

court, upon this issue, at least, to thus bring to bear any information it might possess or obtain aliunde the patent. But it is further urged: This patent states that the invention is "new and useful improvements in angle splices for railway joints," and therefore admits that angle splices are not new for the purpose; that it states, of the prior art, that "these joints have usually been formed by fish plates, the ends of which were arranged at different heights, corresponding with the position of the rails"; and, finally, that it does not claim the angle splice "by itself, broadly, but only when bent in the particular way described." There is great force in these objections, and they certainly raise serious doubt of patentable novelty in the device. Nevertheless, they do not, in my opinion, so far overcome the presumptions in favor of the patent that the complainant should be foreclosed from the showing (which, it was asserted in the argument on his behalf, could be made) of the long-felt want in railroad construction, especially with the adoption of heavier rails for increasing traffic and speed; of attempts and failures to find a remedy, and the extent to which it was supplied by the alleged invention, and of the extensive use which followed,—all being circumstances entitled to consideration in case of doubt, and upon which the doubt may be resolved in favor of the patentee. *Topliff v. Topliff*, 145 U. S. 156, 164, 12 Sup. Ct. 825. In view of the definition of patentability by the supreme court in respect of inventions of great simplicity,—*Loom Co. v. Higgins*, 105 U. S. 580; *Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co.*, 113 U. S. 157, 5 Sup. Ct. 513; *Magowan v. Packing Co.*, 141 U. S. 332, 12 Sup. Ct. 71; *Barbed-Wire Patent*, 143 U. S. 275, 12 Sup. Ct. 443, 450; *Gandy v. Belting Co.*, 143 U. S. 587, 12 Sup. Ct. 598; *Topliff v. Topliff*, 145 U. S. 156, 12 Sup. Ct. 825; *Kremetz v. S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719; and *National Cash-Register Co. v. Boston Cash-Indicator & Recorder Co.*, 156 U. S. 502, 15 Sup. Ct. 434, 1041,—it is my opinion that determination of the validity of this patent should be left to final hearing upon proofs, and that the demurrer should be overruled. It is so ordered.

McBRIER et al. v. A CARGO OF HARD COAL.

(District Court, D. Minnesota, Fifth Division. September 3, 1895.)

WAIVER OF MARITIME LIENS—EFFECT OF DISCHARGE OF CARGO—ADMIRALTY PLEADING.

An allegation that, before discharge of cargo, libelants notified the consignee that they would look to the cargo for freight and demurrage, is sufficient to show that their lien therefor was not waived by such discharge.

This was a libel by James McBrier, John Thompson, and E. D. Carter, owners of the steamboat *Nyanza*, to enforce an alleged lien for freight and demurrage. The *Pioneer Fuel Company*, consignee of the cargo, has interposed certain exceptions to the libel.

H. R. Spencer, for libelants.

E. S. McMillan, for claimant.

NELSON, District Judge. The only question raised on the argument of the exceptions to the libel upon which the court is in doubt is whether the libel, having set forth a discharge of the cargo, should have also stated, in order to preserve a lien for freight and demurrage, the further fact that there was an understanding that such discharge was not a waiver of the lien. It is set forth in the libel that before such discharge a notice was served upon the consignee that the libelants would look to the cargo for freight and demurrage, and also that the consignee eventually discharged the cargo after such notice. I think this is a sufficient allegation that the delivery was not unqualified and absolute, but made with the intent to retain the lien. If it be true that before the cargo was discharged, or when the boat was at the dock of the consignee, notice of a claim and lien for freight and demurrage was given, an action in rem against the cargo can be maintained; and some authorities hold that notice even before the commencement of the suit is sufficient to sustain an action against the cargo to enforce the lien. Upon full consideration of the exceptions to the libel, they are overruled. Ordered accordingly.

THE FLAMBOROUGH.

SWITZERLAND MARINE INS. CO. v. THE FLAMBOROUGH.

(District Court, S. D. New York. May 23, 1895.)

INJURY TO FREIGHT—INSPECTION UNDER HARTER ACT.

Cargo having been damaged through defects of the carrying steamer which could have been ascertained by proper inspection and examination, *held*, that the inspection that was made was not such as "due diligence" under the "Harter Act" requires; and *held*, that the shipowners were chargeable with any negligence of their agents appointed to inspect the steamer.

This action was brought by the Switzerland Marine Insurance Company to recover losses sustained by its assured through jettison to and damage of cargo occasioned by a leak in the steamer Flamborough.

The Flamborough had taken cargo at New York for transportation to West Indian ports and when two days out encountered bad weather, and a few hours later began to leak. Thereupon some goods were jettisoned, but the leak continuing the steamer returned to New York. She was then docked for examination and it was found that 17 of her plates were worn out and that the leak had occurred through one of the plates wasting. The steamer was 27 years old and had been purchased from her former owners five months previous to the voyage. Her new owners were not familiar with shipping and at the time of purchase caused the steamer to be examined by an inspector on their behalf. After purchasing, they placed her under the management of an experienced agent in New York and did not themselves take part in such management. The steamer was not docked at the time of purchase, nor at any time subsequent thereto before the voyage upon which the damage arose. The condition of the plates was such that an examination upon a dock, or a careful examination while the vessel was afloat would have disclosed their weakness.

Butler, Stillman & Hubbard and Mr. Mynderse, for libelant.
Wing, Putnam & Burlingham, for the Flamborough.