

fore, on demurrer, held bad for multifariousness. 68 Fed. 913. Complainants now move to vacate the order sustaining the demurrer, and for leave to amend the bill.

J. Snowden Bell and George H. Christie, for complainants.
Witter & Kenyon, for defendants.

DALLAS, Circuit Judge. When the demurrer to the bill in this case was originally argued, the impression was made upon my mind that it was conceded by complainants that the respective subjects-matter of the five patents sued on were not used in one mechanism, but upon different, though contiguous, parts of the same railroad. Upon this understanding, I held the bill to be multifarious, and upon that ground sustained the demurrer. The complainants now move to vacate that order, and for leave to amend their bill by adding thereto the following:

"And your orators in this behalf further aver the fact to be that the joint use made by the defendants herein as herein averred includes a use of a material and substantial part of the subject-matter of each of the said recited patents in one and the same connected machine, mechanism, or apparatus."

This proposed amendment is accompanied by an affidavit that, to the best of the affiant's knowledge and belief, the facts therein stated are true; and upon the argument of the present motions, complainants' counsel has strenuously insisted that the statement it embodies is supported by the several patents themselves. Counsel for defendants has quite as earnestly contended, on the other hand, that a proper understanding of the patents requires the negation of the averment sought to be introduced by amendment. Waiving any doubt as to whether it would be permissible to now enter upon a discussion of the question thus raised, I decline to do so, because I deem it inexpedient to express any opinion respecting the patents sued upon at this stage of the cause. For the present purpose, I assume the truth of the matter which the complainants ask leave to insert in their bill. The amendment is allowed. The order heretofore made is vacated, and the demurrer overruled. Any question regarding costs, which may call for further consideration of this matter, is reserved. The defendants are assigned to answer or plead *sec. reg.*

COLLINS v. GLEASON.

(Circuit Court, S. D. New York. June 28, 1895.)

1. PATENTS—NOVELTY.

The discovery that sheets of celluloid, which, by reason of their fragility, were not adapted for use as card cases and book covers, could be sewed between leather bindings, and held by their stitches so as to be used for these purposes, *held* to be sufficiently novel to support a patent.

2. SAME—CELLULOID BINDINGS.

The Collins patent, No. 405,874, for celluloid bindings of leather for card cases and book covers, *held* valid and infringed.

This was a bill in equity by Kate J. Collins against Thomas Jay Gleason for infringement of a patent for bindings of leather for celluloid card cases and book covers.

Edwin H. Brown and James C. Chapin, for plaintiff.
L. J. Morrison, for defendant.

WHEELER, District Judge. This suit is brought upon patent No. 405,874, dated June 25, 1889, and granted to the plaintiff, for celluloid bindings of leather for card cases and book covers. The defenses set up in the answer are, in substance, that the specification is insufficient; that, to deceive the public, it was made to contain too much,—with denials that the invention was of any utility; that it was, “in any respect, novel”; and of infringement. The defenses set up wholly fail, and the denials, except as to novelty, are overcome; and as no prior knowledge and use by any person is set up, with place, as required by the statute, or at all, the question of novelty rests upon this general denial, to be determined, as to patentability, upon common knowledge. Celluloid sheets apparently were not, and, from their frangibility, could not well be, used for these purposes without such bindings; for they could not be held by stitches, nor otherwise held in place. The plaintiff discovered that they could be sewed between leather bindings, and be held by the stitches. For this discovery, and the combination of these parts in this way into these new articles of manufacture, she was awarded this patent. Binding the edges of material with other material to hold or strengthen it was not at all new, and a patent for this only would wholly fail. But here was peculiar material, not used before by being sewed, nor practically sewable alone, made sewable and brought into use by this invention. This does not appear to be a merely mechanical double use, but a new use brought about by contrivance, experiment, and adaptation. Such bringing to a new use seems to be patentable. *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194. Decree for plaintiff.

SALISBURY v. SEVENTY THOUSAND FEET OF LUMBER et al.

(District Court, S. D. New York. March 26, 1895.)

DEMURRAGE—DELIVERY OF CARGO—SALE “FREE ON BOARD”—VESSEL TO ARRIVE
—DELAY AT SELLER'S RISK.

The defendant B. (brought in by petition of defendants) loaded the libellant's boat C. with lumber at Albany, and consigned it to himself at New York. He then sold the lumber to H. who bought it for export by the steamer A. P.; B. agreed to deliver it “f. o. b. vessel where she lies” (meaning free on board the A. P., and clear of all claims or liens). When B. sent the boat alongside the A. P. to deliver the lumber, the A. P. was not ready to receive it, and the boat was detained six days before the lumber was received, for which delay the lumber, after delivery on the steamer, was libeled for demurrage. B. claimed to have followed H.'s orders and those of the agents of the steamer as to the time of tender alongside, but upon conflicting evidence on this point, it being found that the lumber was received as soon as the customary permit obtained from the steamer specified: *Held*, that the risk of delay in the readiness of the steamer, and the burden of proving directions to go alongside earlier than the permit stated, were on the seller, B.; that the weight of evidence did not support his contention, and that though the lumber was liable for the demurrage, B. was personally bound to indemnify H. against the claim, and to pay the same with costs.

This was a libel by Nelson H. Salisbury, as executor, etc., against 70,000 feet of lumber and Horace F. Burroughs, Sr., to recover demurrage.

Hyland & Zabriskie, for libelant.

Convers & Kirlin, for Herbst, claimant of the lumber.

Charles H. Hough, for Horace F. Burroughs, Sr.

BROWN, District Judge. The libel was filed to recover freight and demurrage upon the delivery of 70,000 feet of lumber from the river boat E. J. Carroll, upon the steamship Afghan Prince on November 21, 1894. The lumber had been shipped on board the Carroll at Albany by the defendant Burroughs, consigned to himself at New York, and he had thereafter sold the lumber to Herbst who bought it for the purposes of export by the Afghan Prince. The contract between Mr. Burroughs and Mr. Herbst was that the lumber should be "delivered f. o. b. vessel where she lies within lighterage limits, shipping instructions hereafter." The proofs show that by the language used it was meant that the lumber in question should be delivered by the seller free from all claims or charges alongside the ship, by which it was intended to be exported, and into her custody, at the time when the ship was ready to receive it; and that the seller should procure, according to custom, the ship's receipt therefor, and deliver it to the buyer.

The boat with lumber on board was sent by Mr. Burroughs alongside the steamer on the afternoon of November 15th; but the steamer not being ready to receive it, the lighter was moved to the opposite side of the slip, where it remained until the 21st, when it was hauled alongside and the lumber removed to the ship on that day. For this delay in unloading, demurrage for six days is claimed. Mr. Herbst contends that he was not liable for the delay, because he was entitled to have the lumber delivered free of all charges, and because he had not caused any delay in the delivery. Mr. Burroughs claims that the lighter was taken alongside on the 15th under directions of Mr. Seager, the agent of the steamer, or of other persons representing the line of steamers, to whom he had been referred for instruction by Mr. Herbst, while the latter denies that any such reference for instructions was given. Mr. Burroughs was made a party defendant upon petition.

By the contract between Burroughs and Herbst the latter was bound to give instructions as to the time when the lumber should be taken alongside the steamer for delivery. If, instead of giving such instructions himself, therefore, he referred Mr. Burroughs to the agents of the steamer for instructions, Mr. Herbst, as between him and Burroughs, would be bound by any instructions given to Burroughs by the representatives of the steamer, and therefore bound to pay any legal claims for demurrage arising through compliance with such instructions, and look to the steamer or her agents for his own indemnity. Mr. Herbst denies, however, having referred Mr. Burroughs to the agents of the line for any instructions, though admitting that he referred him to them for information, stating that

he had been unable to ascertain from them when the steamer would be ready.

On the 16th of November Mr. Goudie, an employé of Mr. Herbst, obtained a permit for loading the lumber upon the steamer upon the 20th; and the cargo as received within 48 hours after that day, which was sufficient under the custom proved. Both Mr. Herbst and the representatives of the steamer deny any appointment, or the designation of any fixed day for the receipt of the lumber, other than the 20th. The chief reliance of Mr. Burroughs is upon an alleged conversation between his salesman, Mr. Oleson and Captain Saunders, one of the superintendents of the steamship line. The latter testified that in answer to Mr. Oleson's urgent request to receive the cargo without delay, he merely promised that the ship would take it as soon as she could, if he chose to send the lighter to the ship at the Atlantic Basin. Mr. Oleson testified that he promised that if he would send the lighter there that the discharge should be commenced on Friday the 17th.

Mr. Burroughs had, for a week previous, been employing the lighter in other work with this lumber on board, to prevent demurrage accruing, and when he received word that the lumber would be received on the 15th, had other employment engaged for the lighter on that day. I have no doubt that he supposed the lumber would be received at once. On the other hand it was known that the steamer had been delayed in her arrival; had afterwards been obliged to go upon dry dock, and that the time of her loading this lumber, which was to go upon her deck, was uncertain. The ordinary practice of the agents of the line was to give a written permit fixing the time for unloading. In claiming to rely upon oral directions, instead of upon the ordinary written permit as to the time of receiving cargo, the burden of proof is upon Mr. Burroughs to show clearly that a definite time was undoubtedly and definitely fixed. In the contradiction between the two principal witnesses in this regard, I do not think that there is such a preponderance of evidence on the side of Mr. Burroughs as justifies the court in holding that such a definite agreement was made. The testimony of Mr. Oleson, the chief witness on that point, is weakened by errors in other respects, which the preponderance of evidence seems to show that he has made in other parts of the case; first, as respects a time fixed by Mr. Seager, in a conversation which is said to have been had before the vessel arrived; and secondly, as respects the permit for the delivery given to Mr. Oleson on the 16th of November, and Oleson's statement on that day, that he had been unable to obtain from the agent of the ship any definite time to be fixed.

I must hold, therefore, upon the testimony, that Mr. Burroughs in sending the lighter alongside before the permit was obtained, sent her there without any definite appointment, and at his own risk. In selling the lumber free on board of a vessel which was to arrive, Mr. Burroughs took the risk of the delay until the time when the vessel was ready to receive the goods. Upon such a contract he could only avoid that risk, by fixing a time for the delivery, when it should be the duty of the vendee or of the ship to receive it. In this

case, the contract was silent as to the time of delivery, and I cannot find that any fixed day was subsequently agreed upon before the time named in the permit of the 16th for delivery on the 20th. The carrier, however, was entitled to compensation for the use of his boat. She was under the direction of Mr. Burroughs, the shipper; he is liable to the lighter for her detention, and has not sufficiently shown that Mr. Herbst, through any reference to the steamship agents, or any fixed time agreed on with them has relieved him of that liability or entitled him to call upon Mr. Herbst for indemnity.

Mr. Burroughs, before suit, tendered to the libelant's attorneys the freight, though refusing to pay demurrage. The attorneys refused to receive it, lest by receiving it they should release any lien for demurrage. There must be a decree, therefore, for the freight and demurrage against the lumber and the defendant Burroughs, with the provision that he is primarily liable to pay the amount; with an order of reference to ascertain the value of the use of the lighter, if it is not agreed on. The question of costs reserved as between him and the libelant.

The defendant Herbst is entitled to a decree against Burroughs, with costs.

THE MARY L. PETERS.

HOWELL et al. v. THE MARY L. PETERS.

(District Court, S. D. New York. June 25, 1895.)

CARRIERS—DAMAGE TO CARGO—SEA PERILS—LEAKY DECK—UNSEAWORTHINESS—HARTER ACT—"DUE DILIGENCE" REQUIRED OF SUPERINTENDENT OF REPAIRS.

The Mary L. Peters with a cargo of sugar from Sagua La Grande to New York met extraordinary weather in February and March, and the sugar was damaged by water through leaks about the waterways, and hatches, and through the decks; the evidence showed the deck in poor condition before sailing, and unfit for such a voyage and cargo. *Held* (1) that the vessel was answerable for the damage from leaks through the deck; (2) that there was no such "due diligence" exercised by the persons employed by the owners to see to the repair of the ship as to exempt the ship and owners.

This was a libel by Benjamin H. Howell and others against the schooner Mary L. Peters to recover damages to a cargo of sugar.

George A. Black, for libelants.

Goodrich, Deady & Goodrich, for respondent.

BROWN, District Judge. The above libel was filed to recover for damages to bags of sugar upon a voyage from Sagua La Grande to New York in February and March, 1894. The damage arose from sea water taken in through the decks, and in the waterways and around the coamings of the hatches.

The evidence of very severe weather on the voyage is in this case much stronger, in my judgment, than in the case of *The Centurion*, 68 Fed. 382, in which the court of appeals in this dis-