

whistle by the Dakota, is extremely conflicting. It is unnecessary to rehearse the facts as found by the district judge. They are fully set forth in his opinion, and we do not find sufficient in the case to warrant a reversal of such findings. The libellant contends that, even conceding the signals and movements of both vessels to be as found by the district judge, the navigation of the Dakota was faulty in that, having given a signal of one whistle, as she was entitled to do, being the privileged vessel, thereby indicating an intention to cross the bow of the Baker, she thereafter stopped and reversed her engines, thereby confusing the navigation of the Baker, and inducing her to abandon the attempt to pass under the stern of the Dakota, and to endeavor to cross the latter's bow. The district judge, however, found that the collision happened near the New York shore, the Dakota being bound into her slip at Grand street, a special circumstance qualifying the rule that the privileged vessel should keep her course and, as libellant contends, her speed. The Baker knew that she was a ferryboat about to make her slip, and should have anticipated a checking of her speed. The difficulty with the Baker seems to have been that she maintained too high a speed to allow her to conform her own movements to the course of the ferryboat. Decree of the district court affirmed, with costs.

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THE NORMA.

MERRILL v. SULLIVAN.

(Circuit Court of Appeals, Second Circuit. May 28, 1895.)

EVIDENCE—PROOF OF ACCOUNT—ABSENCE OF MEMORANDA.

A bill of particulars containing numerous items of work and materials may be proved, after destruction of the original memoranda, from which the account was made up, by the evidence of the bookkeeper that he correctly transcribed the memoranda, and the testimony of the persons who made and furnished the memoranda to him that the same were correct; but the proof is insufficient where it consists only of the bookkeeper's testimony as to the correctness of his transcription.

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

This was a libel by John W. Sullivan against the steam yacht Norma, Charles H. Merrill, claimant, to recover for labor and materials employed in making certain repairs. There was a decree in favor of libellant for \$2,150.95, with interest, and the claimant appealed.

Henry W. Bates, for appellant.

Chas. C. Burlingham, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The suit was brought to recover \$4,122.87, for labor and materials in repairing the engines of the yacht Norma. After the libel was filed, the claimant paid libellant \$2,000 on ac-

count. The district court referred it to a commissioner to take proofs and report the amount due. Libellant was employed to put the engines in repair and fit them up thoroughly in the best manner and as rapidly as possible, but no price was agreed upon in advance. The libellant served a bill of particulars, which fills 20 printed pages of the record, and avers in his libel that the work done and materials furnished were necessary and were reasonably worth the sum of \$4,122.87. The issues raised by the pleadings were as to the doing of the work and furnishing the materials set forth in the bill of particulars, and as to the reasonable value thereof.

The report of the commissioner is simply: "In my judgment, the libellant has clearly proved his case, and I find that there is due him a balance [after crediting the \$2,000] of \$2,109.12." This is \$13.75 less than libellant's claim, but the commissioner does not state what item or items he disallowed or reduced.

In the absence of any discussion of the case by the commissioner, it is wholly impossible to ascertain by what process of reasoning he reached his conclusion. There was evidence sufficient to sustain a finding that the prices charged for specific items in the bill were reasonable and customary. There is also abundant evidence to show that a great deal of work was done and much material furnished, and it is possible from the testimony to state, in general terms, the character and extent of libellant's services with sufficient fullness to enable persons familiar with work of that kind to estimate its value. A hypothetical question which recited the facts thus proved elicited from a witness called by the claimant an estimate of \$2,200. No similar question was put to any of libellant's witnesses, and none of them who gave any estimate of a lump sum for the work had sufficient personal knowledge of what was done to testify to the value, except in reply to such a question. Presumably, the commissioner reached the conclusion that the libellant had proved his bill of particulars (except as to items aggregating \$13.75) by competent evidence, but we fail to find such proof in the record.

The bookkeeper who made up the bill had but little personal knowledge of the correctness of any of the items. He made up the account from memoranda furnished to him, by foremen or other employes of libellant. When he had transcribed the several items from the memoranda to the account, he destroyed the memoranda, with some few exceptions. Under the rule laid down in *Mayor, etc., of New York City v. Second Ave. R. Co.*, 102 N. Y. 572, 7 N. E. 905, it was competent to prove the charges by the testimony of the bookkeeper, who transcribed them from the temporary memoranda (which were substantially slate entries) supplemented by testimony of the persons who made the memoranda that such memoranda, to their own knowledge, were correct. The bill contains items of charge under 38 different dates. The character of these items is well illustrated by the charges under date of June 29th.

June 29.

|                   |      |
|-------------------|------|
| 1 file.....       | .50  |
| 1 lubricator..... | 2.90 |

|   |      |        |
|---|------|--------|
| 1½ lbs. Tupper's [ ] flax packing.....            | .80  | 1.20   |
| 1 lb. pure rubber.....                            |      | .40    |
| 1 5/8" stud. and hx. nut.....                     |      | .08    |
| 2 1/2" ".....                                     | .07  | .14    |
| 1 1½" nipple.....                                 |      | .17    |
| 8 1¼" fin. hx. nuts. for C. H.....                | .70  | 5.60   |
| 9 hrs. fit. eccs. and straps.....                 | .35  | 3.15   |
| 4 " drill ecc. rod.....                           | .60  | 2.40   |
| 9 " fit. cylinder.....                            | .35  | 3.15   |
| 5 " lathe check valves.....                       | .60  | 3.00   |
| 17 " fit. air pumps.....                          | .35  | 5.95   |
| 6 " fit. brass oil cups.....                      | .36  | 2.10   |
| 1 day lathe valve stems and valve stuff box.....  |      | 6.00   |
| 3 hrs. fit. valve stems.....                      | .35  | 1.05   |
| 7 " " quadrant.....                               | .35  | 2.45   |
| 9 " " blower engine.....                          | .35  | 3.15   |
| 2 " " gland.....                                  | .35  | .70    |
| 2 " lathe bush for link motion.....               | .60  | 1.20   |
| 3 " " pins " " ".....                             | .60  | 1.80   |
| 3 " drill link and block.....                     | .60  | 1.80   |
| 9 " fit. " " ".....                               | .35  | 3.15   |
| 2 " " lever.....                                  | .35  | .70    |
| 2 " plan. rev. links.....                         |      | .60    |
| 9 " large lathe crank and int. shaft.....         | 1.00 | 9.00   |
| 1 " drill C. P boxes.....                         |      | .60    |
| 2 " fit. thrust collars.....                      | .35  | .70    |
| 3 " patt. mak. on thrust collars.....             | .45  | 1.35   |
| 2¼ days helper on eng. parts.....                 | 3.50 | 9.63   |
| ¼ day patt. mak. on pist. valve and v. cover..... | 4.50 | 1.13   |
| 1 hrs. forge valve stem and piston rod.....       |      | .80    |
| 4 lbs. steel.....                                 | .06  | .24    |
| 4½ hrs. lathe blinder bolts and nuts.....         | .60  | 2.70   |
| 54 hrs. foreman in charge.....                    | .50  | 27.00  |
| 352 " mach. & rigger on board.....                | .35  | 123.20 |

A large part of these charges is for labor at rates per hour which vary with the character of the work done, or of the machine or tool used by the workman. Part of this work was done in the shop, and part on the yacht. The time of the men working on the yacht was kept by a foreman, who testified that the memoranda he made of the time of the men under him was correct to his personal knowledge. As to such items on the bill, therefore, as represent the time of the men on the yacht there was competent evidence sustaining them, before the commissioner, for the bookkeeper swears that he correctly transferred the items from the memoranda; and, although the master of the yacht testified that some of the men were frequently idle during working hours, the finding of the master on conflicting evidence would not be disturbed.

In the case of work done in the shop, the bookkeeper made up his account from memoranda furnished to him by the workmen, which he assumed to be correct, as he had only general knowledge as to the fact that they were working. These memoranda were destroyed, but as they were of the nature of slate entries that circumstance is not material, when the person transcribing them testifies to the accuracy of his transcription, and the persons furnishing them to their correctness. Each workman returned, on these shop memoranda, not only the hours he worked, but also the materials he used. The form of memorandum is as follows:

| John W. Sullivan.<br>Engine Works.<br>385 South Street. |                                       | Date.         | Name.     |
|---|---------------------------------------|---------------|-----------|
| Hours.  | Tool.<br>Materials used and what for. | Kind of Work. | For Whom. |

The difficulty with the proof on this branch of the case is that no one testifies of his own knowledge to the accuracy of these shop memoranda. Since the originals are destroyed, it would probably not be possible to produce specific evidence to the accuracy of each separate memorandum, but libellant should at least have called the workmen who made the memoranda to testify that all memoranda made by them and turned in to the bookkeeper during the period in question correctly set forth the hours they worked and the materials they used. Without such proof, the charges in the bill are supported only by hearsay evidence. Besides the charges for material used by a workman who returned his time on a shop memorandum, other material was sent direct to the yacht, either from the shop or from some outside place where it was bought. Except in a few instances, however, there is no competent evidence of the delivery of such material.

Upon the argument it was intimated that the court would make an independent examination of the entire bill in connection with the evidence, and determine what items are sustained by competent proof. It has become apparent, however, that without further evidence such a disposition of the case would work injustice to the libellant, who apparently, being misled by the commissioner's acceptance of his proof as sufficient to cover his whole charge, has failed to identify those items on the bill as to which the proof is legally sufficient. For example: The charge above quoted, "352 hours mach. & rigger on board," is evidently for work done at the yacht; the charge, "5 hours lathe check valves," is presumably for work at the shop, where the lathe is; but, as to such charges as "17 hours fit. air pumps," we cannot tell whether the work was done at the shop or on the yacht, and therefore whether it stands unproved or proved upon the record.

The decree of the district court is therefore reversed, with costs of this court to appellants, and the cause remitted to the district court, with instructions to refer it back to the commissioner to take such further evidence as may be offered, and report either the fair and reasonable value of the work and material as a whole or what items are proved, and the fair and reasonable value of such items.

## PEARSOL et al. v. MAXWELL et al.

(Circuit Court, W. D. Pennsylvania. March 2, 1895.)

## No. 1.

## CONSTRUCTION OF WILL—ESTATES TAIL—BARRING REMAINDER.

A testator devised land to E., "to have and to hold the same to the said E. and the heirs of her body, provided, however, that the children of the said E. do not marry or be given in marriage to any of the children of my uncle J., or to any of his grandchildren, or great-grandchildren, or other lineal descendants of the said J.; but should any of the children of the said E. marry any of the descendants of the said J., the share of my estate of he, she, or they so marrying as aforesaid shall go to and become vested in the other child or children of the said E., share and share alike"; and the testator charged E. with the payment of a legacy of \$2,000: Held, that E. took an estate tail, which became converted into a fee simple absolute by her deed executed agreeably to the Pennsylvania statute for the barring of estates tail.

This was an action of ejectment brought by William S. Pearsol and others against George C. Maxwell and others. In pursuance of a written stipulation, the case was tried by court without the intervention of a jury. The following facts were found by the court:

(1) This action of ejectment is for the recovery of the undivided one-half part of a tract of land situate in Luzerne township, Fayette county, Pennsylvania. (2) The plaintiffs and the defendants respectively claim title to said land under the will of Samuel N. Crawford, who died in the year 1853, seised in fee of said land, having first made his last will, dated May 15, 1853, which will was duly probated after his death, namely, on July 13, 1853, and is recorded in said county of Fayette in Will Book No. 3, page 86. Said will contains the following clauses: "Item. I give and devise to my cousin Edith Pearsol, daughter of Benjamin Sharpless, all that portion of the farm upon which I now reside, and bounded and described as follows, viz.: Beginning on the Monongahela river where my lands adjoin those of Joseph Crawford's and said river; thence north 74°, west 30 perches; south 83°, east 75 perches, to lands of William Crawford; thence south 14°, east 207 perches; thence north 89¼°, east 134 perches, to a post; thence along the lands of Joseph Crawford north ¼°, west 205 perches, to the place of beginning, on the Monongahela river aforesaid,—to have and to hold the same to the said Edith Pearsol and the heirs of her body, provided, however, that the children of the said Edith Pearsol do not marry or be given in marriage to any of the children of my uncle Joseph Crawford, or to any of his grandchildren or great-grandchildren, or to any other lineal descendant of the said Joseph Crawford; but should any of the children of the said Edith Pearsol marry any of the descendants of the said Joseph Crawford, the share of my estate of he, she, or they so marrying as aforesaid shall go to and become vested in the other child or children of the said Edith, share and share alike. The part of my farm above devised to Edith Pearsol contains one hundred and seventy-five acres by a survey thereof made by James Moffit. It is my will and desire and I do hereby bequeath to the said Edith Pearsol all my household and kitchen furniture, and that she shall pay to my cousin Benjamin W. Crawford, Sr., the sum of two thousand dollars within five years after my decease, without interest on the same." Said will (prount) is made part of this finding. (3) By deed dated June 10, 1858, William Pearsol and Edith, his wife (the above-named devisee), conveyed the said tract of land to Christopher Cox, his heirs and assigns; the said grantors declaring in said deed that it was their intention by said deed forever to debar any estate tail in possession, reversion, or remainder, which the said Edith had in the said land, which deed was executed, acknowledged, and recorded agreeably to the provisions of the act of assembly of January 16, 1799, for the barring of estates tail. (4) The defendants (or some of them) have succeeded to and are invested with the