

mounted upon the same carriage, and made adjustable toward the cutting disk, to bring the cigarette laterally against the plate for cutting it into lengths, as described."

This again was objected to, and finally the claim was put in as it is before us:

"The combination, with the rotary cutting disk, the carriage carrying the same, and means for moving the carriage parallel to the feed of the cigarette, of a holder for the cigarette, mounted on the same carriage, and means for projecting said holder and the cigarette toward the relatively stationary cutting disk, substantially as and for the purposes described."

Now, when it is remembered that he claimed, as an improvement on methods existing already, that he brought the cigarette to the cutter, and so avoided the movement of a heavy, cumbrous machine, and that in his original claim and in the amendments to it he had the same idea, distinctly stated, the conclusion must follow that by reason of the phraseology of his specifications and claims as first drawn and afterwards amended he has limited himself to the mechanism which he describes, in which the cigarette holder travels to the knife, and not the knife to the cigarette.

The last point open for consideration is that which applies specifically to the present defendants. It does not affect the other parties charged with infringement, who have stipulated to abide the result of this suit. An action was brought by the present complainants against the present defendants and the Pollard or International Company, in which suit the same patents set up by complainants in this case were said to have been infringed. The result of this suit was that their patents were declared to be valid. Complainants contend that, as to these defendants, that question is res judicata. Defendants deny the right of complainants to set up this ground of estoppel in the evidence, they having failed to set it up in the pleadings. The conclusion reached in this opinion renders the discussion of this question unnecessary. Giving to the decree set up as an estoppel its full force, and, for the sake of argument, admitting it into this case, though not set up in the pleadings, it would defeat any objection these defendants now set up to the validity of the Bonsack patents. The defendants may be precluded from discussing this question, but the other question—whether the Briggs machine is an infringement of them—still remains; and that has been decided in the negative.

This case came on to be heard upon the pleadings, evidence, and exhibits. Considering the same, and the arguments of counsel thereon, it is ordered, adjudged, and decreed, that the bill be dismissed, with costs.

THE DANIA.

NETHERLANDS-AMERICAN STEAM NAV. CO. et al. v. THE DANIA.

(District Court, E. D. New York. November 11, 1895.)

SALVAGE—COMPENSATION.

A steamship valued, with her cargo and freight, at \$426,000, becoming utterly helpless from a broken shaft, about 360 miles from New York,

was towed to that port by another steamer in two days and two hours, without difficulty, during weather which was fine, excepting that a dense fog prevailed about half the time. The towing steamer was a slow vessel, to which the loss of a few days was not important. *Held*, that the service was a salvage service for which \$17,500 was a proper award, including therein some \$700 of expenses. The *Daniel Steinman*, 19 Fed. 919, distinguished.

This was a libel by the Netherlands-American Steam Navigation Company and others against the steamship *Dania*, her cargo and freight, to recover for salvage services embracing a towage occupying two days and two hours.

Wing, Putnam & Burlingham, for libelants.
Wheeler & Cortis, for claimants.

BENEDICT, District Judge. This is an action brought by the owners of the steamship *Werkendam* against the steamship *Dania*, to recover salvage compensation for services rendered to the *Dania* in June last, under the following circumstances: The steamship *Dania*, owned by the Hamburg-American Packet Company, bound on a voyage to New York, having on board 402 passengers, and valued, with cargo and freight, at \$426,000, when she arrived at a point some 360 miles from Sandy Hook, in Long. 66 03, Lat. 41 11, stopped to take on board a pilot. When she attempted to start again, it was found impossible to move her propeller, and examination showed that the shaft was broken in the nut outside the hull. When the shaft broke is not known, but it appears that the propeller revolved under the action of the engine until the engine stopped; and, when the engine stopped, the propeller dropped away from the shaft, and it was impossible to move it or to repair the shaft, the break being outside the hull. The steamer became absolutely helpless. Her hull, however, was sound and staunch. As soon as the break of the shaft was discovered, the pilot boat, which had not passed out of sight, was hailed; and, when her boat returned to the steamer, the request was made that any steamer that might be fallen in with by the pilot boat should be notified of the position and situation of the *Dania*; and danger signals were given to the pilot boat in order to enable her to stop any vessel she might meet. This was about 7 o'clock p. m. The weather was fair, and the sea smooth. At this time the *Dania* was about 70 miles southeasterly from George's Shoal, and, as subsequent observation shows, she was slowly drifting towards that shoal. No vessel was then in sight. About 3:30 of the next morning, the pilot boat sighted the *Werkendam*, bound for New York, being some 10 miles distant from the *Dania*, but not visible to her on the horizon. The *Werkendam*, upon being informed by the pilot boat of the position and the danger of the *Dania*, changed her course, and, after about an hour's steaming, approached the *Dania*. At that time the *Dania* was showing three lights in the forerigging, and flags, indicating a desire to be taken in tow. The *Werkendam* undertook to render her that service; and, at a little after 7 o'clock a. m., made a hawser fast to her, and started for New York, where she arrived with the *Dania* at 9 o'clock on Saturday morning.

The voyage of the *Werkendam* with the *Dania* in tow was uneventful. The weather was fine, and no hawser was broken. The

only noteworthy circumstance attending the service is that, for half the time at least, the vessels were enveloped in a dense fog. The weight of the evidence is that during part of the time the fog was so dense that the Dania could not be seen from the Werkendam. The most that the witnesses from the Dania claim is that the Werkendam was always visible to them two ship's lengths away. This circumstance increased the peril of the services very much. Fog may be said to be the peril of the seas. In this instance the peril was increased by the fact that the code of signals makes no provision for notifying approaching vessels of the presence of a tow behind a steamer. It was not impossible, therefore, that if the Werkendam had fallen in with a vessel crossing her course, while the Werkendam might have escaped collision, the Dania, being towed by a long hawser, would be liable to be struck, and perhaps sunk; in which case all salvage compensation would be lost to the Werkendam. The risk which ordinarily attends the towing of a steamer at sea was, in my opinion, very considerably increased in this instance by the fog. I have no hesitation, therefore, in holding that the Dania was rescued from a position of peril by meritorious services performed by the Werkendam, and that the Werkendam is entitled to salvage compensation therefor. As to the proper amount, reference has been made to the case of *The Daniel Steinman* (decided by this court) 19 Fed. 919, where this court awarded \$25,000 for a salvage service rendered to the steamship *Daniel Steinman* by the steamer *Republic*. The injury to the *Daniel Steinman* was very similar to the injury to the *Dania*. The service to the *Daniel Steinman* occupied 36 hours. It was rendered in fine weather, and there was no fog. The differences between that case and this one are that the *Daniel Steinman* could possibly have reached a port of safety under her own sail without assistance; there is no evidence in this case that the *Dania* could have done so. The value of the *Daniel Steinman*, freight and cargo, was \$252,500; the value of the *Dania*, her cargo and freight, is \$426,000. The services to the *Daniel Steinman* were rendered by the steamer *Republic*, a powerful steamer of the White Star Line, where regularity of arrival and departure are considered of the greatest importance; the *Werkendam* was a slow steamer, to which a few days' delay was unimportant. The *Republic* was loaded with passengers and freight bound for New York. Her value, including cargo and freight, was \$780,000. She had on board 697 cabin passengers, and the mails. The distance the *Daniel Steinman* was towed by the *Republic* was about twice as great as the distance in this case, but the risk in this case was more, on account of the fog. No two salvage cases are alike, and the difference between the steamship *Republic* and the steamship *Werkendam* makes a difference between the case of *The Daniel Steinman* and the present case.

Taking all the circumstances of this case into consideration, I am of the opinion that \$17,500 is a proper sum to be awarded as salvage compensation. I include in this the \$700 expenses of the *Werkendam*; this sum is first to be paid to the owners of the *Werkendam*, and the remainder distributed among the owners, master, and crew.

PAUL v. CHILSOQUIE et al.

(Circuit Court, D. Indiana. November 21, 1895.)

No. 9,255.

REMOVAL OF CAUSES—CITIZENSHIP—INDIANS.

A member of an Indian tribe residing within the limits of the United States, who has not been naturalized, is not a citizen of the United States nor of the state of his residence, nor is he a citizen or subject of a foreign state, within the meaning of the constitution or the statutes conferring jurisdiction on the federal courts; and such unnaturalized Indian cannot remove into a federal court a civil suit, brought against him in a state court, unless it appears upon the face of the complaint or declaration that a federal question is necessarily involved.

This was an action of ejectment, brought in a court of the state of Indiana, by Henry C. Paul, against Chilsoquie, a Miami Indian, and others. Defendant Chilsoquie petitioned for the removal of the cause to the federal court. Denied.

Spencer & Branyan, for plaintiff.

Buell M. Cobb, for petitioner.

BAKER, District Judge. This is an action pending in the circuit court of Wabash county, in the state of Indiana, for the recovery of the possession of a parcel of real estate situate in the county of Huntington, in the state of Indiana, of which the defendant Chilsoquie is alleged to have possession without right. The petitioner seeks removal on the ground of bias and local prejudice which will prevent her from obtaining a fair and impartial trial either in the court where her cause is now pending or in any other court of the state into which the cause can be removed. There is no claim that the cause of action is removable into this court on the ground that the suit is one arising under the constitution or laws of the United States, or under any treaty made under their authority. Nor is it shown in the petition that this court can assume or exercise jurisdiction because the controversy or suit is one between citizens of different states. The petition avers that the plaintiff, Henry C. Paul, is a citizen of the state of Indiana, and that the defendant Chilsoquie "is a Miami Indian, and that she has never exercised any rights of citizenship in the state of Indiana; that for many years the Miami Indians have been residents of, and maintained tribal relations in, the state of Kansas, and that she has always been recognized, both by the chiefs and the head men of said tribe, as well as by the government of the United States, as a member of said tribe, and that she is not a citizen of the state of Indiana, and that at the time said tribe was removed from the state of Indiana to the state of Kansas she, having been married to Francis Revarre, remained in the state of Indiana," and that she had never removed therefrom. There is no statement in the petition that she is taxed or taxable. The counsel for the petitioner maintains that the Miami tribe of Indians has been recognized by the government as a state or nation having the right to make treaties, to carry on