

tion. *Reckendorfer v. Faber*, 92 U. S. 357; *Hailes v. Van Wormer*, 20 Wall. 353; *Pickering v. McCullough*, 104 U. S. 310. The new use of an old compound has been held to be patentable. *Muntz v. Foster*, 2 Webst. Pat. Cas. 93; *Merwin*, Patentability, 306.

The validity of the claims being established, infringement of them by the defendant is also placed beyond doubt. The only difference between complainant's meter and that of the defendant consists in this: that in the place of a wire ring used in the former the defendant uses a thin, broad, flat, and perforated metal plate, which produces the same result. The complainant's meter uses a thick, annular metal piece, while the defendant uses a broad, thin, annular metal piece, both being split to straddle the radial abutment in the measuring chamber. The substance of complainant's patented piston is employed, and only its form is slightly changed. As was said in *Machine Co. v. Murphy*, 97 U. S. 120:

"Authorities concur that the substantial equivalent of a thing, in the sense of the patent law, is the same as the thing itself; so that, if two devices do the same thing in substantially the same way, and accomplish substantially the same result, they are the same, even though they differ in name, form, or shape."

Nash sought to construct a meter piston of hard rubber that would not easily change its form or distort. Lightness, strength, and durability were the desirable qualities for such a piston, and this combination has been secured by his invention, which is none the less an invention because he may have been unable to explain or describe the principle or theory on which the desired effects have been obtained. It is the resultant product, and not the principle by which it is wrought out, which is patentable. The decree of the circuit court is affirmed.

THE COLUMBUS.

THE SCOWS NOS. 6, 8, 11, AND 12.

MUNN v. THE COLUMBUS et al.

(District Court, E. D. Pennsylvania. January 8, 1895.)

No. 25.

ADMIRALTY—SERVICES RENDERED TO SEVERAL VESSELS—JOINT LIEN.

The P. Dredging Co., owning three dredges and fifteen scows, which were employed, under a contract, in removing obstructions in a river, hired libelant's tugboats to tow the scows from the place where the dredging was going on to the place where they were to be discharged, and back again, and to move the dredges from place to place, as their work progressed. Neither scows nor dredges would have been of any use alone; neither had any means of propulsion or steering, and without the use of tugs they could do nothing. Libelant's tugboats performed the work and towed the various scows back and forth many times, no itemized account being kept of the towage of any particular scow or dredge. *Held*, that libelant had no joint lien on the several scows and dredges for the entire price of the services separately rendered to those vessels.

This was a libel by Frank W. Munn, managing owner of the tugboats Philadelphia and Alert, against the dredge Columbus and four

scows, for towage. The cause was heard on an agreed statement of facts:

"It is hereby agreed that the above case shall be heard finally upon the following facts, reserving the right to either party to appeal: The libellant is part owner and managing owner of the tugs Philadelphia and Alert. In the year 1891, James A. Mundy & Co. entered into a contract with the United States for the removal of Windmill and other islands in the Delaware river, opposite Philadelphia, and for the deposit of the material removed therefrom upon League island. To carry out this work, James A. Mundy and others organized under the laws of the state of New Jersey a corporation known as the Philadelphia Dredging Company, and this dredging company, or James A. Mundy and others associated with him, purchased and secured a dredging plant,—i. e. a number of dredges, scows, and towboats,—to be used in the same operation of dredging for the prosecution of the work in the removal of these islands. This plant was made up of two dredging plants, one known as the 'Philadelphia plant' and the other as the 'Thompson plant.' The Philadelphia dredging plant consisted of the dredge Starbuck and three bottom-dumping scows, Nos. 13, 14, and 15. The Thompson plant consisted of the dredges Columbus, America, and Norwalk, and the tug Bowen, and the scows Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12. These two plants were used and operated as one by the Philadelphia Dredging Company. The dredges above mentioned were anchored at the islands which were to be removed, and as the earth was excavated it was deposited upon the scows by the dredges in the manner usual in dredging operations. By the contract with the United States government the material excavated from the islands was required to be deposited upon League island, at a distance of about six miles from the scene of the dredging operation; and to receive the excavated material the above-mentioned scows were employed. They were bottom-dumping scows, constructed in the usual manner, and lacked any facilities whatever for propulsion, either steam or sail, or for steering, and it therefore became necessary to supply additional tugboats to tow the loaded scows down the river to League island and the empty scows back to the dredges to be refilled. In 1892 the Philadelphia Dredging Company, or James A. Mundy and those operating and owning the said plants, entered into an arrangement with libellant for the towage of the scows from the dredges to League island and back, and for such moving of the dredges as might be necessary, and agreed to pay the sum of \$26 per day for the tug Philadelphia and \$30 per day for the tug Alert. During the months of July and August, 1892, the tug Philadelphia rendered said towage service properly for 30 days, during November 26 days, and during December 20 days, for which the sum of \$2,054 became due to libellant. During July, 1892, the tug Alert rendered said towage services properly for 4 nights at \$30 per night, and 4½ hours' time at \$4 per hour, for which the sum of \$138 became due to libellant. The dredges above named were not supplied with any mud pockets, or dumps, except the said scows, and had no means of propulsion, and, in order to be used as dredges, were required to be operated in conjunction with one or more scows, as was done in this case, to receive the mud dredged, and were required to be advanced or moved from time to time as the dredging work progressed. The dredges excavated the earth and deposited it on the bottom-dumping scows. After the scows were loaded, they were, either singly, or, more usually, in a tow consisting of several, towed down the river to League island, and were there dumped over the receiver of the mud pump, the light scows being towed back to the dredge to be reloaded, the round trip occupying about three-quarters of a day. The said towage services were necessary to enable the work of dredging to be carried on, as without the use of the scows to carry the excavated material the dredges would have been useless for this work, and the scows would have been of no use for this work without the services of the dredges. The scows bore no name, but were known by numbers only. When brought back empty, the various scows were towed to the dredges, to be filled, in accordance with the directions of the superintendents in charge of the dredging work. No itemized account of the towing of the dredges or of each scow to and from each dredge or the towage of the dredges was kept by the

tugs. This suit was brought by libellant against the dredges Columbus, America, and Starbuck, and the scows Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, and 14, and of these the marshal attached the dredge Columbus and scows 6, 8, 11, and 12. The dredges and scows against which the suit was brought were the only ones within the jurisdiction of the court at that time."

John F. Lewis and Horace L. Cheyney, for libellant.

J. Rodman Paul, N. Dubois Miller, and Biddle & Ward, for respondents.

BUTLER, District Judge. The libellant has proceeded on a supposed joint lien against the several vessels attached, for the entire contract price of all the services separately rendered to these vessels, and to others not attached which were engaged in the same work. The proceeding is anomalous; no precedent for it is to be found in the history of admiralty jurisprudence. It is doubtless an experiment suggested by the libellant's necessities. The dredging company, having failed to keep its contract and being insolvent, the libellant must lose compensation for his services unless he can establish a lien such as he sets up. He might have kept an account with each vessel, and have proceeded against her separately for it, but looking, evidently, to the dredging company alone, for payment, he failed to do this. Now, to overcome the difficulty, he seeks to treat all the vessels as one, and supposes he may do so, because they were engaged in the same work, and thus hopes to recover his entire claim for the services rendered to all from such as he has been able to catch.

That he cannot do this seems plain. Where several vessels are physically connected, as in the case of a tow for instance, they may be considered one for certain purposes, but under no other circumstances. It is supposed *The Alabama*, 22 Fed. 449, is authority to the contrary; but it is not. The only question there was whether a dredge is a vessel, and liable to admiralty lien. The court held that it is, because it is intended for use in the water, in connection with scows. Whether the decision is justifiable has been doubted; but it has been followed, and is probably right. It certainly is not authority, however, for the proposition that several dredges and any number of scows which may happen to be employed with them, may be treated as one vessel, and consequently be made the subject of a joint lien for services rendered to any one of them. The courts are jealous of the extension of admiralty liens, and more inclined to restrict than to extend them. *The Mary Morgan*, 28 Fed. 197. If this libel is sustained it will only be necessary hereafter to call the several vessels belonging to a Line engaged in the same service, a "plant" (a new term in the admiralty) to render each and all liable to lien for services rendered either. The second point made, to wit, that the libellant did not render the services on the faith of the vessels, but in reliance on the contract, need not be considered.

The libel must be dismissed.

SCHOFIELD v. HORSE SPRINGS CATTLE CO. et al.

(Circuit Court, D. Montana. January 3, 1895.)

No. 314.

1. COURTS—DURATION OF TERM—ABSENCE OF JUDGE.

A term of court does not lapse or terminate before the limit set by law for its continuance, because of the absence of the judge assigned to hold it, on a day to which its session has been adjourned for convenience in the transaction of business, though no written order adjourning such term is made.

2. EQUITY—PRACTICE—OPENING DEFAULT.

In support of a motion to set aside a default and a decree entered pro confesso, and for leave to defend, an affidavit of one of the defendants was submitted, stating that "as to a portion of the cattle mentioned in the complaint the said bank did not * * * have a lien thereon, * * * but the same are free from the mortgages," and that the affiant had fully stated his case to his counsel, and was advised that he had a good defense upon the merits. An affidavit of counsel was also submitted, stating that the defendant had stated his case as fully as he could, in the absence of certain papers, and that affiant believed that the defendant had a good defense upon the merits. *Held*, that such affidavits were too indefinite, and could not supply the place of a sworn answer, or an affidavit stating the facts constituting the defense, in the absence of which the motion to open the default must be denied.

This was a suit by John W. Schofield, receiver of the Albuquerque National Bank of New Mexico, against the Horse Springs Cattle Company, W. B. Slaughter, and D. C. Kyle. A decree pro confesso was entered against all the defendants. Defendant Kyle moves to set the same aside, and for leave to defend.

Toole & Wallace, for complainant.

Sanders & Sanders, for defendants.

KNOWLES, District Judge. This case is presented to the court on a motion to set aside a default and decree entered pro confesso therein. The bill of complaint was filed March 2, 1894. On the 5th day of April, said year, a subpoena was duly issued commanding the said Horse Springs Cattle Company, W. B. Slaughter, and D. C. Kyle to appear on the 7th day of May, 1894, and answer said bill. This subpoena was served on the defendant Kyle on the 10th day of said April, 1894. On the 5th day of April, 1894, an affidavit was filed showing the nonresidence of the defendants Slaughter and the Horse Springs Cattle Company. On the same date the court made an order requiring the said defendants Slaughter and the Horse Springs Cattle Company to appear, plead, answer, or demur on the said 7th day of May, 1894, and that this order be served, if practicable, upon said defendant the Horse Springs Cattle Company by the United States marshal of the district of New Mexico, and upon the said Slaughter by the marshal of the state of Kansas, that state appearing to be his residence. It appears from the return on this order that the marshal of New Mexico served the order personally on the defendant Slaughter in that territory on the 23d day of April, said year, and that the Horse Springs Cattle Company accepted service of the same on the 27th day of that month. On the 29th day of May,

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