MAYOR, ETC., OF CITY OF NEW YORK et al. v. AMERICAN CABLE RY. CO.

(Circuit Court of Appeals, Second Circuit. April 18, 1894.)

ASSIGNMENT OF PATENTS—PATENT-OFFICE RECORDS.

Certified copies of the patent-office record of instruments purporting to be assignments are not prima facie proof of the execution or genuineness of the instruments. Dederick v. Agricultural Co., 26 Fed. 763, and National Folding Box & Paper Co. v. American Paper Pail & Box Co., 55 Fed. 488, disapproved.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit by the American Cable Railway Company against the mayor, aldermen, and commonalty of the city of New York, for infringement of letters patent No. 271,727, issued February 6, 1883, to Daniel J. Miller, for improvements in the construction of cable railways. There was a decree for complainant in the court below (56 Fed. 149), and defendants appeal.

Francis Forbes and William N. Dykman (on the brief), for appellants.

Chas. Howard Williams, Daniel H. Driscoll, and Edward W. Cady (on the brief), for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The complainant's title to the letters patent in suit depends upon the authenticity of the mesne assignments under which it claims. No evidence was introduced tending to prove the execution of the assignments from the patentee to Horton, from Horton to the Cable Railway Construction Company, and from the Cable Railway Construction Company to the complainant, except duly-certified copies of the patent-office record of three instruments which purport to be such assignments. The objection that the instruments were not sufficiently proved was taken in due season, and was insisted upon at the hearing in the circuit court. We are of opinion that the objection was valid, and consequently that the complainant was not entitled to a decree.

The assignment of a patent is not a public document, but is merely a private writing There is no statutory provision requiring it to be recorded in the patent office. Section 4898 of the Revised Statutes permits this to be done for the protection of the assignee against a subsequent bona fide purchaser or mortgagee. The section does not make the recorded instrument evidence, does not require the assignment to be executed in the presence of any public officer, or to be acknowledged or authenticated in any way before recording, and does not provide or contemplate that it shall remain subsequently in the custody of the office. It devolves upon the patent office merely the clerical duty of recording any instrument which purports to be the assignment of a patent. We are aware of no principle which gives to such a record the effect of primary evidence, or of

prima facie proof of the execution or the genuineness of the original document. To give it such effect would enable parties to manufacture evidence for themselves.

Section 892 of the Revised Statutes does not touch the point. That section provides that written or printed copies of any records, books, papers, or drawings belonging to the patent office shall be evidence in all cases wherein the originals could be evidence. The original assignment does not belong to the patent office. The section makes a copy evidence of the same class as the original record, but has no application when the original record is not competent. The early cases of Brooks v. Jenkins, 3 McLean, 432, Fed. Cas. No. 1,953, and Parker v. Haworth, 4 McLean, 370, Fed. Cas. No. 10,738, in which it was held that a certified copy of the patent-office record of an assignment of a patent is prima facie evidence of the genuineness of the instrument, were decided at first instance, and apparently without much consideration. The rule of these cases has been accepted without discussion in the later cases of Lee v. Blandy, 1 Bond, 361, Fed. Cas. No. 8,182; Dederick v. Agricultural Co., 26 Fed. 763; National Folding Box & Paper Co. v. American Paper Pail & Box Co., 55 Fed. 488. It is not improbable that these decisions were influenced by the technical nature of the objection in the particular cases. But the rule opens the door to fraud, as any stranger can put an assignment upon record; and it imposes upon a defendant who honestly doubts whether a party who claims title to a patent is the owner the burden which ought to rest upon his adversary. Our conclusions are supported by the opinion of the circuit court of appeals in Paine v. Trask, 5 C. C. A. 497, 56 Fed. 233, where the question was considered with care, although its decision was unnecessary to the judgment.

We have not considered the point argued by the appellants that the bill should have been dismissed because no proof was given of the complainant's incorporation. The assignment of errors does not present the question. Although, upon the proofs in the circuit court, the complainant was not entitled to a decree, it would have been a proper exercise of discretion on the part of the court, in view of the reliance which the complainant had doubtless placed upon the adjudications which have been referred to, to permit the complainant to reopen the proofs, and the cause to be reheard. In reversing the decree and directing the dismissal of the complainant's bill, we do so without prejudice to the granting by the circuit court of such an application, if seasonably made by the complainant.

The decree is reversed, with instructions to the circuit court to proceed in conformity with this opinion.

THE STATE OF VIRGINIA.

In re STATE STEAMSHIP CO.

(District Court, E. D. New York. April 13, 1894.)

SHIPPING—LIMITATION OF LIABILITY.

Where the British owner of a British ship is proceeded against in an American court by both British and American cargo owners in respect to a loss of cargo occurring in British waters, the extent of his liability is determined by the statutes of the United States, and not those of Great Britian.

This was a petition for limitation of liability for loss of cargo by the steamship State of Virginia, filed by the State Steamship Company.

Wing, Shoudy & Putnam, for petitioner.
Butler, Stillman & Hubbard, for claimants.

BENEDICT, District Judge. In July, 1879, the steamship State of Virginia, owned by the State Steamship Company, and bound for a voyage from New York to Glasgow, with a cargo, stranded on Sable Island. Her cargo sustained damage, for which suits were commenced by certain English underwriters and by certain American underwriters against the owners, in personam, in this court. Thereafter, and before the suits came on for trial, this petition for limitation of liability was filed by the State Steamship Company, and an order was made to appraise the value of the steamship State of Virginia and her pending freight on the voyage, and the interest of the petitioner in the same. The petitioner is a corporation organized under the laws of Great Britain. The steamship State of Virginia was a British vessel. The proofs taken before the commissioner show that the vessel became a wreck, and that the cost of her attempted rescue was greater than the sum realized from the property saved. The commissioner accordingly reported that the steamer and her freight, after the disaster and stranding aforesaid, were of no value. To this finding, exception has been taken, in order to raise the question whether a British owner of a British ship, being proceeded against in an American court by both British and American cargo owners, in respect to a loss of cargo occurring in British waters, can claim the limitation of liability provided by the statutes of the United States, or whether the limitation of this liability is to be determined by the law of Great Britain, there being a statute of Great Britain whereby the liability of a shipowner is limited to eight pounds per ton of gross registered tonnage. No objection being taken to the method adopted for presenting this question for the decision of the court upon this question, I have given it due consideration; and my opinion is that the extent of the liability of the shipowner, in a case like this, is determined by the statutes of the United States, and not by the statutes of Great Britain. The exceptions are therefore overruled.

PHOENIX TOWING & TRANSP. CO. v. MAYOR, ETC., OF CITY OF NEW YORK.

(District Court, S. D. New York. March 27, 1894.)

TUGS AND TOWS—MOORING SCOW—EXPOSED PLACE—GALE—DAMAGE—LIABILITY. Defendant chartered libelant's scow to carry garbage to sea. On returning from a trip, the scow was made fast to the sea fence, in a position which would be exposed in case it should come on to blow from the west, and without any notice of the mooring being given to libelant. There was no custom or usage between the parties that authorized defendant to leave the scow at that place without previous arrangement with libelant, although two other scows had been left there by libelant's directions during the few days previous. At the time of mooring this scow, the weather indications were threatening, and the master of the scow protested against being left there. He had thereafter no means of mooring the scow, and was in no way negligent. During the night it blew a gale from the northwest, and in the morning the scow was found to be damaged. *Held*, that defendants were liable.

Stewart & Macklin, for libelant.

William H. Clark, Corp. Counsel, and James M. Ward, Asst. Corp. Counsel, for claimants.

BROWN, District Judge. About 3 or 4 o'clock in the afternoon of Sunday, the 19th of February, 1893, the libelant's scow Seth Low, which had been used by the defendant for carrying garbage outside of Sandy Hook, was left at the Erie Basin breakwater, or sea fence. The place of mooring was comparatively safe, except as against strong westerly winds. During the night the wind changed from southward to a violent westerly gale, and the scow sank from pounding. The above libel was filed to recover damages.

Several of the libelant's scows had been in use by the defendant under arrangements for daily hire. A few days before, the defendant was notified that the scows would be wanted, and that they should be returned as soon as they were discharged. The practice upon returning scows was for the defendant to inquire by telephone of the libelant at what place the scows should be left, and to leave them in accordance with the answer received in reply. Two other scows, upon being discharged, had been left by the libelant's directions at the sea fence during one or two days preceding. The Seth Low being loaded, was taken to the stake boats at Gravesend on Saturday night, and during the following day (Sunday) towed out to sea, her cargo dumped, and she was then brought back to the sea fence, as above stated. It does not appear that any previous inquiry had been made where she should be left for the libelant to receive her; nor was the libelant notified, though the captain of the Municipal—the tug in charge—testifies that he received directions from the defendant to leave her at the Erie Basin breakwater.

When left there, the captain of the scow protested that it was not a proper place, and desired to be taken to Gowanus, not far distant. The weight of evidence shows that the weather was at that time somewhat threatening; the wind being from the south