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-

fendants, and as estopping the plaintiffs from asserting that the "foot rest" of the defendants is an infringement of the patent in suit, have been fully examined and carefully considered, but nothing has been shown which, in my opinion, amounts to a waiver of the complainants' rights, or which precludes them from maintaining them in a court of equity. Therefore, it is necessary to dispose of this motion upon the other defenses which have been interposed, and these are, (1) that the patent is invalid; and (2) that the defendants have not infringed. Upon both points this motion is supported by the decree of the supreme court of the District of Columbia in the case of Morrison v. Dental Chair Co., 49 O. G. 735. That case involved the same claim as is here in question, viz. the ninth claim of letters patent No. 369,295, dated August 30, 1887, granted to James B. Morrison for "adjustable chairs," as follows:

"In combination with a chair body having a platform or step attached thereto, a supplemental foot rest, and arms, to sustain said rest, pivoted to the platform, to swing forward and backward to a limited extent, and interlocking with said platform in an upright, operative position, when turned rearward as well as forward, whereby said arms are adapted to sustain the rest in either of two operative positions at different distances from the chair seat."

This claim was distinctly sustained by the decree to which I have referred, and, for the purpose of this application, its validity is thereby conclusively established. Brush Electric Co. v. Accumulator Co., 50 Fed. Rep. 833; Cary v. Spring-Bed Co., 27 Fed. Rep. 299; Cary v. Manufacturing Co., 24 Fed. Rep. 141. But, if this were otherwise, still the only new matter set up and insisted upon here is a patent issued to C. L. Bauder, April 6, 1842, for a "foot rest" so manifestly different from that of Morrison, and so plainly incapable of accomplishing its object, that it is obvious, upon inspection, that they do not conflict. The supreme court of the District of Columbia also adjudged the defendant in the Morrison Case had infringed this patent by the use of an appliance which was substantially the same as that of the defendants in the present case. The infringing device of the Chair Company was said by Judge Coxe to be identified with that of the patent "by the fact that there are lugs placed upon the frame, which are exactly as in the other, for the very purpose of preventing the rest from going down to a level with the platform, and for the purpose of keeping it in position where it can operate as a foot rest." So, also, in speaking of certain devices which had been introduced to show anticipation, the learned judge, in distinguishing them, said: "* * * The rest, when it is turned rearward, instead of being used as a rest for the foot, simply folds up flat with the body of the chair or platform, and therefore it does not serve the purpose of a rest at all." And, again: "The rest was folded into the body of platform, or went down immediately upon it, and was not sufficiently elevated from it to be used at all." It is evident that it was not the mere presence of "lugs" which was considered important, but the fact that they were present "for the purpose of keeping it [the rest] in position where it can operate as a foot rest;" and, although lugs are absent from the contrivance of these defend-