THE NEWARK.

(Circuit Court of Appeals, Third Circuit. September 20, 1898.)

No. 1.

COLLISION—TUG AND TOW WITH STEAMER—CHANNELS AND PIERS.

A tug with a barge in tow was slowly passing out from her pier into the Hudson river, having given the usual long whistle to notify vessels of her approach, when she received two short whistles from a steamboat, and stopped to allow her to pass to the westward. The steamboat failed to starboard her helm, in accordance with her own signal, until it was too late to avoid collision with the barge, although it was midday, and she had plenty of water way to pursue a safe course. *Held*, that the steamboat was solely at fault, the failure to observe her plain duty being gross negligence.

Appeal from the District Court of the United States for the District of New Jersey.

Flavel McGee, for appellants.

Robert D. Benedict, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

BRADFORD, District Judge. The libel in this case was filed by the Knickerbocker Ice Company, owner of the barge Barmore, against the steamboat Newark, to recover damages for injuries sustained by the barge in a collision with the steamboat on the Hudson river a short distance off the end of pier No. 47, on the easterly side of the river, August 30, 1895. The steamboat was adjudged by the court below to have been solely at fault, and it was decreed that the libelant recover accordingly. A careful examination of the evidence has satisfied us that the decree should be affirmed. No culpability appears on the part of the barge, or of the tug R. G. Townsend, which had the barge in tow on the occasion in question. While slowly passing out under one bell and before leaving the slip the tug blew the usual long whistle to notify vessels on the river of its approach. When the steamboat gave her first signal of two short whistles the tug with the barge promptly stopped in order that the steamboat might safely pass up the river to the westward of them. The signal thus given by the steamboat was a notification to the tug and barge that she would so pass to the westward. If the steamboat had, upon first blowing her whistle, immediately put her helm to starboard she would, according to the evidence, have swung sufficiently to port to enable her to clear the barge. But this she omitted to do; and when she did starboard her helm it was too late. It was in the middle of the day, she had plenty of water way and there was nothing to prevent her from pursuing a proper and safe course. Nothing but gross negligence can account for the omission by the steamboat to observe her plain duty. The decree of the court below is affirmed.

RUBBER TIRE WHEEL CO. v. COLUMBIA PNEUMATIC WAGON WHEEL CO.

(Circuit Court, S. D. New York. September 16, 1898.)

1. EQUITY PRACTICE—MOTION FOR LEAVE TO TAKE PROOFS.
Notice of a motion for leave to take testimony in sur rebuttal should set forth specifically the precise facts which the applicant desires to prove.
2. PATENTS—SUIT FOR INFRINGEMENT—LEAVE TO TAKE PROOFS.
Leave will be granted a defendant to take testimony in sur rebuttal to show that decrees put in evidence in rebuttal, which appear upon their face to show a decision by the court after opposition, were not in fact so rendered.

Motion for Leave to Take Proofs in Sur Rebuttal.

Charles W. Stapleton, for the motion.
Paul A. Staley, opposed.

LACOMBE, Circuit Judge. Inasmuch as the rebuttal testimony is supposed to close the proofs, any application for leave to take sur rebuttal should set forth specifically, and not in general terms, the precise facts which applicant wishes to prove. A notice of motion, such as is given here, for leave "to take proofs in sur rebuttal," is altogether too vague. Inasmuch, however, as there are indications in the accompanying affidavits of some of the facts now sought to be proved, and the motion has been argued at length, it will be disposed of despite the defects in the notice.

1. As to any of the decrees put in evidence by complainant in rebuttal, which appear upon their face to show a decision by the court after opposition, defendant may show that they were in fact entered by consent, or by collusion, and under some arrangement whereby, although the decree would apparently evidence acquiescence by defendant decreed against, both parties to such decree agreed that between themselves it should mean nothing of the kind.

2. As to any particular sample of tire introduced by complainant on rebuttal, and testified to by complainant's witness as being of some particular kind, or grade, or quality, or composition of rubber, defendant may show that it is in fact of some other kind, or grade, or quality, or composition.

3. As to any samples introduced by complainant on rebuttal as "samples of Du Bois tires," defendant may show that they are not in fact "samples of Du Bois tires."

4. Defendant may show the method of applying tires used by complainant at and prior to the time of the commencement of this suit.

In all other respects the motion is denied. Proper practice would require defendant to set forth the names of the witnesses by whom it expects to make these sur rebuttal proofs, or to give proper excuse for their omission. It must be assumed, however, that, before moving, defendant ascertained that it could procure such testimony. It would seem, therefore, that two weeks from the entry of this order should be abundant time in which to put it in, and, inasmuch as the printing of the rest of defendant's record may go on meanwhile (as suggested on the hearing) and the sur rebuttal proof must necessarily