

Reichenbach. The depositions of Alfred Simon, Charles Tomlinson, Luke A. Power, Arthur P. Yates, and questions and answers 1 to 19 of the deposition of Ernest Caffisch, were to prove the superiority of defendants' bromide paper over the complainant's product. The deposition of Harry Littlejohn was to show the inferiority of some of complainant's paper which his company had received and been unable to sell. The complainant moves to suppress all this testimony on the ground of its immateriality, and although it seems to have been introduced to meet a little testimony from George G. Rockwood, who spoke of the inferiority of the defendants' paper, the issue had no bearing upon the real issues in the case, was immaterial, and the motion, so far as it related to that testimony, should have been granted. The testimony of Mr. Abbott for the defendants, in reply to the rebuttal of the complainant, is deserving of censure. He was the defendants' patent expert, and testified in their behalf. After the complainant's experts had replied in rebuttal, he was again examined; and, in reply to a single question, made an argument from previously prepared manuscript notes, of 100 printed pages, consisting of comments and criticisms upon the testimony, and his opinions and beliefs occasionally mingled with hearsay. While a portion of his testimony related to experiments in which he had assisted, and was not objectionable, the argumentative portion went entirely beyond the proper bounds of expert testimony; so that it ought not to be treated as testimony for which costs should be allowed. No costs should be allowed in either court for the first hundred pages, and no costs should be allowed in either court for the other testimony which has been pronounced inadmissible. The decree of the circuit court, except as modified in the matter of costs, is affirmed, with costs of this court as specified.

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## KANSAS CITY HAY-PRESS CO. v. DEVOL et al.

(Circuit Court of Appeals, Eighth Circuit. September 6, 1897.)

No. 808.

## PATENTS—VALIDITY AND CONSTRUCTION—HAY-BALING PRESSES.

Patent No. 495,944, to Knight, Kelly, and Alderson, as assignees of Livengood et al., for improvements in hay-baling presses, if valid at all as to its fifth claim, must, in view of the prior state of the art, as shown especially in the Whitman patent, No. 446,311, be narrowly construed. 81 Fed. 726, reversed.

Appeal from the Circuit Court of the United States for the Western District of Missouri.

This was a suit in equity by the Kansas City Hay-Press Company against H. F. Devol, George Devol, and W. S. Livengood, for alleged infringement of certain patents relating to hay-baling presses. In the circuit court the bill was dismissed after a hearing on the merits (72 Fed. 717), and the complainant appealed. This court heretofore, on May 10, 1897, reversed that decree, and directed the court below to enter a decree dismissing the bill as to certain of the patents sued on, but sustaining others, and directing an injunction and accounting

for infringement thereof. 81 Fed. 726. The case is now heard upon a petition for rehearing.

James Scammon (Offield, Towle & Linthicum, of counsel), for appellant.

Geo. A. Neal and T. S. Brown (Bond, Adams, Pickard & Jackson, of counsel), for appellees.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

PER CURLAM. When the opinion in this case was prepared, the chief point of controversy with respect to patent No. 495,944, issued on April 18, 1893, to James E. Knight, Edward Kelly, and William A. Alderson, as assignees of Winfield S. Livengood et al., seemed to be whether the title to that patent was duly vested in the complainant, the Kansas City Hay-Press Company. To this question our attention was chiefly directed on the argument, and for that reason full consideration was not given to the further questions whether claim 5 of said patent was valid and had been infringed. We find no occasion to modify our views with respect to the title to the patent, and what was said on that subject will be adhered to. In a petition for a rehearing recently filed by the appellees, the question whether claim 5 of patent No. 495,944 is valid, or was shown to have been infringed by the appellees, is more elaborately discussed, and our attention has been more particularly directed to the state of the art to which claim 5 of patent No. 495,944 relates. We have become satisfied, after considering this claim in relation to the state of the art as disclosed by several prior patents,—to wit, patent No. 446,311, issued to H. L. Whitman on February 10, 1891; patent No. 375,078, issued to Winfield S. Livengood on December 20, 1887; and patent No. 459,630, issued to John H. Hampton on September 15, 1891,—all of which patents relate to improvements in baling presses, that the claim is not valid, or, if valid, that it must be construed with such limitations as to exempt the appellees from the charge of infringement. We do not deem it necessary to go into this question in detail, and therefore content ourselves with the statement that the Whitman patent, No. 446,311, to which reference has been made, discloses a combination substantially the same as that covered by claim 5 of patent No. 495,944. As this question has received full consideration in connection with the petition for a rehearing, we do not deem it necessary to set the case down for reargument on this point. We have accordingly concluded to modify our former decree by directing that the bill of complaint be dismissed as to patent No. 495,944, at the cost of the complainant company, and that so much of our former judgment as upheld the validity of claim 5 of said patent, and directed an accounting as to the profits realized and damages sustained by the infringement thereof, be expunged. In all other respects the decree as formerly entered will be sustained and remain undisturbed, and the petition for a rehearing will be denied.

LOPES et al. v. LUCE et al.

(District Court, D. Massachusetts. December 11, 1897.)

Nos. 821-826.

**WHALE FISHERIES—SHIPPING ARTICLES—PROFITS OF TRADE.**

The printed shipping articles for a whaling voyage contained an interlineation providing that the officers and seamen were not to participate in any furs, skins, or bones "taken in the way of trade." It appeared that the owners intended to engage to a considerable extent in trading with the natives, but did not inform the seamen thereof. In the course of the voyage they were required to perform much extra work connected with the trading, and in the preparation and care of the skins, bone, etc., acquired thereby. *Held*, that they were entitled to compensation for this extra work, and, under the peculiar circumstances of the case, they were entitled to the same share in the profits of the trading as was given them by the shipping articles as their lays in the catch.

These were six libels filed by seamen of the whaling schooner *Era* against Thomas Luce and others to recover the value of their lays, and also compensation claimed by them as their share in the profits of trading ventures carried on during the voyage. These libels were consolidated and heard together.

Thomas F. Desmond and Thomas A. Codd, for libelants.  
Carver & Blodgett, for respondents.

BROWN, District Judge. Upon the evidence of witnesses as to the value of the catch of the whaling schooner *Era*, there appears no reason to disturb the allowance of 28 cents a gallon for oil, and \$3.50 a pound for bone. According to the decided preponderance of testimony, the price for the bone was fair, if not liberal, and an allowance of a greater quantity of oil than was actually contained in the vessel more than offset the difference that would result from the allowance of the price of 30 cents per gallon for the oil. From the testimony of intelligent witnesses upon both sides, it appears that the owners took no unfair advantage of the men, but estimated the value of the catch fairly, at a figure very close to the actual cash value. Under such circumstances, the settlement should stand, so far as the value of the catch is concerned.

Whether the men are entitled to an additional amount for a share in the trade is a more serious question. The shipping articles contain the following provision: "It is understood and agreed that the officers and seamen are not to participate in any furs, skins, or bone taken in the way of trade." This provision was a written interlineation in printed articles. The men deny that it was read to them or called to their attention. The testimony of the owners is that the men were told simply that they were to have no share in the trade, and that no explanation was given them as to the amount of trade contemplated. It appears in evidence that the trade with the natives was considered by the owners a considerable part of the venture; that the sum of \$1,351.37 was invested in articles for barter, which an owner testified was "quite a sum for trading"; and that a portion only of the articles procured in trade sold for \$2,039.02.

It further appears that the men did considerable work upon the skins and other articles taken in trade, and were ordered to do so by the master, and were subjected to hardship in consequence. I find no satisfactory evidence of a custom of owners of whaling vessels to engage in trade to a similar extent, or to exclude the men from sharing in substantially all that results from the voyage. In *The Holder Borden*, 1 Spr. 144, 149, Fed. Cas. No. 6,600, it was said:

"We should keep in mind that this is a whaling voyage, in which the great principle of maritime policy, of uniting the interest of the mariners with that of the owner, is adopted in its greatest force."

This policy is applicable for the benefit of the seamen as well as of the owners. Even were the men informed that they were not to participate in the profits of trade, which they dispute, they had no reason to suppose that trade was an important object of the voyage, or that, through their labor, they were to assist the owners gratuitously in what was practically an independent venture. As at the time of the signing of the shipping articles the owners had in mind a trading enterprise of considerable importance, which, from the testimony, they regarded as "something of an experiment," and as the men were not informed of this intention, either actually or by any existing usage, I am of the opinion that the minds of the owners and of the men did not meet when the contract was signed. The articles should not be so construed as to permit the conversion of a voyage ostensibly for whaling into a voyage for the double object of whaling and trading. The evidence in this case, which tends to show the success of the trading experiment, and the probability of further and more important trading enterprises, affords a warning against a construction of the articles in question that would permit owners of whaling vessels to increase indefinitely the size of their trading ventures, and to secure without compensation, in a private business of freighting articles of barter to and from remote Northern regions, the services of men who visit these regions, and encounter peril and hardship, for the doubtful profits of a whaling catch. I find no evidence of an existing usage that would justify such a construction, and in the absence of evidence that all that was contemplated by the owners was communicated to the men, and undertaken by them voluntarily and with a full understanding, I consider such a construction of the stipulation as one derogatory of the seamen's general rights, and not to be supported by a court of admiralty. *Matern v. Gibbs*, 1 Spr. 159, Fed. Cas. No. 9,273; *Brown v. Lull*, 2 Sumn. 443, Fed. Cas. No. 2,018. As the libelants contributed to this collateral enterprise of the owners, not only in the transportation upon the vessel of the articles given and received in barter, but also by special labor expended in the work of trading, and in the preparation and care of the skins, bone, etc., I am of the opinion that they should receive compensation. The case should therefore be referred to a commissioner, to take an account of the fair market value at the time of the termination of the voyage of all articles received by the owners in trade, and, after deducting from the gross amount thereof such sums as shall be a fair allowance to the owners for their special

investment and special expenses in the trading venture, to report the balance, if any, in favor of the owners, as the amount of profit of said trade. Whatever rule of compensation might under other circumstances be adopted, I am of the opinion that under the present libels and proofs the libelants are entitled, respectively, to the same share in the profits of said trade as appear by the shipping articles to be their lays in the catch. A decree for the libelants may be entered in accordance with this opinion.

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RED R. S. S. CO., Limited, v. NORTH AMERICAN TRANSPORT CO.

(District Court, S. D. New York. January 6, 1898.)

1. CHARTER OF STEAMER—LAY-DAYS—DISPATCH MONEYS—TIME SAVED IN LOADING.

A charter of the steamship William Storrs to the defendants, allowed for loading 15 running days, Sundays and holidays excepted, and dispatch money £10 per day for each day or part of a day saved in loading. The master permitted the charterers to commence loading with the use of the ship's appliances on the day preceding the time when the lay-days by the charter began, without prejudice to the continuance of the lay-days. *Held*, that the time used by the charterers in loading on the day preceding the commencement of the lay-days, was not time saved in loading, and that the charterers could not, therefore, claim dispatch money for that time.

2. SAME—DETENTION OF SHIP'S PAPERS.

Under a second charter of the same steamer, 18 running lay-days were allowed, Sundays and legal holidays excepted, with the provision for dispatch moneys at £15 per day "if steamer be dispatched in less time than is specified." *Held* under this provision of the charter that the right to dispatch moneys would begin on the day the ship was actually dispatched by the charterers, notwithstanding their use of the ship by permission for loading before the lay-days commenced. *Held*, further, that under a charter providing for bills of lading and a delivery of the cargo according to the custom of the port, the charterers had no right to require the master to sign bills of lading containing more specific provisions as to a particular alleged custom of which the master was ignorant, or to detain the vessel on account of his refusal to sign such bills, although the custom was in fact correctly stated, and the dispatch moneys, therefore, could not be claimed for the time lost in dispatching the ship on account of this controversy.

(Syllabus by the Court.)

This was a libel in rem by the Red R. Steamship Company, Limited, against the North American Transport Company, to recover money claimed under a charter party.

Convers & Kirlin, for libellant.

Butler, Notman, Joline & Mynderse, for respondent.

BROWN, District Judge. The above libel was filed to recover certain small balances alleged to be due to the libellant for the hire of the steamship William Storrs under two different charter parties, dated the one July 26, 1893, and the other October 10, 1893. The items claimed consist of certain credits for dispatch moneys, which in settlement with the charterers the master allowed to them as credits against the charter hire, for time saved in loading, and in dispatching the vessel less than the lay-days specified in the charter.

The charter of July provided that: