

v. Crosby Steam Gauge & Valve Co., 113 U. S. 157, 5 Sup. Ct. 513; Manufacturing Co. v. Adams, 151 U. S. 139, 14 Sup. Ct. 295; Electric Co. v. La Rue, 139 U. S. 601, 11 Sup. Ct. 670; Stohlmann v. Parker, 53 Fed. 925, 4 C. C. A. 109; Machine Co. v. Dizer, 61 Fed. 102, 9 C. C. A. 382.

The foregoing are some of the cases in which the deviations from former devices were trifling, but the changes produced better results, and were held to constitute patentable inventions.

In the case of *Topliff v. Topliff*, supra, the court, speaking of the change in the patented device from former ones, observed:

"Trifling as this deviation seems to be, it renders it possible to adapt the Augur device to any side-spring wagon of ordinary construction."

And on this ground the patent was upheld. In the *Barbed Wire Patent Case*, supra, the court said:

"From this view of the state of the art at the time the patent in suit was issued, it is evident that Glidden can neither claim broadly the use of the plain or the twisted wire, nor the sharp thorns of barbs, nor, indeed, the combination of the two as they appear in the Kelly patent. * * * The vital difference in the two patents is in the shape of the barb itself."

And upon this difference the patent was sustained. In *Consolidated Safety Valve Co. v. Crosby Steam Gauge & Valve Co.*, supra, the principal thing that had been done by the inventor of the patent there involved was to make a change in the size and shape of the area of the valve outside of the beveled seat. In *Manufacturing Co. v. Adams*, supra, although the court found it difficult to differentiate between the patent in suit and previous devices, yet it was held that, as a better machine was produced, the patent therefor was sustainable.

Applying these principles to the patent in suit, I am of opinion that the device covered by it constitutes a patentable invention, and that it had not been anticipated by any prior patented device. It is not seriously contended but that, if the complainant's patent is valid, the defendants' device is an infringement of it. In my judgment, it is so palpable an infringement that it is needless to point out the coincidence of structure and operation of the two devices. It is apparent upon the most casual inspection. There will be a decree for the complainant.

THE BATTLER.

NEALL v. WESTERN ASSUR. CO. et al.

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

No. 115.

1. MARITIME LIENS—DISTRIBUTION OF FUND—LIMITATION OF LIABILITY.

Holders of maritime liens of the same class are entitled, especially in proceedings for limitation of liability, to pro rata distribution, without regard to the dates of issuing process or obtaining decrees, unless their rights have been forfeited.

2. SAME—FORFEITURE BY LACHES.

Where the owner of tows lost by a tug invited the insurer of their cargoes to join with him in a suit against the tug, and the insurer refused to do so, but, after the tug's liability had been established by a decree, then filed a separate libel, *held*, that it had waived its right to share pro rata with the original libellant, and was only entitled to the surplus, if any, after his decree was satisfied. *Woodworth v. Insurance Co.*, 5 Wall 87, followed.

Sur exceptions to the report of the commissioner appointed by virtue of the petition of Frank M. Neall, trustee, as owner of the steam tug *Battler*, for limitation of liability for damages claimed from loss or injury by the sinking of the barges *Tonawanda* and *Wallace* while in charge of the *Battler*.

The original suit was brought by John J. Schrader, as owner of the said barges, on December 9, 1889, and was heard on May 23, 1893; and on June 13, 1893, an interlocutory decree was made in favor of the libellant. See 55 Fed. 1006. A commissioner was then appointed to compute and report the amount of damages. On October 20, 1893, before the taking of testimony upon the matter of damages was completed, a libel was filed against the tug by the Western Assurance Company of Toronto, Canada; the said company being the underwriters of coal shipped on the said barges at the time of the loss. The damages claimed in this libel were \$13,688.31. Service of the writ, however, was not effected, and on October 28, 1893, Frank M. Neall, trustee, filed this petition for a limitation of liability. See 58 Fed. 704. On November 3, 1893, in accordance therewith, a commissioner was appointed to ascertain the value of the tug, and it was found to be \$20,784.22. A bond in that amount having been entered by the owners of the tug, it was ordered that further prosecution of all suits in respect to claims in said matter should be restrained, and the commissioner whose report is now passed upon was appointed for the purpose of hearing proof of claims. He allowed the claims of Schrader to the amount of \$19,701.26, with interest thereon from the date of the sinking of the barges, viz. September 10, 1889, to the date of the filing of the decree, the amount of which when added to the face of the claim would exceed the amount of the bond entered, basing his decision upon *Woodworth v. Insurance Co.*, 5 Wall. 89, and *The Saracen*, 6 Moore, P. C. 56. The proofs showed that Schrader and the other parties interested had invited the assurance company to join with them in the original suit; that the said company had agents in Philadelphia to attend to their interest in the premises; and that, from correspondence and other evidence, it was evident to the commissioner that no steps had been taken or were intended to have been taken by the company except the outcome of the original suit was successful.

N. Dubois Miller and J. Rodman Paul, for libellants.

John F. Lewis, Edwin F. Pugh, and Henry Flanders, for respondents.

BUTLER, District Judge. As respects the tug's liability, I am asked to reconsider the subject in the light of testimony presented by the assurance company before the commissioner. This testimony was produced solely to account for the company's delay in making claim, and is of no material value in considering the question of liability. It consists mainly of opinions of the company's agents based upon what they learned after the occurrence. One or more of them visited the locality of the accident to ascertain the feasibility of reclaiming some part of the cargo, and for that purpose alone. The testimony shows that this was the subject of their inquiries, and that the question of the tug's liability was not mooted. These opin-

ions are not evidence against the original libellant. To the extent that the witnesses state facts, I have considered their statements, but find nothing in them that answers the testimony on which the tug was condemned.

As respects the assurance company's claim to participate in the distribution, the question is interesting, if not difficult. In the absence of *Woodworth v. Insurance Co.*, 5 Wall. 87, I would allow the claim. After a careful examination, I am satisfied that a decree in favor of one lien holder does not of itself entitle him to a preference over others of the same class (in this country), where the proceeds of a vessel are in court for distribution. Neither the date of issuing process nor obtaining a decree is important in this respect.

But especially is this so where the proceeding is governed by the act of congress for limitation of vessel owners' liability. All parties having liens are entitled to share in the distribution, unless their rights have been forfeited. *Henry*, Adm. 201; *The Martha*, No. 44 of 1884, Dist. Ct. E. D. Pa.; *The Sarah*, No. 56 of 1880, Dist. Ct. E. D. Pa.; *The E. A. Barnard*, 2 Fed. 719; *The City of Tawas*, 3 Fed. 173; *U. S. v. Ames*, 99 U. S. 35; *The Rose Culkin*, 52 Fed. 331; *The Benefactor*, 103 U. S. 244; *The City of Norwich*, 118 U. S. 491 [6 Sup. Ct. 1150]; *Providence & N. Y. S. S. Co. v. Hill Manuf'g Co.*, 109 U. S. 578 [3 Sup. Ct. 379, 617]; *The Triumph*, 2 Blatchf. 433, note [Fed. Cas. No. 14,182]; *The Saracen*, 6 Moore, P. C. 56; *The Phebe*, 1 Ware, 365 [Fed. Cas. No. 11,065]; *The Fanny*, 2 Low. 509 [Fed. Cas. No. 4,638]; *The America*, 16 Law Rep. 264 [Fed. Cas. No. 288]; *The Arcturus*, 18 Fed. 744; *The J. W. Tucker*, 20 Fed. 131; *The Julia*, 57 Fed. 235.

Aside from this question, however, I am unable to distinguish the case before me from that of *Woodworth v. Insurance Co.*, 5 Wall. 87. In that case the supreme court held that where one of two parties injured in a collision institutes proceedings against the vessel in fault, and at his own expense prosecutes the suit to condemnation, the other, who has contributed nothing to establish the vessel's liability, but has stood by, taking no part, cannot share the proceeds of the vessel, or receive any thing therefrom until the claim of the other has been satisfied. Here the assurance company not only stood by, doing nothing, but as the commissioner has found, refused to assist when requested. Indeed it discouraged, or sought to discourage, the original libellant by suggesting difficulties in the way of a recovery. Under such circumstances the supreme court seems to regard it as inequitable to allow one occupying the position of the assurance company to participate in the distribution, and therefore treats him as having waived or forfeited his claim in so far as the original libellant is concerned.

All exceptions are dismissed and the report confirmed.

THE SPOKANE.

MCGRAW TRANSPORTATION CO. v. THE SPOKANE.

(District Court, E. D. Wisconsin. April 17, 1895.)

ADMIRALTY—SALVAGE.

The steamship S., while navigating on Lake Michigan, at the close of the season, and when storms were to be expected, broke her shaft, and thereby became disabled, having no sails. Neither her position nor the conditions of the weather at the time threatened any immediate danger, but the barometer was falling, indicating the approach of a storm. The steamship V., passing on her course, responded to the signals of the S., and at the request of the master of the latter took her in tow for a port where she could be repaired. During the following night a storm came on which caused some trouble in the towage, but no extraordinary difficulty or great danger. On the afternoon of the day following that when the S. was taken in tow, the two steamers reached a port, where the S. was left in charge of a tug. The V. suffered no injury except a delay of 22 hours. The value of the S. and cargo was \$320,000, and of the V. \$125,000. *Held*, that the service rendered by the V. was a salvage service, but not of the highest order, and that an allowance of \$3,600 was proper.

This was a libel by the McGraw Transportation Company against the propeller Spokane for salvage.

This libel was filed by the owner of the propeller City of Venice for salvage services in releasing from peril on Lake Michigan the propeller Spokane and her cargo of general merchandise, and towing to the port of Milwaukee for repairs. The City of Venice was a freighting steamer, registering 1,771 tons, and laden with coal, bound for Chicago. The Spokane was a steel steamer, and also a freighter, of about equal tonnage, bound from Chicago to Buffalo, stanch and well manned and equipped. The Spokane left Chicago December 9, 1894, for her last return trip of the season. On December 10, at 9:55 a. m., her shaft broke, leaving the vessel without motive power, as she was not provided with sails. At the time of this disaster she was on her course, 12 to 15 miles off the east shore of Lake Michigan, about 8 miles north of the port of Manistee, and about 40 miles south of the South Manitow Island. Her position was only a few miles south of Point Au Becs Scie, where the courses join of vessels bound south by either the outer or inner passage of the Manitow, and there diverge for Milwaukee and Chicago. The master knew that several large steamers were then about due at that point, bound down for those ports; that their courses would bring them in sight, and one of them might be expected soon. Preparations were thereupon made for a tow; a new 10-inch hawser which was on board was placed in readiness, and a flag of distress was raised. Excepting her inability to navigate, the Spokane was in every respect seaworthy, and in no imminent peril; there was no sea running, an off-shore breeze prevailed, there was deep water, a good shore, and she was well supplied with ground tackle; a small boat could be safely sent to the shore to wire for assistance, but it does not appear that a sufficient tugboat could be obtained from any port nearer than Milwaukee. The testimony shows that there was a falling barometer at the time the assistance in question was rendered, betokening the storm of rain and wind which came that night. The City of Venice, on her course for Chicago, sighted the Spokane about noon of the 10th, bearing a trifle on her starboard bow; the Spokane gave the distress signal of four blasts of her whistle, in addition to the flag signal, whereupon the Venice was promptly headed for her, coming within hail at about 12:40; was informed of her disabled condition, and asked to stand by and give her a tow to Milwaukee for repairs. There is some variance with regard to the expressions used by the master of the Spokane,—whether he was urgent that the Venice should not leave them, and whether the port of Manitowoc was mentioned, and rejected because