

the right of Smith, as against Barter, to the inventions covered by letters No. 133,898, the applications of July 12, 1871, and May 20, 1872, and the caveat of October 23, 1871. The patents granted upon those applications were Nos. 158,992 and 164,050. It was, therefore, only the claims of the three patents, 133,898, 158,992, and 164,050, which were involved in the interference, and there was no reason for suspending action upon other applications, unless they were for the same inventions. If they were for the same inventions, they ought not to have been granted, and, having been granted, are invalid. That the earlier "applications and caveat practically covered all the devices and patents mentioned" is alleged in the bill. The allegation is manifestly true, and consequently the patentee was without justification for making "special applications for parts of his said invention not included in the alleged interference." There were no such parts. It may be observed, too, that the features of the later patents are all described and illustrated in the patent of Barter, a copy of which is made an exhibit in the bill. If, therefore, they were not included in the interference and did not so become the established property of Smith under the three patents mentioned, then they belong to Barter, if included in his claims, and, if not to him, then to the public, because of his failure to claim them.

It is doubtless true, as contended, aside from any right to an injunction, that there may be ground for jurisdiction in equity in the nature and circumstances of the account, and in the necessity for discovery; but in respect to the expired patents, which are here assumed to be valid, it is not shown that the remedy at law would be inadequate.

The decree of the circuit court is affirmed.

THE EMPIRE.

GULF PORT STEAMSHIP CO., Limited, v. THOMAS et al.

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

No. 369.

**CHARTER PARTY—EXECUTION BY SHIP BROKERS ON TELEGRAPHIC CONTRACT—
VARIANCE—GUARANTY OF TONNAGE.**

Ship brokers in New Orleans cabled ship brokers in Liverpool that they wanted a steamer for 2,500 tons oil cake or meal at 20 shillings per ton. This offer was communicated by the Liverpool brokers to the owners of the steamer Empire, but was refused on the ground that she could not carry her dead weight in freight of that character. The owners, however, made a counter offer, pursuant to which the Liverpool brokers cabled that the ship would take "a full cargo of oil cake, meal, or flour * * * guarantied 2,500 tons d. w. c. [dead-weight cargo] ex-bunkers." The New Orleans brokers replied that they had "closed, in accordance with telegrams exchanged," in answer to which the Liverpool brokers telegraphed, "We confirm charter." The charter was drawn by the New Orleans brokers, but, in place of the terms contained in the cabled offer of the owners, it read, "guarantied to carry not less than 2,500 tons (of 2,240 lbs.) of cargo." *Held*, that the real guaranty was to carry 2,500 tons dead-weight cargo, and that the inability of the steamer to carry 2,500 tons of light cargo like oil cake was no breach of the guaranty.

Appeal from the District Court of the United States for the Eastern District of Louisiana.

This was a libel by the Gulf Port Steamship Company, Limited, a corporation under the laws of Louisiana, and doing business in New Orleans, against the steamship Empire, William Thomas & Co., of Liverpool, England, claimants, to recover damages for breach of a charter party. The breach alleged consisted in the failure of the steamship to take the full amount of 2,500 tons of cottonseed oil cake or meal, tendered by libellant, it being claimed by it that she was guarantied by the charter party under which she was laden to carry that quantity. A cross libel was filed by the claimants for freight alleged to be due, and for demurrage and other charges. The district court entered a decree dismissing both the libel and the cross libel. The libellant alone appeals.

The charter party was executed under the following circumstances: On March 22, 1892, Ross, Howe & Merrow, ship brokers in New Orleans, cabled to Simpson, Spence & Young, ship brokers in Liverpool, that they "wanted a steamer for not more than 2,500 tons oil cake, and, or meal, and, or flour, in sacks, 20 shillings." Simpson, Spence & Young quoted this offer the next day in Liverpool to all their correspondents, among them William Thomas & Co., owners of the Empire. William Thomas & Co. refused to accept 20 shillings a ton for a cargo of oil cake, on the ground that they did not think that the steamer would carry her dead weight of such cargo. They, however, made a counter proposition, which was cabled by Simpson, Spence & Young to Ross, Howe & Merrow. This offer was to charter for a lump sum, the ship to take "a full cargo of oil cake, meal, or flour * * * guarantied 2,500 tons d. w. c. [dead-weight cargo] ex-bunkers." On the next day Ross, Howe & Merrow replied that they had "closed in accordance with telegrams exchanged." The same day the Liverpool brokers, acting on the reply of Ross, Howe & Merrow that the latter would draw the charter "in accordance with telegrams exchanged," cabled as follows: "We confirm charter. Send six copies of charter party at once." The Liverpool brokers then wrote the following letter to the owners of the steamship:

"Liverpool, March 25, 1892.

"Messrs. Wm. Thomas & Co., Liverpool, 'Empire'—Dear Sirs: We have closed this steamer subject to your confirmation for the New Orleans freight at 2,600 pounds to Glasgow, Hull, Newcastle, Hamburg, Antwerp, Rotterdam, Amsterdam, or Bremen,—2,500 pounds if ordered to Plymouth, Avonmouth, Liverpool, or London, twelve weather working days for loading ex S. and H., free of dispatch money, 2½ per cent. address, canceling nonreadiness 5th May. charterer's stevedore to be employed as customary, at current rates, all other usual conditions of charter, steamer guarantying 2,500 tons dead-weight ex-bunkers. We strongly advise you to confirm, as we are quite certain this is the best business in the market. For grain charterers now only offer to-day 39 c. f. o., with 25th April, canceling, and from the Northern ports the outside obtainable for April-May loading is 3-3 c. f. o. We have special order from Philadelphia to Copenhagen or Aarhus at 3-6, option Stettin, 3-9.

"Yours, faithfully, [Signed] Per pro Simpson, Spence & Young.

"Cargo oil cake, and, or meal, and, or flour in sacks.

J. T. G.

"[Indorsed on face in corner free of cables.]

J. T. G."

On the same day the Liverpool brokers wrote again to the owners of the steamship the following letter:

"March 25, 1892.

"Messrs. Wm. Thomas & Co., Liverpool—Dear Sirs: In accordance with your authority, we are now cabling our New Orleans friends concerning charter S. S. 'Empire' on terms of our letter to you this morning. We thank you for the authority, and will hand you copies of charter immediately they come to hand.

"Yours, faithfully,

Per pro Simpson, Spence & Young,

"J. T. Gibson."

The charter, however, as drawn in New Orleans by Ross, Howe & Merrow, instead of the guaranty of 2,500 tons dead weight, etc., read, "guarantied to

carry not less than 2,500 tons (of 2,240 pounds) of cargo." Without waiting for the arrival of the copies of the charter party, the ship was ordered to New Orleans, the owners delivering to her captain the first letter written to them on March 25, by Simpson, Spence & Young, and which contained a statement of the terms which they had authorized to be incorporated in the charter party. On arrival at New Orleans, the captain gave written notice to Ross, Howe & Merrow that he was ready to receive cargo "under charter dated 25th March, 1892." A copy of the charter party was handed to him in New Orleans, but he testified that he did not look at it, because he took it for granted that it was like the letter. It appears that the ship took all the cargo which she could properly carry, but that she had not sufficient space for the full 2,500 tons of light oil cake and meal tendered by libellant. Copies of the charter party having been received at Liverpool by Simpson, Spence & Young prior to April 14, 1892, they on that date wrote to Ross, Howe & Merrow a letter, containing the following: "'Empire'—Charters duly received, and we passed same on to owner. We are surprised that you have made this charter out on the lump sum, 'B' form, which is entirely unusual, as it ought to have been made out on the usual oil-cake form of charter, you simply inserting the guaranty of 2,500 tons dead weight. Owner absolutely refuses to allow clause 7, and this must be erased. There are one or two other points in the charter which he objected to, but we have now got him to agree to them, and the charter is therefore all in order with the exception of clause 7, which must be entirely erased."

Clause 7 was not in controversy in this case. In respect to this letter, Mr. John T. Gibson, manager of Simpson, Spence & Young, in his deposition made the following explanation: "On or about the 10th April I received copies of the charter party from Messrs. Ross, Howe & Merrow, and sent a copy on to Messrs. William Thomas & Co., and Mr. Jones, Messrs. William Thomas & Co.'s clerk, subsequently came to see me about it. He pointed out that in the guaranty as to carrying capacity the word 'deadweight' was omitted. It is quite possible that I told him that it must have been an oversight on the part of Messrs. Ross, Howe & Merrow, as it was arranged in the cablegrams that that was the guaranty. I afterwards saw Mr. Thomas, but I do not recollect quite what passed between us, but I think it very likely that I also told him that it must have been an oversight on the part of Messrs. Ross, Howe & Merrow. After these interviews, I wrote out to America to put the matter right, and a true copy of my letter is now produced and shown to me, marked 'J. T. G. 5.' I annex copy of certain letters and cables now produced and shown to me, marked 'J. T. G. 6,' which are true copies of what passed subsequently between Messrs. Ross, Howe & Merrow and ourselves."

Guy M. Hornor, for appellant.

James McConnell, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and BRUCE, District Judge.

PER CURIAM. The controlling question in this case is whether William Thomas & Co., owners of the steamship Empire, in chartering said steamship to the Gulf Port Steamship Company, guaranteed said steamship to carry a cargo of not less than 2,500 tons of cottonseed oil cake, and, or meal, and, or flour, in sacks, or, as contended by the owners, the guaranty was for the ship to carry a cargo of 2,500 tons dead weight. The evidence is against the appellants, libellants in the court below, and, the district court having so found, the decree appealed from is affirmed.

THE ELMBANK.

WEIR et al. v. PRICE.

(Circuit Court of Appeals, Ninth Circuit. June 27, 1895.)

No. 199.

1. SALVAGE COMPENSATION—EXTINGUISHING FIRE BY CHEMICALS.

A cargo of sulphur having taken fire at the wharf, water was pumped in for several hours by tugs and by the city fire department, without apparent effect. The underwriters then employed a skilled chemist, who, with the master's assent, took charge of the vessel, and, by generating carbonic acid gas and discharging it into the hold, finally succeeded, with the aid of several chemical engines belonging to the fire department, in extinguishing the fire. At first there was probably some danger of an explosion, and the time employed was five or six days. The value of vessel and cargo as saved was \$97,000. *Held*, that an award of \$10,000 to the chemist was excessive, and should be reduced, on appeal, to \$6,000. 62 Fed. 306, reversed.

2. SAME—SERVICES RENDERED UNDER CONTRACT.

The fact that salvage services are rendered under a contract of employment by which the salvor will be compensated whether successful or not is a matter which should be considered in reduction of the award.

Appeal from the District Court of the United States for the Northern District of California.

This was a libel by Thomas Price against the bark Elmbank and cargo to recover compensation for salvage services; Andrew Weir and others being claimants of the bark, and John Stauffer & Co., claimants of the cargo. In the district court libellant was awarded \$10,000. 62 Fed. 306. The claimants both of the vessel and her cargo appeal.

Andros & Frank, for appellants.

Howell A. Powell and Walter G. Holmes, for appellee.

Before GILBERT, Circuit Judge, and KNOWLES and BELLINGER, District Judges.

GILBERT, Circuit Judge. The appellee was the libellant of the ship Elmbank, her cargo, etc., for salvage services rendered in extinguishing a fire that broke out in the cargo while the vessel lay at her dock in San Francisco. The cargo consisted of sulphur in sacks. The fire broke out at about noon of Saturday, the 10th day of June, 1893. A few minutes later the fire engines of the city fire department of San Francisco arrived. The firemen took off the hatches, and pumped large quantities of water into two of them. Three steam tugs came alongside and offered assistance, which was refused. The firemen continued to pour in water, and made two additional holes in the deck for that purpose. The master of the Elmbank engaged the steam tug Fearless to assist in pumping in water, at an agreed compensation of \$50 per hour. She passed her hose on board and commenced work. The fire, instead of being abated by the large quantity of water which was poured into the hold, appeared to be gaining in intensity. At about 3 o'clock, W. H.