

cessive by reason of the omissions which have been mentioned. But the whole record and the silence of the defendants show that they must properly be charged with a large sum as profits. We have been in doubt as to the proper disposition of the case,—whether it should be sent to a master for rehearing, or whether this court should ascertain from the record the proper amount. *Manufacturing Co. v. Cowing*, 105 U. S. 253. This case has now been in court for eighteen years. It survived two masters, and was before a master for more than nine years. The lapse of time undoubtedly arose from a variety of circumstances, and we are not aware that it is attributable to the counsel in the case; but the delays which are incident to an accounting are well known, and we hesitate exceedingly to compel an additional expenditure of time. The manufacture of plaits in any large amount has now ceased, and it is very likely that further testimony would result only in estimates not the result of experience. We have therefore concluded to ascertain from the record a more satisfactory amount of profits, and conclude that a reasonable allowance will be the sum of \$40,000.

The decree will be reversed, with costs of this court, and the cause remanded, with instructions to enter a decree declaring the validity and the infringement by the defendants of the second and fourth claims of the Crosby and Kellogg patent, and adjudging that the complainants recover from the defendants the sum of \$40,000, as their profits, and the costs in the circuit court to be taxed.

THE HORACE B. PARKER.

CHISHOLM et al. v. ABBOTT et al.

(Circuit Court of Appeals, First Circuit. April 23, 1896.)

No. 140.

COSTS IN ADMIRALTY—APPEAL AND REVERSAL—DIVISION OF DAMAGES.

On a libel for a collision in which libelants' vessel was sunk, the claimants set forth in their answer certain damages to their own vessel, but filed no cross libel. The district court found the claimants' vessel solely in fault, and decreed accordingly. On appeal the circuit court of appeals reversed the decree, deciding that both vessels were in fault, and that the damages should be equally divided. *Held*, that the appellants were entitled to full costs of the appellate court, and that the costs of the district court should be equally divided.

This was a libel in rem by William V. Abbott and others, owners of the schooner pilot boat *D. J. Lawlor*, against the fishing schooner *Horace B. Parker* (*John Chisholm* and others, claimants), to recover damages resulting from a collision whereby the *Lawlor* was sunk and lost. The district court rendered a decree holding the *Parker* solely in fault, and the claimants appealed. This court on January 9, 1896, reversed the decree below, and remanded the cause, with directions to enter a decree dividing equally the damages and the costs in each court. See 18 C. C. A. 406, 71 Fed. 989. On February 18, 1896, the

appellants filed a petition for a rehearing, both upon the merits of the appeal and the question of costs.

Edward S. Dodge and John J. Flaherty, for appellants, accompanied their petition for rehearing with a brief, which, in so far as it related to the matter of costs, was in the following language:

(3) The decision of this court, so far as it divides equally the costs in this court, is erroneous. We respectfully submit that the appellants are entitled to full costs in this court, and that the costs in the district court should be divided, unless the libel is dismissed on this hearing, in which event claimants and appellants are entitled to full costs in each court. *The America*, 92 U. S. 432, 438; *The Umbria*, 8 C. C. A. 181, 59 Fed. 475. As this court is now the court of last resort in collision cases, the rule of the supreme court relating to costs in that court should be followed here. Whatever diversity of opinion may have formerly existed regarding this matter (*The Hercules*, 20 Fed. 205, and cases cited), the order of the court in *The America*, cited above, and the apparent justice of the language of the court in *The Umbria*, cited above, "there is no good reason why the appellant should be required to bear the costs of a necessary appeal," would seem to definitely settle the question.

Thereafter, by leave of court, the parties were heard on briefs on the question of costs, and the following additional brief was filed in behalf of the appellants:

While admitting that costs in admiralty are entirely under the control of the court in each particular case, we respectfully submit that, in the absence of particular circumstances of equity, the courts have always followed some general rule, concerning which the decisions have heretofore been more or less conflicting. However, it is manifest that any rule regarding the allowance of costs in the appellate court must necessarily be different from that prevailing in courts of original jurisdiction.

(1) The costs of the district court should be divided. The appellants in this case sustained damages which they are entitled to recoup or set off against any damages awarded to libelants. We hardly imagine that this court will follow the practice suggested in appellees' brief on the question of costs, which would result in compelling every claimant in a collision case in which his adversary's vessel was totally lost, to incur the expense of filing a cross libel, useless for any purpose except to enable him to recover his costs if partially successful on appeal. In the case of *The Mary Patten*, 2 Low. 196, 199, Fed. Cas. No. 9,223, one party suffered all the damages; and, even under those circumstances, Judge Lowell was in doubt whether full or divided costs should be awarded. It is evident, therefore, that the case of *The Mary Patten* would not be applicable to the case at bar, even in the district court, because the Horace B. Parker suffered substantial damages as well as the Lawlor. Moreover, the decision in the case of *The Mary Patten* appears to have met with criticism and opposition, and to have been modified by Judge Lowell himself in *The Hercules*, 20 Fed. 205.

(2) The appellants are entitled to full costs in this court. See *Metropolitan S. S. Co. v. British & N. A. Steam Nav. Co.* (decided by this court April 16, 1896) 20 C. C. A. 214, 74 Fed. 316. In the case of *The Parthian*, 5 C. C. A. 171, 55 Fed. 426, cited in the appellees' brief on the question of costs, it does not appear that the steamer sustained any damage, or that the question of costs was raised in any form. In the case of *The J. J. Driscoll*, 12 C. C. A. 4, 63 Fed. 1023, cited in the same brief, it will be observed that half costs were allowed to the libelant against each of the two defendant steam vessels, thus awarding full costs in each court to libelant. But, as the decree of the lower court was affirmed in that case, it has no application whatever to the case at bar. The rule in the Second circuit appears to be in accord with the practice followed by this court in *Metropolitan S. S. Co. v. British & N. A. Steam Nav. Co.*, cited above, and in no respect as stated in the appellees' brief. *The Princeton*, 14 C. C. A. 527, 67 Fed. 557; *The Umbria*, 8 C. C. A. 181, 59 Fed. 475.

Eugene P. Carver and Edward E. Blodgett, for appellees.

We respectfully submit that, although the question of costs in this district is discretionary with the court, uniformity of practice should prevail, and that the former practice in the district of Massachusetts should govern.

(1) The costs of the district court should be awarded to the libelants. It will be noted that this is not a collision cause where there is both a libel and a cross libel, but is the case of where but one action was commenced. Judge Lowell fully considered this question in the case of *The Mary Patten*, 2 Low. 199, Fed. Cas. No. 9,223, which presents exactly this question of allowance of costs in the district court where the damages were divided; and this rule, which was there adopted, has been the uniform rule in the district of Massachusetts since that date, in the absence of a special order of the court. It is founded on the familiar principle that a person who is entitled to a money decree, even though for a less amount than he originally asked for, should be entitled to his costs, in the absence of a tender or offer of judgment made by the defendant. The whole question is fully discussed on the last page of that opinion.

(2) That the costs of this court should be equally divided. This rule was adopted in the case of *The Parthian*, 5 C. C. A. 171, 55 Fed. 426, decided by this court in 1893, which was an appeal from a decree from the district court of Massachusetts, being an appeal from the same court as the case at bar. In that case the libel was dismissed in the court below; and this court reversed the decision of the district court, finding both vessels at fault, and decreeing that the costs in the circuit court of appeals should be divided. This rule should apply in the case at bar, the cases in this regard being in every respect the same. The same rule has been followed in the case of *The J. J. Driscoll*, 12 C. C. A. 4, 63 Fed. 1023. In the Sixth circuit, see *The Fountain City*, 10 C. C. A. 278, 62 Fed. 87; *The North Star*, 10 C. C. A. 262, 62 Fed. 71.

We think that the true rule in collision cases in the circuit court of appeals on the question of costs is, viz.: First, if the appellant fully reverses the decree of the district court, and his own vessel be held free from fault, then he should be entitled to full costs on appeal; second, if, the appellant being found alone to blame in the district court, the circuit court of appeals finds both vessels to blame, then that the cost of the appeal should be divided.

That in the case at bar, for the reasons above given, the logical order should be that the libelants recover the costs of the district court, and that the costs of the appeal should be divided.

Before COLT and PUTNAM, Circuit Judges, and NELSON, District Judge.

PER CURIAM. Ordered, that whereas, no judge who concurred in the judgment desires that the petition for a rehearing be granted, except as to the matter of costs, the same is denied, except as to costs; and whereas, both parties have, by leave of court, been heard on briefs on the matter of costs, it is further ordered that the judgment heretofore entered be rescinded, and judgment be now entered as follows: The decree of the district court is reversed, and the case is remanded to that court, with directions to enter a decree dividing equally the damages and the costs in that court, with costs for the appellants in this court. 73 Fed. 1022.

UNITED STATES v. HARRIS et al.

(Circuit Court of Appeals, Seventh Circuit. October 5, 1896.)

No. 319.

APPEALS AND WRITS OF ERROR—SUITS AGAINST UNITED STATES—ACT MARCH 8, 1887.

One H. was arrested on the charge of obtaining money from post offices on forged money orders, and while in the custody of the marshal a sum of money was taken from his person by a special agent of the post-office department. Afterwards H. gave to his attorney an order upon the said post-office agent for the money, a specified sum thereof to be retained by the attorney as fees, and the remainder to be paid over to H.'s wife, to whom he was indebted. This order was not recognized, and the money was ultimately covered into the United States treasury. Subsequently H. gave the attorney an assignment of his rights to such money in trust for the same purposes. Thereafter the attorney filed a petition against the United States, under the act of March 3, 1887 (24 Stat. 505), to recover the money for the use of himself and H.'s wife. The wife, on the same day, was allowed to become a party plaintiff, and afterwards, the cause having been partly heard, H. himself was substituted as petitioner, for the use of his attorney and his wife. *Held* that, as the attorney had only an equitable title under the assignment, and as H. also, after his substitution, sued merely as a trustee, the suit was at all times of an equitable character, and consequently the proper method of reviewing the judgment rendered was by an appeal.

Appeal from the Circuit Court of the United States for the Northern District of Illinois, Northern Division.

This was an action against the United States, prosecuted under the act of March 3, 1887, c. 359 (24 Stat. 505), and it is contended that the appeal should be dismissed because the action was one at law, and the judgment reviewable only upon a writ of error. The original petition was brought by Jesse A. Baldwin, for the use of himself and Lottie A. Harris, the wife of Le Roy S. Harris, and, in substance, it alleged that on February 24, 1894, Le Roy Harris was under arrest, and in the custody of the United States marshal for the Western district of New York, charged with violations of the postal laws, in that he had obtained from postmasters at Laselle, Aurora, and Ottawa, Ill., various sums of money upon forged money orders; that while he was so in custody, James E. Stuart, a special agent of the post-office department, forcibly searched his person, and took from him the sum of \$1,310, which belonged to him; that on March 13, 1894, the petitioner was employed to defend Harris in the trials upon the indictments then pending in the United States district court at Chicago, and on that day was given by Harris an order on Stuart for the said amount of \$1,310, of which he was to retain \$350 as and for attorney's fees, and to deliver the remainder to Lottie A. Harris, to whom Le Roy Harris was indebted for a like amount, for which she afterwards recovered judgment against him; that he presented the order to Stuart before 12 o'clock noon of the day it was drawn; that on the next day Harris sold and assigned to the petitioner, by an instrument in writing, all his right, title, and interest in and to the said sum of \$1,310, for the use of the petitioner and Lottie A. Harris; that Stuart refused to deliver the money to the petitioner, and falsely claimed that two weeks before he had sent the money to Washington, to be turned over to the post-office department; that at 2 o'clock on March 13, 1894, the trial of said Le Roy Harris upon said indictments was begun, and continued through three days; that neither when asked to surrender the money, nor at any time during the trial, did Stuart claim that the money, or any part of it, could be identified as the proceeds of any crime of Harris against the United States, but, on the contrary, he testified at the trial that his investigation corroborated the statement of Harris that he had gotten the money either from the Mt. Morris Bank or the

Harlem Savings Bank, New York; that afterwards, on March 19, 1894, Stuart delivered the money to the chief post-office inspector at Washington, D. C., who covered the same into the treasury of the United States, where it is still held; that the money was taken from Harris wholly without authority of law, and that, the premises considered, the United States was indebted to the petitioner for the amount stated, for the uses aforesaid, etc. This petition was sworn to by the petitioner, and was filed June 28, 1895, and on September 27, 1895, an answer was filed. The cause having been set down for hearing on December 10, 1895, Le Roy Harris on that day filed with the clerk of the court his petition, entitled as in the cause pending, alleging, in substance, that he had a claim against the United States for the sum of \$1,310; that he was indebted to Jesse A. Baldwin and Lottie A. Harris; that he adopted the petition therein before filed; and prayed that he be substituted as party complainant "in lieu of Jesse A. Baldwin, for the use of Jesse A. Baldwin and Lottie A. Harris, and that the suit herein may proceed under the title of Le Roy Harris for the use of Jesse A. Baldwin and Lottie A. Harris vs. The United States." This petition was sworn to by Baldwin. On the same day leave of court was "given Lottie A. Harris to join as party complainant, and adopt the allegations of the petitioner," and the cause, having been partly heard, was continued to the ensuing 12th of the month, but on the same day—December 10th—a further order was made, on the motion of Le Roy S. Harris, consented to by the petitioner, that Le Roy S. Harris be substituted as complainant for the use of Jesse A. Baldwin and Lottie A. Harris, and that the suit proceed under the title of "Le Roy S. Harris for the use, etc., vs. The United States," and that the answer on file stand as an answer to the petition as amended and under the new title. On December 12th the trial was concluded. The court made a special finding of the facts, and gave judgment for the complainant. On March 13, 1896, the United States, by the district attorney, prayed an appeal, and filed an assignment of errors. The transcript was filed with the clerk of this court April 17, 1896, and on June 19, 1896, was made the motion to dismiss the appeal.

John C. Black, for the United States.
Baldwin & Baldwin, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

Until the decision of the supreme court in *Chase v. U. S.*, 155 U. S. 489, 15 Sup. Ct. 174, there had been doubt, and a contrariety of ruling, touching the question of the right and mode of appeal in such cases. *U. S. v. Fletcher*, 8 C. C. A. 453, 8 U. S. App. 481, 60 Fed. 53; *U. S. v. Yukers*, 9 C. C. A. 171, 23 U. S. App. 292, 60 Fed. 641; *U. S. v. Tinsley*, 15 C. C. A. 507, 25 U. S. App. 267, 68 Fed. 433; *U. S. v. Davis*, 131 U. S. 36, 9 Sup. Ct. 657. In *Chase v. U. S.* the statute is analyzed, and the conclusion declared:

"That congress intended that the final determination of suits brought under this act in a district or circuit court of the United States shall be reviewed here upon a writ of error if the case be one at law, and upon appeal if the case is one cognizable in equity or in admiralty, under the existing statutes regulating the jurisdiction of those courts."

To this the court added:

"But congress, while recognizing the settled distinction between law, equity, and admiralty, did not intend that the records of cases brought against the government under this act should contain all that is required in suits instituted in courts of the United States under the general statutes regulating their jurisdiction and the modes of procedure therein. Neither the mode of procedure in the court of claims, nor the mode in which cases there de-

terminated may be brought here for re-examination, were changed by the act of March 3, 1887. But under that act a judgment of a district or circuit court of the United States in an action at law brought against the government will be re-examined here only when the record contains a specific finding of facts with the conclusions of law thereon. In such cases this court will only inquire whether the judgment below is supported by the facts thus found. And we think it was also the purpose of congress to require like specific findings or statements of fact and conclusions of law in cases in equity and in admiralty brought under that act in the district and circuit courts of the United States, and to restrict our inquiry in such cases, as in actions at law, to the sufficiency of the facts so found or stated to support the final judgment."

The original bill in this case was one of equitable cognizance. *Field v. Maghee*, 5 Paige, 538; *Rogers v. Insurance Co.*, 6 Paige, 583, 599; *Story*, Eq. Pl. § 153, and notes. Baldwin, by the assignment of Harris, acquired only an equitable title to a chose in action, and that not for himself alone, but in trust also for another. The equitable character of the case certainly was not changed by the admission of Mrs. Harris as a party complainant. In that condition the case went to trial, and pending the hearing the name of Le Roy S. Harris was substituted as sole complainant; not, however, in his own right or interest, but in trust for Baldwin and Mrs. Harris. It was as a trustee that he prosecuted the suit to the end, and we do not think ourselves constrained to hold that by force of that nominal change of the party plaintiff pending the hearing the suit ceased to be one in equity, and became one at law. The motion is therefore overruled.

CONSOLIDATED WATER CO. v. BABCOCK et al.

(Circuit Court, S. D. California. August 10, 1896.)

No. 667.

1. DIVERSE CITIZENSHIP.

Diverse citizenship, to sustain federal jurisdiction, must be such that all the parties on one side of the controversy are citizens of different states from all those on the other side; and, in determining the question of jurisdiction, the parties are to be arranged on one side or the other, as their interests require.

2. NECESSARY PARTIES.

Where a person is so related to the subject-matter of a suit in equity that his rights must unavoidably be passed on by the court in reaching a final decree, he is a necessary party.

3. SAME.

Complainant company, as owner of the bonds and most of the stock of two water companies which were furnishing water to a city and its inhabitants under a contract with the city, filed a bill to restrain the city from making and carrying out a contract with defendant water company for the furnishing of water by the latter, on the ground that such contract would be made through corrupt influences, and that its consummation would practically confiscate the property of the water companies, the stock and bonds of which were held by the complainant, and render such stock and bonds worthless. *Held*, that the water companies were necessary parties.

4. SAME.

The fact that the bonds of one of such water companies owned by complainant exceeded the assets of such company did not affect the necessity of making it a party.