

by the record. Some of such apparatus is strikingly similar to the plaintiff's; in mode of operation and effect it is substantially identical. The plaintiff's claims must therefore be construed strictly, and thus confined to the specific devices and combinations described. So construed does the defendant infringe them? It must not be overlooked that the defendant has a patent, also, and consequently is entitled to a presumption that his patent is novel, and therefore does not infringe the plaintiff's. The office, with the plaintiff's claim before it, and fresh from their consideration, must be regarded as deciding that they did not cover the defendant's apparatus. This decision is necessarily involved in granting the later patent. To overcome the presumption arising from it, the proofs should show with reasonable clearness, that the decision is wrong. On the other hand, it seems in the light of the proofs to be right. The defendant's apparatus does not, we think, embrace the special devices and combinations specified in the claims. Indeed it seems easier to distinguish the defendant's apparatus from the complainant's than to distinguish the latter from some of those that preceded it. The bill must therefore be dismissed and a decree may be prepared accordingly.

THE INDIA.

THE INDIA AND OWNERS *v.* DONALD *et al.*

(Circuit Court of Appeals, Fifth Circuit. December 7, 1891.)

1. DEMURRAGE—"WEATHER WORKING DAYS."

The term "weather working day," when used in a charter-party, means a day, otherwise a working day, when the weather will reasonably permit the carrying on of the work contemplated.

2. SAME—COMPUTATION OF LAY-DAYS.

"Three clear working days" notice, required by a charter-party to be given by the master to the shipper before lay-days commence, does not begin to run until such notice reaches the shipper.

3. SAME—EXCEPTION IN CHARTER-PARTY—DROUGHT CLAUSE.

A charter-party of a vessel at Limerick chartered to proceed to Ship island, there to load with lumber, provided that the shipper should be allowed a certain number of days "to deliver the cargo," and that in the computation of lay-days "shall be excluded any time lost by reason of quarantine, drought, * * * or any extraordinary occurrence beyond the control of the shippers." The custom of the port was to collect and prepare cargoes at Moss Point, between which place and Ship island no drought can affect communication. *Held*, that the exception in case of drought did not apply to previous droughts in the streams down which the lumber is floated, making a scarcity in the market and preventing the securing of a cargo as required. *Paterson v. Dakin*, 31 Fed. Rep. 682, distinguished.

Appeal from the District Court of the United States for the Southern District of Mississippi.

Libel by Donald Bros. & Co. against the Norwegian bark *India* for damages for failure of her master to give a clear bill of lading. Judgment for libelants, and dismissing cross-bill for demurrage. The owners appeal. Reversed.

J. D. Rouse and Wm. Grant, for appellants.

R. T. Ervin, for appellees.

Before PARDEE, Circuit Judge, and LOCKE and BRUCE, District Judges.

LOCKE, District Judge. This vessel, the owners of which are appellants herein, being at Limerick, was chartered to appellees, Donald Bros. & Co., of Mobile, to proceed with dispatch to Pensacola or Ship island, at the option of charterers, there to load with sawn timber or boards, as the shipper might direct. The terms of the charter-party, as far as necessary to a determination of the questions in this case, are:

"The shippers shall supply, if legal, and if required by the master, the deck-load, to consist (at shippers' option) of sawn timber and or deals and or boards at full freight. The cargo shall be delivered along-side vessel, at her ordered loading berth, at shippers' risk and expense; the master giving shippers a written notice of three clear working days before cargo is required, after vessel being at her ordered loading berth. * * * Eighteen weather working days shall be allowed the shippers in which to deliver the cargo along-side of vessel at port of loading, which is understood to mean actual 'delivery of cargo along-side,' and not 'completion of loading,' and the cargo to be unloaded with all customary dispatch at port of discharge. Ten like days shall be allowed on demurrage at the rate of 4d. per ton register per day. For all such like days as the vessel may be wrongfully detained after such demurrage days, damages for detention shall be paid at the rate of 4d. per ton register per day. Any demurrage or damages for detention shall be settled at the place where incurred. In the computation of lay-days at port of loading shall be excluded any time lost by reason of quarantine, drought, flood, storms, strikes, fire, or any extraordinary occurrence beyond the control of the shippers. The master shall sign shippers' bills of lading as presented, without prejudice to this charter-party, but any difference in freight shall be settled on signing bills of lading."

The ship, having arrived at Ship island under the charter-party, December 25, 1890, discharged ballast, and the master reported as ready to receive cargo, mailing the letter giving notice the 14th January, 1891. This letter it appears from the evidence was received at 9 o'clock the morning of the 16th January. The vessel remained taking in cargo as delivered along-side until March 6th, when she completed her loading. The charterers and shippers presented a clear bill of lading for the master to sign, but he, considering and claiming that his ship had been detained beyond the legal lay-days, and that he was justly entitled to demurrage, refused to sign such clear bill of lading; whereupon a libel was filed, alleging that owing to storms and high winds and stormy bad weather the number of weather working days of the shipper were never exhausted; that storms and high winds and bad weather affected the points where the libelants had under the custom of the port collected and prepared the cargo; and that they were by these causes prevented from delivering the cargo within 18 consecutive days subsequent to the notice; but that these causes were wholly beyond their control, and they had delivered the cargo within the first 18 weather working days, and that the master had refused to sign a clear bill of lading, but had protested against said clear bill of lading, which had destroyed its negotia-

oiliness, and the salability of the cargo, greatly to their damage. To this the owners of the vessel, appellants, filed a cross-libel, alleging that the lay-days, the 18 weather working days allowed by the charter, expired on the 12th of February, and that their vessel had been wrongfully detained, and that there was due them for 10 days' demurrage and 8 days' detention the amount of \$1,162. In answer to this cross-libel, appellees alleged that "in the computation of lay-days there shall be excluded any time lost by reason of quarantine, drought, floods, storms, strikes, fire, or any extraordinary occurrences beyond the control of shippers; and that, owing to droughts, storms, and floods, they were unable to have their timber delivered at Moss Point, the port where or from which the cargo is ordinarily delivered to Ship island, and that owing to said circumstances, which were wholly beyond their control, they were excused from sooner delivering said cargo." They also denied that, owing to the condition of the weather from the 16th January to the 6th March, the 18 weather working days had expired at the time the delivery of the cargo was completed. Upon these pleadings, the case being heard, judgment was found for libelants for one cent and costs, and the claimants' cross-libel was dismissed, with costs, from which the claimants have appealed.

Besides the question of demurrage, other questions arose in the court below, as to certain minor claims of the master of the vessel, for an amount paid as quarantine fees; for damage for breaking a knee of the vessel; and for a difference in exchange; but none of these have been assigned in error, and they will receive no consideration. There appears to be much uncertainty in the allegations of the libelants both in the libel and the answer to the cross-libel as to what condition of facts was to be relied upon; whether droughts, storms, or floods; and whether, according to the allegations of the libel, it was to be understood that the cargo was collected at Moss Point, and they were prevented from delivering it, or, according to the answer to the cross-libel, they were unable to collect it there; but, taken in connection with the evidence, there are plainly presented two questions for examination: Whether there were more than 18 weather working days between the time when the lay-days commenced to run (three clear working days after notice by the master) and the final delivery of the cargo; and, if so, whether such time should be excluded from the time subject to demurrage under the eighth article of the charter-party.

The term "working day" has so entered into commercial language and received judicial construction that its force and meaning is beyond a question or doubt. It has ceased to be an ambiguous phrase; but when the expression is further modified or limited by the word "weather" we find the new combination not so general in its use or so well established in its force; but its construction, and the manner and connection of its use, can permit but one meaning, namely, a day, otherwise a working day, when the weather would reasonably permit the carrying on of the work contemplated. In this case the kind of work contemplated was towing timber in rafts or lumber on lighters and delivering it along-side