

ly upon the effect of proof that these machines were not capable of doing the work which they were represented as able to do. Upon the one side it was contended that the machines had been improperly adjusted upon the wells, and that they had been neglected and improperly cared for, and that their failure to work was not due to any fault in their original construction, or any fault with which the manufacturers and patentees were chargeable. Evidence that the same machines, upon other wells, did work automatically, was a circumstance important or unimportant as it might appear from other evidence that the conditions were similar or dissimilar.

The court charged the jury that if they found that the city of Findlay had ratified this contract, and waived its right to rescind the same, they should find for the plaintiffs, and for such amount to be due them as they should determine these machines were reasonably worth—

“Having reference to their market value as shown by proof, and from other evidence of value, which includes evidence of the way in which they discharged the purposes for which they were sold and designed; and upon such an amount you will give the city credit for the sum of \$315, which they have already paid, and for the commissions which the plaintiffs say they are entitled to as stated in the account.”

To this the court subsequently added:

“I deem it proper to call your attention to the fact that I said, in determining the value of these machines, you might consider, as one of the elements, the market price at which they were sold in the place where used. I still think that this is an element of consideration of their value, and I will let the charge stand as it is.”

Exception was taken to so much of the charge as permitted the jury, in determining the reasonable value of these machines, to look to the “market price at which they were sold in places where used” as one of the elements of actual value. The market value, or the value at which the owner or producer holds them for sale and offers them on the market, is not conclusive evidence of actual value, but it is clearly a matter which may properly be taken into consideration in arriving at the actual value. *Dwight v. Commissioners*, 11 Cush. 201.

Other errors have been assigned and argued. We think there is no substance in any of them. The judgment must be affirmed.

ZIMMERMAN v. GIRARDI.

(Circuit Court of Appeals, Second Circuit. June 17, 1896.)

CONTRACTS—QUESTION FOR JURY.

Plaintiff sued defendant for the value of certain goods alleged to have been sold to him, but which defendant claimed were placed with him by the plaintiff on consignment. The contract originally made between the parties was contained in certain letters and other documents, but there was oral evidence of a conversation between the parties which, if the plaintiff's version of it were believed, tended to establish a new agreement between the parties, after the original contract, by which the defend-

ant on sufficient consideration undertook absolutely to pay for the goods. *Held* that, though, if the contract were wholly contained in the writings, its interpretation would be for the court, and though some of the correspondence tended strongly to corroborate defendant's version of the conversation, the evidence in regard to the latter required the submission of the issue to the jury.

In Error to the Circuit Court of the United States for the Southern District of New York.

Stern & Rushmore, for plaintiff in error.

R. Burnham Moffat, for defendant in error.

Before WALLACE and LACOMBE, Circuit Judges.

WALLACE, Circuit Judge. No exceptions were taken for the defendant, the present plaintiff in error, to any rulings of the trial judge other than his refusal to take the case from the consideration of the jury and decide, as a matter of law, that upon the evidence which had been introduced the plaintiff was not entitled to recover because it did not appear that the defendant had agreed to purchase the merchandise sent to him by the plaintiff. Unless this ruling was erroneous, the assignments of error are without foundation.

The merchandise consisted of seven shipments of straw braids sent by the plaintiff from Marostica, Italy, to the defendant at New York City at different times between June, 1889, and November, 1890, the last but one having been sent in or prior to January, 1890. The contract originally made between the parties respecting the disposition of the goods was embodied in their correspondence, consisting of letters, invoices, and statements of account transmitted during the period of the shipments. It is insisted for the plaintiff in error that, unless this correspondence imports an agreement that the goods were sent upon consignment, to be sold by the defendant for the account of the plaintiff, it shows that the parties never reached an agreement, because there was no assent by the defendant to the terms of sale proposed by the plaintiff; and upon this theory he contends that a verdict should have been directed in his favor. If the only evidence of a purchase by the defendant had been that which was contained in the correspondence, the contention would be sound. There were no words or phrases in the letters having a significance depending upon extraneous evidence, and, this being so, the case would have been controlled by the rule that the interpretation of agreements to be deduced from correspondence of the parties devolves upon the court as matter of law. But, besides the letters, oral evidence was introduced relating to an interview which took place between the parties at Brugg, Switzerland, in August, 1891, tending to show that a further agreement was made by the parties. The interview was carried on through the medium of an interpreter, and the testimony, possibly because it was taken upon commission, does not give the conversation in much detail, or disclose a specific promise by the defendant to purchase or pay for the goods. But, if the version given by the plaintiff and his witness Padovan is true, what took place raised at least an implication of acquiescence and

assent by the defendant equivalent to such a promise. The plaintiff himself testified as follows:

"John Zimmerman said that the merchandise had not been sold because the season was unpropitious, and because other articles were in demand and were sold. I said I did not accept such reasons, because they did not concern me in any way, and I ventured the suggestion that it was because of the fact of small sales he had from time to time pretended that my merchandise was on consignment, and that such claim was in manifest contradiction to all preceding correspondence. John Zimmerman assured me many times that in the following autumn the conditions of the New York market would change, and predicted the certain sale of the merchandise. On the basis of this express assurance, I said I would grant him, by way of compromise, a respite until the following autumn, or until December at the latest, for the full payment of the merchandise without any deduction, whether for discounts or for charges. But I did not say I would grant him consignment. On the contrary, it was clearly stated to him that, as soon as he arrived in New York, which was to be within a few weeks, he should open and examine the merchandise, which he said was on the docks, and should remit at the same time a payment of 20,000 francs on account. I insisted upon this agreement to such an extent that Fritz Zimmerman said that, as we understood each other, there was no occasion to keep bringing the subject up again; otherwise, John Zimmerman would be offended. After this he gave me an order for 7,450 pieces 'Maglina nella biancata,' to be paid for as soon as the merchandise should arrive at Florence and be examined by Fritz Zimmerman."

The witness Padovan testified that, after the parties had stated their different contentions—

"Girardi thereupon stated that by way of compromise he would grant not a consignment, but a respite for payment of the balance of the merchandise at the invoice prices, without deductions or allowances, until the autumn or December following; insisting, and to this Zimmerman said he agreed, that as soon as the latter should arrive in New York, where he expected to be in a short time, 20,000 francs should be remitted on account, immediately upon examination of the goods, which Zimmerman said were lying on the docks. Girardi kept insisting upon these conditions, so that Fritz Zimmerman finally said it was best not to speak again on the subject, so as not to sour John Zimmerman. It seemed to Girardi to have been agreed upon, and he accepted the suggestion. After the conversation Mr. John Zimmerman gave Girardi a new order for braids."

Notwithstanding the testimony of the defendant to the effect that, at that interview, he refused to change his position in the matter, and that its final outcome was that the plaintiff agreed to have the goods stand on consignment,—testimony which is materially corroborated by letters from the plaintiff written subsequently,—the evidence in respect to this interview presented an issue of fact which it was the exclusive province of the jury to decide. It authorized them to find that, whatever might have been the previous contract between the parties, a new agreement was reached by which the plaintiff consented to extend the time of payment of the demand, which he then claimed to be due, and the defendant promised to accept the goods upon the basis of a purchase to be paid for in the following December. The trial judge could not have directed a verdict for the defendant without invading the province of the jury.

We find no error in the record, and the judgment should therefore be affirmed.

THE ELECTRON.

ELECTRO-DYNAMIC CO. v. THE ELECTRON.

BIGLER v. ELECTRO-DYNAMIC CO.

(Circuit Court of Appeals, Second Circuit. May 26, 1896.)

1. **CONTRACT OF SALE—CONSTRUCTION—GUARANTY OF HORSE POWER.**
 Libelant contracted to refit a yacht with electric storage batteries, and rewind the original motor therein "so as to produce 15 horse power, or 25 horse power as a spurt, or to produce readily about 10 horse power at ordinary service." *Held* that, in the absence of any definite explanation, this amount of horse power was to be developed in the battery and wires for delivery to the machinery, subject to such frictional diminution in the machinery itself as might intervene between the ends of the wires and the propeller blades. 56 Fed. 304, affirmed.
2. **ADMIRALTY JURISDICTION—MARITIME LIENS—STATE STATUTES.**
 The federal admiralty courts cannot enforce a lien claimed under a state statute for materials and repairs furnished to a foreign vessel, unless it appears that credit was given to the vessel.
3. **SAME—WAIVER OF OBJECTIONS—FILING OF CROSS LIBEL.**
 In a suit in rem to enforce an alleged lien under a state statute, the filing by defendant of a cross libel in personam, and obtaining a stay of proceedings on the original libel until security to respond in damages is given, *held* not to operate as a waiver of objections to the existence of any maritime lien.
4. **SALE—IMPLIED WARRANTY OF RIGHT TO USE—EVICTION UNDER PATENT.**
 On a sale of personal property there is an implied warranty of the purchaser's uninterrupted right to use the article purchased, especially when such use is indispensable to the continuance of the business for which it was purchased; and if the purchaser is prevented from using it by a third person having a valid patent covering the article in question, this is an eviction, which will constitute a defense to an action for the price.
5. **SAME—WHAT CONSTITUTES AN EVICTION.**
 Mere notice by a third party of his claim that an article purchased infringes a patent owned by him is not of itself an eviction of the purchaser, so as to show a breach of the seller's implied warranty of a right to use.
6. **SAME.**
 Where certain electrical machinery was sold, and the purchaser used it for one season, after which he was notified by a third party of a claim of infringement of a patent owned by the latter which had been sustained by the courts, *held*, that this breach of implied warranty of a right to use did not, under the circumstances, constitute a perfect defense against the payment of any part of the purchase price.

Appeal from the District Court of the United States for the Eastern District of New York.

This was a libel by the Electro-Dynamic Company against the yacht Electron, James Bigler, claimant, to recover a balance alleged to be due of the price of certain supplies and repairs. The claimant filed a cross libel in personam to recover damage for an alleged breach of the contract under which the repairs were furnished, and the court granted a stay of proceedings on the original libel until security was given for the damages claimed under the cross libel. 48 Fed. 689. Afterwards the case was heard upon the merits, and the court below entered a decree for libelant, and