the date of issue. The original application was delayed by interference proceedings in the patent office. Whatever may be the rule as to cases where the application for the generic patent was filed subsequent to the application for the specific patent, I do not think the patentee should be deprived of his broad patent where the application for such patent was made first, and was delayed in the patent office through no fault of the inventor. Such a ruling would be a reproach to the law."

It is not necessary for the decision of this case to extend the principle of said decision in said case of Thomson-Houston Electric Co. v. Winchester Ave. R. Co., namely, that, when a prior application for a generic patent has been delayed in the patent office without the fault of the applicant, the grant of a subsequent patent for a specific, distinct, and separate improvement upon the principal patent will not invalidate a patent subsequently issued upon the original application. Let a decree be entered for an injunction and accounting as to claims 21 and 22 of the patent in suit.

THE GLIDE.

HUDSON v. GRAFFLIN.

(Circuit Court of Appeals, Fourth Circuit. February 4, 1896.)

No. 135.

1. ADMIRALTY APPEALS—DECREE AGAINST STIPULATORS—APPEAL BY CLAIMANT ALONE.

The sureties in a stipulation for the release of a vessel are not parties to the cause, though they are bound by the decree. Hence, where the decree is adverse to the stipulators, the claimant may appeal alone without any proceedings to effect a severance.

2. SAME—DEFECTIVE RECORD—ORAL TESTIMONY.

An admiralty cause was tried in the district court for the district of Maryland upon oral testimony alone, there being no rule in that district requiring the testimony to be reduced to writing. An appeal was taken, but, as no notes of the evidence had been preserved, it could not be included in the record. The proctor for the appellant sought to supply the omission by retaking the testimony of the witnesses before a notary, first giving notice to the proctors on the other side. The latter declined to be present, and, when the testimony was submitted to the judge, he declined to certify that it was the purport of the testimony taken before him. The record was filed in the appellate court with these depositions attached. *Held*, that the judge below properly refused to make the requested certificate; that the depositions could not be considered on appeal; and that, under the peculiar circumstances, the appellate court would not hear the case de novo, but would remand it without prejudice, and with instructions to grant a new trial, with a statement, however, that this proceeding is not to be regarded as a precedent, and that in future the party by whose omission the testimony is not taken, so that it can be incorporated in the record, must suffer the consequences.

Appeal from the District Court of the United States for the District of Maryland.

Motion to dismiss the appeal. Leave to take testimony pending the appeal was heretofore granted. 15 C. C. A. 627, 68 Fed. 719.

Robert H. Smith, for appellant.

Frank Gosnell, for appellee.

Argued before GOFF and SIMONTON, Circuit Judges, and BRAWLEY, District Judge.

SIMONTON, Circuit Judge. This case comes up on a motion to dismiss an appeal from the district court of the United States for the district of Maryland, sitting in admiralty.

On 21st August, 1894, George W. Grafflin filed his libel against the barge Glide for damages to a cargo of fertilizers shipped by him on the barge. George P. Hudson intervened as managing owner and claimant. On 23d August she was released from arrest upon stipulation by George P. Hudson, with Samuel G. Rowland and Joseph B. Seth, sureties on the stipulation. The cause was heard upon oral evidence, in open court; but no part of it was reduced to writing, nor were any official notes of it taken. There is no rule or practice in the district court for the district of Maryland making it indispensable to reduce the testimony of an admiralty cause to writing. On 13th April, 1895, a decree was signed in favor of Grafflin, "that Samuel G. Rowland, George P. Hudson, and Joseph B. Seth, stipulators for the barge Glide, pay to George W. Grafflin, libelant, $1,380.20 and costs, within 10 days from the date of the decree." The Glide, pending the suit and previously to the trial, had been sunk, and made a total wreck. In a short time after the entry of the decree, a petition for leave to appeal was filed by George P. Hudson, styling himself managing owner and claimant of the barge Glide. The stipulators did not appeal; nor has there been any severance. The appeal was perfected. In making up the record, the testimony taken at the trial could not be included in the record for the reasons stated. The respondent, on the part of his client, endeavored to rectify the omission by taking de novo, before a notary public, the evidence of the witnesses who had testified in his behalf, giving notice to the proctors of the libelant of his intention so to do, and of the time and place selected. These gentlemen declined to be present. When the testimony was taken, it was submitted to his honor, the district judge, with the purpose of obtaining his certificate to the fact that this was the purport of the testimony, or at least of a part of the testimony, taken before him. The district judge refused to give this certificate—First, because he knew of no law or practice which would justify him in doing so; and, second, because he could not, from his recollection or notes, certify that the testimony of the witnesses so taken was, in substance, the same as given before him. The record has come into this court without any of the testimony actually taken at the trial, and with no statement of it, except said depositions. The appellee (libelant below) moves to dismiss the appeal—First, because, the decree being against the stipulators jointly, and not against the barge Glide, the appeal is taken by George P. Hudson, managing owner of the Glide, alone, and not by any of the stipulators, without proof of severance; second, because the record does not contain any of the evidence taken at the trial.

As to the first ground: It is unquestionably true that all parties against whom a joint judgment or decree is rendered must join in the application for writ of error or appeal, or the record must show

that those who have not joined have had notice of the application, and have either refused or neglected to join. Beardsley v. Railway Co., 158 U. S., at page 127, 15 Sup. Ct. 786; Estis v. Trabue, 128 U. S., at page 229, 9 Sup. Ct. 58; Hardee v. Wilson, 146 U. S. 179, 13 Sup. Ct. 39; The Columbia, 15 C. C. A. 91, 67 Fed. 942. Formerly, a formal writ or summons and judgment of severance was required. Now, it is enough to show that the parties had been notified in writing by due service, and notwithstanding do not join. Hardee v. Wilson, supra. But this rule evidently applies only to the parties on the record. Sureties to a stipulation are not parties to the record. When a vessel is attached by proceedings in rem, the owner, or some one on his behalf, files his claim to her, and thenceforward becomes a party to the record, and conducts and controls the defense. Lane v. Townsend, 1 Ware, 289, Fed. Cas. No. 8,054. If he be minded to release her from the arrest, he enters into a stipulation, with sureties, either before or after he files his answer, and thenceforward this stipulation represents the vessel. But the sureties in the stipulation do not become parties. Her subsequent fate does not concern the suit. The stipulation having been returned to the court, judgment thereon against both the principal and the sureties may be recovered at the time of rendering the decree in the original cause. Rev. St. U. S. § 941.

The twenty-first rule in admiralty says:

"In all cases of a final decree for the payment of money, the libellant shall have a writ of execution in the nature of a fieri facias, commanding the marshal or his deputy to levy and collect the amount thereof out of the goods and chattels, lands, tenements or other real estate of the defendant or stipulator."

So, also, by the terms of the stipulation, the sureties consent and agree to pay into court the full amount of the stipulation upon notice of the order or decree of the court, or that execution may issue against their goods, chattels, and lands. Ben. Adm. 649.

This is also the rule as laid down in Clerke's Practice in Admiralty (title 64):

"Decree having been entered against the principal, it should be executed against his sureties without any other process."

In Williams & B. Adm. Jur. p. 286, the rule is thus stated:

"The sureties are only liable to answer the judgment of the court, and they cannot be called upon to pay more than the sum recovered in the suit, together with costs adjudged against the defendant. To this extent, as soon as the defendant has made default, their liability is absolute, because the security is not a mere personal security given to the plaintiff, but it is a security given to the court as a pledge or substitute for the property proceeded against. But the sureties are not parties to the suit, and they are not entitled to interfere in any stage of the proceedings, although, if the defendant be guilty of fraud or there is any collusion between him and the adverse suitors, the sureties are entitled to apply to the court alleging such fraud or collusion."

For an exhaustive and learned discussion of this matter, see Lane v. Townsend, 1 Ware, 289, Fed. Cas. No. 8,054.

In other words, the sureties, in great measure, stand in the position of bail to the action. They are not parties to the cause. They