

Before PARDEE and McCORMICK, Circuit Judges.

PER CURIAM. As the parties waived trial by jury in the circuit court and submitted the case to the judge, we are concluded by the findings of fact. The vital question in the case is whether the lands in controversy had been so segregated from the public domain by the alleged decree in 1851 as to permit of their assessment and taxation by the state of Florida in the years 1877, 1878, and 1879. From the findings of fact relating to the decree of 1851, we are of opinion that the said decree did not become final and executory. This we understand to be the ruling of the circuit court, and we affirm the same. Affirmed.

THE EDWIN.

CRAWLEY v. THE EDWIN.

(District Court, E. D. New York. April 28, 1898.)

1. NEGLIGENCE—EVIDENCE—WEIGHT AND SUFFICIENCY.

A longshoreman, who was injured by the slipping of a boom from its crotch, introduced three witnesses, who testified that the cleats and leg of the crotch were badly worn. Three other witnesses, on behalf of claimant, testified that the leg and cleats were in good condition. *Held* that, the burden being on libellant to prove the worn condition, his proof failed.

2. EVIDENCE—ADMISSIBILITY.

On an issue as to the condition of a crotch supporting a boom, testimony of a ship surveyor, who examined it several days after an accident alleged to have been caused by its defective condition, is inadmissible, it not being proven that the crotch had remained unchanged.

3. MASTER AND SERVANT—APPLIANCES ON SHIPBOARD.

Where the wooden crotch for supporting a boom is such as are usually in use on old ships, and it is not shown to be unsuitable, it is not the duty of the shipowners to furnish a later appliance, although it is a superior one.

This was a libel by John Crawley against the steamship Edwin to recover damages for personal injuries.

Alex. McKinney and Robert H. Roy, for libellant.
Convers & Kirlin, for claimant.

THOMAS, District Judge. The libellant is a longshoreman. On the 29th day of December, 1898, he was employed by a firm of stevedores to assist in loading with grain the claimant's steamship, the Edwin. The ship was lying at a dock at the foot of Pacific street, Brooklyn, with her bow in, and her starboard side abreast, the wharf. The grain was brought into the aft hatch from an elevator on the port side of the ship, by means of a pipe 70 feet in length. The free end of the pipe was supported by a line running from it to a gaff of the ship. Slipped over the end of the pipe, and held to the same by a rope, was a sleeve or nozzle, about 16 feet long and some 8 inches wide. This sleeve ran into the hatch of the ship sufficiently to carry the grain into the port or starboard side thereof, accordingly as the free end of the sleeve was raised or lowered. To raise or lower the

end of the sleeve for this purpose was the duty of the libellant. To enable him to do this, a rope was fastened to the sleeve, somewhere along the portion thereof extending from about the coaming of the hatch, on which the sleeve rested, to the end of the sleeve. The claimant claims that, to obtain a purchase on the sleeve, the libellant had carried the rope over the boom, which was some 6 feet to the starboard of the sleeve, and which extended from the mast across the hatch to a point aft thereof, where it rested on a crotch. The boom was $46\frac{1}{2}$ feet long, measured 12 inches in diameter, weighed about 1,800 pounds, and could only be moved from its position by some great force suitably applied for that purpose. The boom was not supported otherwise than by the mast at one end and the crotch at the other. The crotch consisted of two pieces of wood, 6 inches in width and 3 inches in thickness, set into each other at the point of intersection, and holding the end of the boom some 7 feet above the deck. The spread of the crotch was 4 feet and 8 inches, and the opening wherein the boom rested was 11 inches wide by 6 inches deep. On the deck were bolted pieces of wood, each 9 by 7 inches in length and breadth, with a recess 3 by $6\frac{1}{2}$ inches by 1 inch deep, into which the leg fitted. Crotches of this sort for holding booms are of the older kind. Somewhere from 10 to 20 years ago, iron supports, firmly fastened to the deck, came into use, and are now generally employed on the newer ships. The wooden crotches, however, continue in use on the older ships, and it is not apparent that they are not sufficiently suitable. In such case it was not the duty of the shipowner to provide the later appliance for the protection of the libellant, although it might in some respect be superior.

While the libellant was attending to the sleeve, and leaning over and looking down into the hatch for that purpose, the boom fell over to port and struck him, doing the injury which is the subject of this action. A witness for the libellant states that he saw the crotch sliding a little to port, until it finally tilted on its port leg, and went bodily over, allowing the boom to fall. This witness, and two others, all stevedores, state that the leg and the cleat into which it was fitted were considerably worn, and it is the claim of the libellant that this worn condition enabled the leg of the crotch to slip over the cleat, aided thereto by the slippery and icy condition of the deck which then existed.

On the part of the ship three witnesses, all connected with the ship, state that the legs and cleats were in good condition and were not worn. A ship surveyor, two or three days after the accident, examined the crotch and cleats and found them in good condition. Upon the trial a question arose as to accepting the evidence of this subsequent examination, as it did not appear that the appliances had remained unchanged. Although the witness seemed to identify the crotch and cleats, by showing that they did not appear to have been disturbed or removed, yet, for the purposes of this discussion, his evidence should be disregarded.

The case on this issue will then stand in this way: Three men, fellow workmen of the libellant, examined in court, testified to the worn condition of the crotch and cleats. Three persons connected

with the ship, examined on depositions, testified to the good condition of the crotch and cleats. The three men examined by the libellant impressed the court with their general good faith. The witnesses not presented in court cannot be presumed to have been otherwise than presentable and well-appearing. The burden of proving the defective condition is on the libellant; hence he must produce a preponderance of evidence. Can the court justly say that the evidence of the libellant's witnesses outweighs that of the claimant's witnesses? The men on the ship had the best opportunity to judge, and there seems to be no reason for holding that they are less worthy witnesses than those produced by the libellant.

It is urged that the theory of the worn legs and cleats should be adopted, as this alleged condition furnishes a sufficient cause, and no other sufficient cause appears. A cause may be sufficient, yet it has no claim to acceptance unless the quality or weight of the evidence brought to establish it be also sufficient. Otherwise there would be the following illogical deduction: (a) Worn legs and cleats are a sufficient cause of the boom's slipping. (b) No other sufficient cause appears. (c) Worn legs and cleats are not proven by a preponderance of evidence. (d) The sufficiency of the worn legs and cleats as a cause, and the insufficiency of the proof of other causes, justifies the adoption of the theory that worn legs and cleats were the cause, although no sufficient independent proof thereof be given. In other words, the doctrine of exclusion is employed to help out evidence defective in weight. But the fact that theories furnished by the claimant do not explain the accident does not leave it to be inferred that the real cause is that suggested by the libellant. The libellant must stand on the strength of his own theory, and not on the weakness of that of his adversary. The claimant is not required to present either a theory or an explanation. He may content himself with adducing evidence sufficient in weight to counterbalance that produced by the libellant in support of his particular theory.

The event has been thoroughly investigated, and the cause of the accident has not been proved within the rule that places the burden of proof upon the libellant. Therefore the legal presumption that the claimant was not negligent must continue. There is no question of the libellant's injury. Although the libellant's case has been presented thoroughly and with skill, it fails because of the onus resting upon him of showing, with the precision required by law, what agencies produced the accident. The circumstances seem to preclude an ascertainment of the just cause of the accident.

The libel must be dismissed, with costs.

TICKTIN v. FIDELITY & CASUALTY CO. OF NEW YORK.¹

(Circuit Court, W. D. Missouri, W. D. May 20, 1898.)

No. 2,222.

ACCIDENT INSURANCE—SUICIDE.

Rev. St. Mo. 1889, § 5855, which provides that in suits "upon policies of life insurance," suicide shall be no defense, although the policy may contain stipulation to the contrary, does not apply to accident policies, although Rev. St. Mo. 1889, § 5811, authorizes life insurance companies to engage in the business of accident insurance, declaring, however, that "such accident insurance shall be made a separate department of the business of a life insurance company undertaking it."

This was an action by Liebbe Ticktin against the Fidelity & Casualty Company of New York on an accident insurance policy. Defendant demurred to the petition.

I. Ringolsky, for plaintiff.

Warner, Dean, Gibson & McLeod, for defendant.

PHILIPS, District Judge. The defendant, the Fidelity & Casualty Company of New York, is what is known as an "accident insurance company," engaged in the business of insuring persons against injuries resulting from accident. The petition avers that the accident to the plaintiff resulted in death from suicide while insane, by taking oil of mustard. By the fourth clause of the policy it is expressly stipulated that "in case of injuries, fatal or otherwise, intentionally inflicted upon himself by the insured, or inflicted upon himself or received by him while insane, the measure of this company's liability shall be a sum equal to the premium paid, the same being agreed upon as in full liquidation of all claims under this policy." As the petition does not count upon a claim for recovery only of the premium paid, but for the full amount of the policy as in case of death by accident, the demurrer raises the question that, by the express provision of the policy, the liability sued for has not arisen. To obviate this objection, the plaintiff invokes the provision of section 5855, Rev. St. Mo. 1889, which is as follows:

"Sec. 5855. In all suits upon policies of insurance on life hereafter issued by any company doing business in this state, it shall be no defense that the insured committed suicide unless it shall be shown to the satisfaction of the court or jury trying the cause that the insured contemplated suicide at the time he made his application for the policy, and any stipulation in the policy to the contrary shall be void."

The question of controlling importance to be decided is: Does this statute apply to an accident policy? The time at my command will not permit more than to briefly state the conclusions I have reached on this question. By the express terms of said section it is limited to "policies of insurance on life." Clearly, therefore, there is no escape from the proposition that, unless an accident policy can be held to be a policy of insurance on life, this statute affords no shelter to the defendant. It being a statute in contravention of the common-law

¹ Motion for rehearing pending.