

facture, that their evidence must be accepted as true. The fact is uncontradicted, except by the negative statement of the three witnesses summoned by the defendant, who are able only to say that they have no recollection that sand was ever used by the firm in weighting the bottom of spittoons or cuspidors.

The invention claimed by Topham in his second claim is so accurately described by these manufactures of the Chicago firm, anticipating the date of his patent, that I must hold the claim to be void for want of novelty, and dismiss the bill of complaint, with costs.

HAVEMEYER *v.* BONNELL and others.

(Circuit Court, D. New Jersey. July 31, 1884.)

PATENT—BOTTOMS OF CUSPIDORS—DISMISSAL OF BILL.

Law announced in decision in case of *Havemeyer v. Randall*, ante, 404, applied to this case.

In Equity.

NIXON, J. For the reasons assigned in the case of *The Same Complainant v. Randall*, ante, 404, in which the same questions are involved, the above bill of complaint must be dismissed, with costs; and it is ordered accordingly.

WORDEN and another *v.* SEARLS.

(Circuit Court, D. New Jersey. July 22, 1884.)

1. PATENT LAW—JUDGMENT IN TRIAL OF SAME ISSUES BEFORE ANOTHER COURT.
In hearing a case formerly tried before another court, no new question being suggested or newly-discovered evidence adduced, the judgment of the former court should be assumed to have been correct.
2. SAME—PATENT WHIP-HOLDERS—INVALID CLAIM—COSTS—REV. ST. § 4922.
The invalidity of a new claim in a reissue does not render a patent void or impair the validity of the first claim, and suits may be maintained on the parts which the patentee is entitled to hold, although if such suits are commenced before a disclaimer is entered no costs can be recovered.

In Equity.

Sprague & Hunt, for complainants.

T. P. Fitch, for defendant.

NIXON, J. This is a suit in equity, brought for the infringement of the first, second, and third claims of certain reissued letters patent, dated February 18, 1879, and numbered 8,581, for "improve-

ment in whip-holders." The original letters patent, No. 70,075, were issued October 22, 1867, with a single claim, as follows:

"The shape and construction of the whip-holder, and the connection of the two sectional halves by hinges or joints, in such a manner as to hold the whip, when inserted, closely and firmly, by clasping the same at the top and bottom of the holder at the same time, the holder being formed of metal, cast or pressed into proper shape, substantially as and for the purpose set forth and described."

In the reissue four claims are substituted for the one claim of the original, as follows:

"(1) A whip-holder consisting of the parts, A, B, of double conical shape, and connected together at the bilge by a pivotal joint, substantially as described. (2) A whip-holder divided throughout its length into two parts hinged together, so that the holder will disclose a large opening for the reception of the whip, and will be closed at its top around the whip when the same is inserted into the holder, substantially as set forth. (3) A whip-holder composed of two parts hinged together, with the inner edges of each part cut away from the point of hinging to the ends, to allow the parts to work upon the joints, without overlapping each other, substantially as described. (4) A whip-holder composed of two parts of double conical shape, hinged together as described, and wherein one of the halves of the holder is provided with loops or fastenings, by means of which the holder is attached to a carriage seat or dash-board, substantially as specified."

In the case of *Worden v. Fisher*, pending in the Sixth circuit, and reported in 11 FED. REP. 505, his honor, Judge BROWN, seems to have carefully considered the question of the validity of this reissue, and he came to the conclusion (1) that the first, second, and third claims were valid,—regarding them as not expanding the claim of the original patent, but only making it more definite and particular; and (2) that the fourth claim was void because it embraced loops or fastenings, by means of which the holder was attached to the carriage or dasher, the same being a mechanical contrivance that appeared nowhere in the original patent.

The present action is brought against the person who was the manufacturer of the whip-sockets which, in the above case, were adjudged to infringe the reissued letters patent of the complainants. We have the same issues here which were passed upon by the circuit court there. No new question has been suggested, or newly-discovered evidence adduced, tending to change or modify the adjudication in that case. Under these circumstances I am not willing to sit in review of the decision of the learned judge who determined the case, but feel myself bound to assume that he was correct in finding the reissue valid as to the first three claims, and that the whip-sockets manufactured by the defendant infringe the complainant's patent.

But another and more difficult question has been brought to my attention. The decree in *Worden v. Fisher*, *supra*, was entered February 7, 1882, in which the court decided against the validity of the fourth claim. This suit was commenced about a month afterwards,

in March of the same year. When the cause came on for final hearing, the counsel for the defendants moved to dismiss it, on the ground that the complainant had been guilty of unreasonable delay in entering a disclaimer to the fourth claim, which had been adjudicated void. The motion was based on section 4922 of the Revised Statutes, which provides that whenever, through inadvertence, accident, or mistake, and without any willful default, or intent to defraud the public, a patentee has, in his specification, claimed to be the original and first inventor of any material or substantial part of the thing patented, of which he was not the original and first inventor, such patentee may maintain a suit at law or in equity for the infringement of any part thereof, which was *bona fide* his own, if it is a material part of the thing patented, and distinguishable from the parts claimed without right. But in every such case no costs shall be recovered unless the proper disclaimer has been entered in the patent-office before the commencement of the suit; and no patentee shall be entitled to the benefits of the section if he has unreasonably neglected or delayed to enter a disclaimer. In answer to such a motion, it might, perhaps, be sufficient to say, as was said by Justices NELSON and HALL in *Burden v. Corning*, 2 Fisher, 498, that the defense of unreasonable neglect or delay in filing a disclaimer must be set up in the answer before it can be considered by the court. But if that be waived as technical, the statute certainly requires that the part of the thing patented which is claimed without right, must be a material and substantial part of the invention, in order to render a disclaimer necessary. It was so held in *Hall v. Wiles*, 2 Blatchf. C. C. 194, and the decision has been since approved and followed.

The rejected claim in the reissue does not embrace any material or substantial part of the invention secured by the original patent. It has been declared void because it was not in the original specification and claim. It refers mainly to the method of attaching or fastening the whip-socket to the carriage or dash-board, and is no part of the socket itself, which embodies the invention patented. No complaint is made as to its infringement. It was not included in the pending suit, and hence the defendants have not been prejudiced in the defenses set up in their answer for want of a disclaimer.

The case of *Gage v. Herring*, 107 U. S. 646, S. C. 2 Sup. Ct. Rep. 819, is an authority for holding that the invalidity of a new claim in a reissue does not render the patent void or impair the validity of the first claims, and that suits may be maintained on the parts which the patentee is entitled to hold, although if such suits are commenced before a disclaimer is entered no costs can be recovered.

The complainants are entitled to a decree, without costs, and it is ordered accordingly.

THE KATIE COLLINS.

(District Court, D. Delaware. July 29, 1884.)

1. SALVAGE—PUBLIC POLICY.

Salvage exceeds a fair remuneration for work and labor, the excess being intended, upon principles of sound public policy, not only as a reward to the particular salvor, but also as an inducement to others to render like services.

2. SAME—WANT OF SKILL OR ENERGY ON PART OF SALVOR.

But salvage may be reduced by want of skill or energy displayed by the salvors, or even forfeited by their misconduct or gross negligence.

3. SAME—STRANDED VESSEL.

Where salvors, having the management of the business, fail to get a stranded vessel afloat at the first high water at which she might have been floated, had they employed the proper means, they must be considered as having failed in point of skill and energy, and must suffer the just and legal consequences of such failure, notwithstanding they may have saved the vessel and cargo.

4. SAME—MISTAKE OR ACCIDENT.

Where, by mistake or accident, salvors, in attempting to haul off a stranded vessel, misplace a beach-anchor and thereby unnecessarily prolong the work, they will not be entitled to a compensation much, if any, in excess of their actual expenses.

In Admiralty.

Henry R. Edmunds and Theodore M. Etting, for libelants.

Henry Flanders and Curtis Tilton, for claimants.

WALES, J. The schooner *Katie Collins*, laden with lumber and bound from Jacksonville, Florida, to Perth Amboy, New Jersey, went ashore on the Virginia coast, about seven miles south of Chincoteague island, at midnight on the thirtieth of October, 1881. The disaster was attributed to mistaking the Chincoteague light, on her star-board bow, for the head-light on a steam-ship. The next day her captain sent a message to the nearest telegraph station, to be forwarded to the libelants at Norfolk, Virginia, requesting them to come to his assistance at once. This message was received by the libelants at 12 o'clock m. on the first of November, and they immediately made preparations to go to the relief of the stranded vessel, distant about 80 miles from Norfolk and 50 miles from Cape Charles. The wrecking schooner *B. & J. Baker*, of 100 tons burden, owned by the libelants, supplied with a beach-anchor, hoisting engine, steam-pump, and other necessary appliances used in the wrecking business, with a crew of eight men all told, left Norfolk the same night, in tow of the tug *Nettie*, for Hampton roads. On the morning of November 2d, the *Baker* was taken in tow by the *Rattler*, a larger tug, which had come from Baltimore by order of the libelants, and was brought round to the vicinity of the *Collins*, coming to an anchor a few miles to the southward, for fear they might pass her in the dark. Early on Thursday, November 3d, Nelson, the wreck-master in charge of the expedition, anchored directly off the *Collins*, at the distance of about 200 fathoms. His first step was to take the soundings; rowing