

The attorney for the defendant has argued, with ingenuity and force, that the wrongful act for which damages may be recovered by an action at law is the ground of the defendant's liability in every such case, and that the right of action must be deemed to have accrued, and that the statute of limitations commences to run, immediately upon the happening of an injury. But I think that the argument is based upon false premises. A wrong and a resulting injury—two distinct elements—are both essential to a complete case. A right of action *ex delicto* does not accrue to an individual in his own right, or to him in a representative character, until an injury has resulted from a wrong to him in the character in which he may be entitled to sue. Now, coming directly to the case in hand, it is to be observed that it is a statutory action, differing from an ordinary action *ex delicto* in this: that the death of a person, resulting from a wrong, is a necessary element, and until the death of Mrs. Nestelle this cause of action had not accrued in favor of her legal representative. *Mason v. Railway Co.*, (Utah,) 24 Pac. Rep. 796. In my opinion it is not material at this stage of the case whether, if a judgment had been rendered during the lifetime of Mrs. Nestelle, in an action for the same injury, it would or would not bar this action. The statute gives an action to the legal representatives of the deceased to recover damages for her death, if the same was caused by the defendant's negligence, (2 Hill's Code, § 138,) without limiting the time for commencing the same, otherwise than as provided in 2 Hill's Code, § 120, which reads as follows: "An action for relief not hereinbefore provided for shall be commenced within two years after the cause of action shall have accrued."

Demurrer overruled.

S. S. WHITE DENTAL MANUF'G CO. v. JOHNSON et al.

(Circuit Court, E. D. Pennsylvania. June 6, 1893.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

Complainant in a suit for the infringement of a patent is entitled to a preliminary injunction where it appears that the supreme court of the District of Columbia has in a prior suit sustained the validity of his patent, and held that it was infringed by a device which was substantially the same as that of the present defendant.

In Equity. Suit by the S. S. White Dental Manufacturing Company against Johnson and others for the infringement of complainant's patent. Complainants move for a preliminary injunction. Writ granted.

Jos. C. Fraley, for complainant.

George Harding, George B. Selden, and Jerome Carty, for defendants.

DALLAS, Circuit Judge. This is a motion for preliminary injunction. The circumstances which have been urged in argument as showing acquiescence by the plaintiffs in the conduct of the de-

plain, in view of the fact that it has infringed, or threatened infringement, although when it did so it expected that complainant's patent would turn out to be void. If defendant does not intend to sell such infringing mats, its business is in no way interfered with by an order prohibiting it from doing so. Nor does the suggestion that some improper use may be made of the order, by advertising it so as to interfere with or embarrass the defendant in the sale of other mats,—not now before the court,—warrant a refusal of the relief asked for. It is to be assumed that complainant has applied in good faith, and intends to avail of the preliminary injunction only to accomplish the purpose for which it is granted, viz. the securing of the rights it has shown on this motion. Should the contrary appear hereafter, it will work such a change in the equities between the parties that the court will experience no difficulty in reconsidering this decision.

WILLIAMS et al. v. McNEELY et al.

(Circuit Court, E. D. Pennsylvania. June 6, 1893.)

No. 44.

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction will not be granted in an infringement suit where the affidavits of experts disclose a conflict that cannot be decided in complainant's favor without danger of unjustly interfering with the business of defendants, who are merely users of the device in question, and whose financial responsibility is not questioned.

In Equity. On motion for preliminary injunction in a suit by Williams & Webster against McNeely & Co. for alleged infringement of a patent. Writ denied.

Ernest Howard Hunter, for complainants.
S. S. Hollingsworth, for respondents.

DALLAS, Circuit Judge. An application for a preliminary injunction is not, in patent causes any more than in others, an available short cut to an adjudication upon asserted, but disputed and doubtful, rights. Where, upon such a motion, the defendant avers that the subject-matter of the infringement alleged differs substantially from that of the patent, the question thus presented ought not, in my judgment, to be decided upon the ex parte affidavits, but should be left, unless the defendant's contention be plainly frivolous and unsupported, entirely open for decision upon the evidence as finally presented.

In this case it is not necessary that I should express any opinion upon the several points which have been discussed by counsel. It is sufficient to say that a conflict of expert opinion as to the fact of infringement has been disclosed, which possibly may be reconciled, or be made easy of determination, by cross-examination of the respective witnesses, but which cannot now be decided in

favor of the complainants without danger of unjustly interfering with the business of the defendants, whose financial responsibility is not questioned, and who are but users, and not manufacturers or vendors, of the mechanism in question. The motion for preliminary injunction is denied.

THE ROBERT BURNETT.

LEHIGH COAL & NAV. CO. v. THE ROBERT BURNETT.

(District Court, S. D. New York. May 8, 1893.)

TUGS AND TOWS — SEEKING HARBOR IN THREATENING WEATHER — NECESSARY ALLEGATIONS OF LIBEL—PROOF.

In order to hold a tug liable for negligence in losing her tow, because, in threatening weather, she passed a safe harbor to go to one which she knew she could not enter except under favorable conditions, such fault must be alleged in the libel, and the threatening nature of the weather at the time of passing the safe harbor proved. Where a tug of proper draft for the service, passed Huntington harbor, in Long Island sound, and attempted to enter the Missiquog river, on whose bar the depth of water varies according to the state of wind and tide, and, being unable to do so, turned back for Huntington harbor, as is customary under such circumstances, and on her return lost part of her tow in the increasing sea, and it was not alleged in the libel, or proved, that on first passing Huntington harbor the weather was so threatening that she should then have sought shelter, *held*, that her negligence was not proved, sufficient to hold her liable for the loss.

In Admiralty. Libel for negligence of tug in losing part of her tow. Dismissed.

Wing, Shoudy & Putnam, for libelants.
Stewart & Macklin, for claimants.

BROWN, District Judge. On the 31st August, 1892, the steam tug Robert Burnett took in charge 10 chunkers loaded with coal, to tow them to St. Johnland, reached by a small narrow river, Missiquog, about 10 miles beyond Huntington on Long Island sound. The tow was in two tiers of five chunkers each, upon a hawser of about 60 or 70 fathoms. She left at about 11 P. M. and arrived at the bar of the river at about 4 o'clock the following afternoon. The water on the bar is shallow, and the channel shifting, through the operation of winds and tides; and the depth of water varies with the conditions of the wind and tide. The chunkers drew 6 feet; the tug, 7 feet 2 inches. On arrival, with the aid of a local pilot, who was called in accordance with the usual practice, it was found that there was only 6½ feet of water at high tide. Huntington was the nearest and only safe place to go to, and the tug, after finding that entrance was impossible, turned around to go back to Huntington. The wind and sea on the return became such that the chunkers of the head tier were filled with water, and one after another were sunk, or beached by the tug, before arriving at Huntington. The libel is filed to recover damages, alleging unfitness of the tug, in-