the right to maintain the bill. But still, as the orator did not move to have the answer taken off the file for the irregularity; nor to have the bill taken *pro confesso* for want of an