

the plaintiff's right of action, and the demurrers to these pleas are therefore sustained.

*Twelfth.* That the plaintiff did not, with reasonable diligence, and within a reasonable time after the date of the contract, in good faith begin the work, etc. It is objected that these were not conditions precedent, and that the plea, being in the nature of a plea in confession and avoidance, does not in terms confess or admit any of the allegations contained in the count. This plea, if intended to be in justification of the company's acts, should expressly or tacitly confess the act which it is intended to justify. Avoidance cannot be pleaded unless the act complained of be admitted. Gould, Pl. c. 6, § 111.

The defendant might have pleaded abandonment on the part of the plaintiff, or his intention of abandonment, and given the want of beginning in reasonable time and the want of reasonable diligence in evidence of such abandonment, or of the intention to abandon the work.

*Fourteenth and Fifteenth.* These pleas, depending on the non-performance by the plaintiff of the subordinate time stipulations as a bar to this action, cannot be sustained, since we have already decided that those stipulations are not conditions precedent.

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WILLIAM CRAMP & SONS SHIP & ENGINE BUILDING Co. v. SLOAN and another.

*'Circuit Court, S. D. New York. August 23, 1884.)*

1. CONTRACT—MEETING OF MINDS—MISTAKE—INTENTION OF PARTY.

Where there is any miscarriage in expressing the mind of a party to a contract, it would seem to be just that he should be bound by what he fairly expressed, whether he intended it as he expressed it or not.

2. PRACTICE—VERDICT—WEIGHT OF EVIDENCE.

Where the jury do not come to their finding without competent evidence, and the verdict is not so against any great preponderance of evidence as to show that it was reached through passion, prejudice, or other improper motive, or want of consideration, and no error of law intervenes, the verdict should be sustained.

Motion for New Trial.

*William G. Choate*, for plaintiff.

*Hamilton O'Dell*, for defendant.

WHEELER, J. There was no question at the trial but that the plaintiff commenced and proceeded with the construction of two steam-ships, until stopped by the defendants, upon some understanding with them that the ships would be wanted, at the price of \$570,000, when completed, for an enterprise in which they were interested, and which they hoped to carry out. The point upon which

the case turned was whether the plaintiff proceeded upon order from the defendants to build the ships for them according to the plaintiff's proposals, or at the plaintiff's own risk as to the ships being wanted for the enterprise. There was direct and positive testimony that the plaintiff proceeded upon the order of the defendants, which was corroborated by some circumstances, so that, although there was positive evidence to the contrary, the jury did not come to their finding without competent evidence. Neither was the verdict so against any great preponderance of evidence as to show that it was reached through passion, prejudice, or other improper motive, or want of consideration. The evidence upon the principal point was mostly oral and circumstantial. It was such as the parties had the right to have the jury weigh, and such as was very proper for the jury to weigh. As the parties had the right to have it weighed, so they have the right to have the result stand, unless error in law has intervened. Any other conclusion would impair the right to a trial by jury, guaranteed to all parties to such causes.

The greatest doubt as to the correctness of the rulings at the trial has arisen upon that part of the instructions to the jury to the effect that, if both parties did not mutually understand that the building of the ship was to be proceeded with for the defendants, upon their contract to take and pay for them, still if the defendants gave the officers of the plaintiff, who transacted the business, fairly to understand, as prudent men in the transaction of such business, that the plaintiff might go on and build the ships for them, and they would take them at the agreed price, the defendants would be bound. This was not intended to trench upon the necessity of a meeting of the minds of the parties to make a contract. The price and kind of ships was fully agreed upon. The question was whether the contract should be proceeded with. The plaintiff could only act upon what the defendants fairly gave its officers and agents to understand. If there was any miscarriage in expressing the mind of the defendants it would seem to be just that they should be bound by what they fairly expressed, whether they intended it as they expressed it or not. Poth. Obl. 19; Story, Cont. § 86; *Adams v. Lindsell*, 1 Barn. & Ald. 681. As, if they had told the plaintiff to build two ships, when they intended to say, and understood that they said, to build one, it would seem to be clear that they would be holden for the two. And if they told the plaintiff to go on and build the ships, it would seem to be equally clear that they would be bound, although they did not understand that they told the plaintiffs so.

Some point is made as to the correctness of the charge to the jury, to the effect that if the defendants told the plaintiff to stop the work the plaintiff would have the right to stop, and the defendants, if the work was proceeding on their order, would be holden for what had been done. The answer sets up, in substance, that the defendants did direct that the work should cease. There is no allegation or

proof that they ever requested that it should start again. They have not claimed that they were not liable because the plaintiff did not go on and complete the ships, but have rested their defense upon the ground that they never directed or requested the plaintiff to build the ships. Perhaps it would have been more strictly correct to have submitted nothing about the stopping of the work to the jury, but, if so, as this finding was in accordance with their admission of record, the error could not harm them.

No adequate ground for disturbing the verdict appears; the motion for a new trial must therefore be overruled. Motion denied, and stay of proceeding vacated.

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UNITED STATES v. McDOWELL.

(District Court, S. D. New York. August 25, 1884.)

1. CUSTOMS DUTIES—APPRAISEMENT AND LIQUIDATION CONCLUSIVE—DEMURRER—REV. ST. §§ 2929, 2930, 2931.

The appraisement and liquidation of duties by the appraiser and collector are binding and conclusive in all collateral proceedings, and, in the absence of any reliquidation or reappraisal, cannot be disregarded or reviewed, except in the modes provided by sections 2929, 2930, and 2931 of the Revised Statutes. A suit in the district court is not one of those modes. *Held*, accordingly, on demurrer, that, after payment of the duties as liquidated, a suit for duties alleged to be due in excess of the liquidation, on account of an alleged untrue discount, fraudulently procured to be allowed in the appraisement of value, could not be sustained.

2. SAME—ACTION BY UNITED STATES.

The above rule, frequently applied in this court as against importers, must be equally applied in suits brought here by the United States.

3. SAME—REAPPRAISEMENT.

A reappraisal of value may be made without a re-examination of the goods themselves, where the items to be corrected, such as an alleged false discount in the invoice, do not depend on any inspection of the goods.

Demurrer to Complaint.

*John Proctor Clark*, Asst. Dist. Atty., for plaintiff.

*Arnoux, Ritch & Woodford* and *Wm. C. Wallace*, for defendant.

BROWN, J. This suit is brought to recover additional duties claimed to be due to the United States upon certain imported goods. The complaint charges that in the invoice and entry the importer falsely and fraudulently represented that a certain discount had been allowed upon the goods; whereas, in fact, no such discount had been made upon the invoice value. In the liquidation the alleged discount was allowed. In effect, this suit is for the purpose of recovering the duty on the amount of the discount alleged to have been improperly allowed in the liquidation. The defendant has demurred upon the ground that no cause of action is stated, inasmuch as there has been no reliquidation, and the duties, as it appears, have been paid in full, according to the only liquidation ever made.