

by me indorsed. Boat to be ready for delivery early in May. Interest to be added to the notes. I trust this covers your proposition.

"Yours, &c.,

J. Bigler."

1. The first point taken in defense is that the articles were not furnished on the credit of the yacht, and that there is no lien. They were delivered, however, to the vessel at Newark, N. J., where the contract provided that they should be delivered, and the law of that state expressly gives a lien for such work and material. This objection must, therefore, be overruled.

2. The burden of the defense on the merits, as well as of the claim in the cross libel, is, that the new batteries and rewinding of the motor did not produce the expected speed of the boat in actual service, nor the number of revolutions of the wheel referred to in certain conversations, nor 10 horse power in ordinary service, nor 25 horse power at a spurt; and that the batteries and work were defective and inefficient, and the beneficial use prevented by the infringement of the Brush patents.

The rule of law is well settled, that contemporaneous or prior conversation between the parties cannot be resorted to in order to enlarge or vary the rights and obligations of parties to a written contract. It may be set aside for fraud, or reformed in equity to correct a mutual mistake. The recent decisions of the supreme court in no respect relax this ancient rule. *De Witt v. Berry*, 134 U. S. 306, 10 Sup. Ct. Rep. 536. The evidence offered by the claimant, therefore, for the purpose of proving a guaranty of a definite number of revolutions was rejected; but for the purpose of giving the defendant the benefit of any possible doubt about what had been intended by the "horse power," the conversations on that subject were admitted; and by that means considerable appears in the testimony with reference to revolutions also. From the contract made by the letters of February 17th and 28th, it is clear, however, that there was no guaranty of any kind, save the production of horse power; and the result of all the evidence on this point seems to me to show clearly that the batteries did produce or "develop" in the language of the claimant's letter of February 19th, the amount of horse power therein agreed. It is plain from the testimony not only that the agreement itself contains no warranty as to the number of revolutions that the wheel should make, or as to the speed which the boat should attain, but that the libelant was in no condition to determine either of these things accurately, and did not undertake anything in regard to them. There is no allegation in the pleadings and no evidence of any fraud. Mr. Griscom's letter of February 26th, moreover, was explicit notice to the claimant that he was "not authorized to change in any part" the proposition previously submitted; and with this notice the proposition was accepted by the claimant. The responsibilities of the libelant under it cannot, therefore, be enlarged or varied by parol evidence of prior conversations.

A few weeks afterwards it was ascertained that at Atlantic City, where the yacht was intended to run in the carriage of passengers, the voltage of the electric current from which she must draw her

supplies was not sufficient for properly charging the 250 cells as designed. A substitute, by nearly doubling the number of cells, viz. to 376, was therefore agreed upon, but without any further change in the contract.

It is evident that the whole subject was in the nature of an experiment, in which whatever may have been the hope or expression of confidence by either party, as to the result in increased speed, no warranty or guaranty was assumed by the libelant. Even down to the trial, the simple question what was the amount of horse power delivered at the propeller blade, over and above all friction of machinery, was left undetermined, and is still uncertain; so that if the contract were held to import an obligation to supply so much effective power at the propeller, the evidence would not establish any breach. One object of the admission of evidence in regard to the conversations of the parties in reference to power was to ascertain the common understanding of the parties, if there was any, as to what was intended by producing or developing so much horse power. In the absence of any definite evidence to the contrary, I should hold that this phrase, as applied to an electric battery, meant the horse power developed in the battery and wires, and delivered to the machinery; subject to such frictional diminution in the machinery itself as might intervene between the ends of the wires of the battery and the propeller blades. If the latter view be correct, the evidence shows that the agreement was more than fully performed.

The evidence does not sustain the charge of bad material or bad workmanship.

3. The authorities are very meager as respects the obligations of the vendor of a patented article in regard to any warranty of a perpetual right of the vendee to use it. In the present case the contract was for the supply of "23 M accumulators." It was a contract for a definite thing, manufactured by another company than the libelant. The articles were delivered pursuant to the contract, and were used by the defendant without hindrance during the season of 1891, as long as he desired to use them, and it does not certainly appear whether he has desired to use them further or not. Where both the parties to a sale have knowledge of the material facts regarding conflicting claims to a patent right and no guaranty is asked or given, such as in practice often is given, this might possibly be held to be sufficient evidence of the intent of the parties that no guaranty or agreement for indemnity was intended. In the present case, as I understand the evidence, the rights of the different patentees were in controversy at the time this contract was made, and no final adjudication had been made. The libelant, it appeared, though not identical with the patentee company, by its members, as I understand, had the control of it, and had expected a decision in its favor. The claimant testifies that he knew nothing of this controversy, and that nothing was said to him upon the subject by the libelant. Neither the answer nor the cross libel, however, charges any secrecy or bad faith on the part of the libelant in making the contract, and if the controversy were

still undetermined and no interruption of the claimant's use of the articles had occurred, plainly the controversy over the patent and its result would be no defense. *American Electric Const. Co. v. Consumers' Gas Co.*, 47 Fed. Rep. 43, affirmed 50 Fed. Rep. 778, 1 C. C. A. 663.

In the case of *Carman v. Trude*, 25 How. Pr. 440, the plaintiff had sold a patent meat safe to the defendant, who paid the full price therefor, less \$25, which the plaintiff told him was owing to the person having the patent right thereon, and whom the vendee assumed to pay. It appeared, however, that the \$25 reserved was the price owing to the patentor for the use of the safe for a single year only; and that \$25 more was required for the perpetual use of it. The supreme court of this state on appeal held that the sale carried an implied warranty of both the article and the right to use it, that the vendee was entitled to the additional \$25, and that this was his only proper damage in the case. The decision was based, not upon the ground of fraud, but on the ground that the plaintiff was not the full owner of that which he had undertaken to sell and of what he had impliedly warranted; and that he must, therefore, pay as damages such an amount as was required to make the sale good.

While that case is not exactly parallel with the present, it seems to me to have been correctly decided, and that the principle of the case is applicable here. The mere ownership of the title to personal property designed solely for use is of no value, if the owner cannot lawfully use it at all. Its value is in its use. In a case like the present, the use is the very substance and essence of the right intended to be given and acquired. As respects the vendor's implied warranty the right to use should stand on the same ground as the title. Unless, therefore, sufficient facts appear to warrant the inference that the vendee took the risk of any conflicting claims as to the patent right, I think the vendor is bound either to secure to the vendee the right to use that which was sold for use, or else to answer in damages for the loss of the value of that use from the time any further use was prevented. See *Benj. Sales*, §§ 985-990, and notes. To give any ground, however, for damages, there must doubtless be an eviction of the vendee from the use of the article, or what is equivalent to an eviction. *American Electric Const. Co. v. Consumers' Gas Co.*, supra. A final adjudication between the parties principally concerned, resulting in a perpetual injunction, such as is usually given in patent cases in a court of equity, is, I think, equivalent to eviction, when notice of such adjudication has been brought home to the party by the person having the legal right, with an imperative prohibition, such as was given in the present case, against any further use of the article.

What damages should be allowed to the defendant for the interruption of the further use of this battery, is not easy to determine upon the evidence. A proper award of damages, as indicated in the case of *Carman v. Trude*, supra, would be either what it would cost to procure a license for the continued use of the