

The earlier art shows a reproducer held rigidly. The "floating reproducer" was adapted to put itself in place and keep itself in place despite the various disarrangements of parts to which machines of this class are liable. And in defendants' machine this same automatic action is secured in the same way. Resting always on the bottom of the groove, the reproducer is always in that part of the groove or record—held there by yielding pressure—where it can be acted upon by the irregular surface which preserves the sound waves; and it would seem to make little difference whether that surface was located at the bottom or at the side of the groove, especially in view of the language of the specification:

"The reproducing style, mounted as just explained, is specially adapted for use in connection with a record in the form of a groove with sloping walls, and this combination is specially claimed; but it may also be usefully employed in connection with other forms of record."

There seems to be no special equity in the circumstance that defendants have not heretofore been disturbed by suit. Complainant has evidently been diligent in bringing suits against earlier infringers, and was under no obligation to sue every one at the same time.

Upon formally withdrawing the motion as to the other claims, complainant may take an order in the usual form as to No. 21. After the order is entered, however, its operation will be suspended until January 25, 1899, in order to give defendants an opportunity to prosecute and argue an appeal, if they be so advised.

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THE PENOKEE.

(Circuit Court of Appeals, Sixth Circuit. November 14, 1898.)

Nos. 573-575.

**MARITIME LIENS—WAGES AND ADVANCES—EVIDENCE.**

Evidence considered, and held insufficient to satisfy the court of the bonafides of certain claims for wages and advances which were alleged to constitute maritime liens entitled to precedence over a mortgage on the vessel.

Appeal from the District Court of the United States for the Eastern District of Michigan.

Fred C. Harvey, for appellants.

L. M. Huntsberger, for appellee.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge. Three appeals by intervening libelants have been heard together. They are as follows: First, that of Nettie Lasch, who filed a claim for wages alleged to be due her as cook for the seasons of 1894 and 1895; second, that of Pearl C. Klumph, who intervened to recover wages claimed as due him as seaman for 1894 and 1895; and third, that of William C. Klumph, who has filed a claim for money which he claims was advanced by him for repairs to be made

upon the vessel. The schooner Penokee was sold in the spring of 1894 to Almond P. Klumph, who paid part cash, and executed a mortgage upon the vessel for the remaining purchase money, which was duly recorded. The mortgagor covenanted not to involve the vessel in debt, while the mortgage continued, beyond \$300, and gave a bond with personal security to secure the mortgagee against a breach. The Penokee was sailed during the seasons of 1894 and 1895, by her owner, Almond P. Klumph, as master, and in November, 1895, was libeled for wages and supplies, etc. The mortgagee intervened, and set up the unpaid purchase money so secured by mortgage. The vessel has been sold. Her proceeds are insufficient to pay off the maritime liens allowed as preferences and the mortgagee. The claims of the three appealing libelants were allowed in full by the commissioner to whom they were referred. Exceptions were filed by the mortgagee, which were sustained by the court, so far as to disallow so much of the claims of Nettie Lasch and Pearl Klumph as sought to recover for wages claimed as earned in 1894. The claim of W. C. Klumph was disallowed altogether. The libelants only have appealed.

The record has been carefully read. The owner, Almond P. Klumph, is the father of the two libelants, Pearl and W. C. Klumph, and the friend and intimate of his cook, the libelant Nettie Lasch. It is also shown most conclusively that this owner and mortgagor entertained malicious feelings towards the mortgagees of his vessel. The evidence fails to satisfy us as to the bona fides of any of these claims, and fails to remove the suspicion of a family conspiracy to concoct claims which would prejudice the mortgagee, the mortgagor being insolvent, and his indemnity bond worthless. Making every allowance for the weight to be attached to a commissioner's report where evidence is conflicting, we are unable to see any error in the ruling of the district court upon the exceptions to that report filed by the mortgagee. The evidence is voluminous, and we only deem it necessary to state our conclusions. The decrees appealed from will be affirmed, with costs.

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#### THE TIGER.

(District Court, N. D. California. December 12, 1898.)

No. 11,426.

#### 1. MARITIME LIENS—LACHES OF CLAIMANT—BONA FIDE PURCHASERS.

The question as to what length of delay in proceeding to enforce a maritime lien will constitute laches and bar relief against a bona fide purchaser of the vessel is always one of fact to be determined in view of the particular facts in each case.

#### 2. SAME—FACTS CONSIDERED.

Where a libel to enforce a lien for work against a steam tug was not filed until 17 months after the work was performed, during 10 months of which time the tug had been out of commission, and lying in the harbor of the city where the libelant resided, such delay constituted laches which barred the libelant of relief as against an owner who purchased the tug a few days before the libel was filed, without knowledge of the claim, and knowing that the vessel had been out of service for many months, and who made inquiry of the seller as to liens before the purchase.

This is a libel in admiralty by Michael Aamadt and others against the steam tug Tiger, etc., Sanford Bennett, claimant.

John J. Coffey, for libelants.

Andros & Frank, for respondent.

DE HAVEN, District Judge. This is a suit in admiralty to enforce a lien against the steam tug Tiger for the balance due the libelant for work performed by him on board that boat as carpenter and seaman between the 17th of March, 1896, and the 18th of October of the same year. On March 15, 1898,—13 days prior to the commencement of this action,—the vessel was sold for a valuable consideration to one Bennett, who has appeared as claimant, and made answer to the libel. The defense interposed is that the lien sought to be enforced is barred by reason of the laches of the libelant in failing to take appropriate proceedings to enforce the same before the tug was purchased by, and passed into the possession of, the claimant. It appears from the evidence that for 10 months prior to the 15th of March, 1898, the Tiger was out of commission, and lying in the harbor of San Francisco, and the libelant was during the same time residing in the city of San Francisco. The claimant at the time of his purchase knew that the tug had been out of commission during the period named, and before purchasing inquired of her owners in relation to outstanding liens, and was informed by them that there were none, and he had no notice from any source of the claim of lien sought to be enforced in this action. That upon these facts the claimant must be deemed to be a bona fide purchaser without notice of libelant's asserted lien, does not admit of doubt. He knew that the tug had been out of employment for nearly a year, and was without a master, and in seeking information from the vendors the claimant did all that was reasonably required of him for the purpose of ascertaining what claims were outstanding against the tug. There was nothing whatever in the circumstances attending the transaction to suggest to a man of ordinary prudence the necessity for inquiry from any person other than the vendors. The question, then, arises whether upon these facts the libelant is now entitled to enforce his lien. I am of the opinion that he is not. The lien claimed is maritime in its nature, and such a lien cannot be enforced to the detriment of a bona fide purchaser, when the person in whose favor it exists had a reasonable opportunity to commence proceedings to enforce it before the change of ownership, and neglected to do so. The question as to what length of delay in proceeding to enforce such a lien will constitute laches is always one of fact to be determined in view of the particular facts of each case where the question arises. *The Key City*, 14 Wall. 653. But unreasonable delay will defeat the lien when the rights of a bona fide purchaser have intervened. Thus, in the case of *The Lyndhurst*, 48 Fed. 840, it was sought to enforce a lien for materials furnished about one year before the libel was filed, and more than five months after the vessel had been sold to a bona fide purchaser, and the court, in holding that the lien was lost by laches, said:

"As against a bona fide purchaser who makes all reasonable efforts to discover incumbrances, and fails to find any, such a lien, after a delay of nearly a year to take any steps to enforce it, where the vessel has been all the

time within easy reach of process, and the vendor meantime, as in this case, has become insolvent, is lost through laches. After such ample opportunity to enforce the lien, the loss should fall upon the lienor, and not on the bona fide vendee. The period of limitation of liens in admiralty, as against a bona fide purchaser, is 'a reasonable opportunity to enforce them.'

So, also, in *The Lillie Mills*, 1 Spr. 307, Fed. Cas. No. 8,352, the same principle was declared in the following language:

"When the rights of third persons have intervened, the lien will be regarded as lost if the person in whose favor it existed has had a reasonable opportunity to enforce it, and has not done so. This is the well-settled rule of the admiralty. The lien for supplies has its origin in the necessities and convenience of commerce and navigation. It is for the interest of navigation and commerce that these liens should exist, and it is equally so that they should not be allowed to extend unnecessarily, to the injury of innocent third persons."

The same rule is also approved in *The Utility*, 1 Blatchf. & H. 218, Fed. Cas. No. 16,806; *The Bristol*, 11 Fed. 156, 20 Fed. 800; *Nesbit v. The Amboy*, 36 Fed. 926. That in this case the libellant had, during the 10 months the *Tiger* was lying in the harbor of San Francisco, ample opportunity to commence proceedings to enforce his lien, cannot well be disputed; and as such lien was latent, and without such action upon his part could not well be known to the public, his delay in filing this libel until after the vessel had been sold to a bona fide purchaser was at his own peril, and operates as a waiver of the lien in favor of such purchaser. The libel will be dismissed, the claimant to recover costs.

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## MEMORANDUM DECISIONS.

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**ANTISDEL v. CHICAGO HOTEL CABINET CO.** (Circuit Court of Appeals, Seventh Circuit. December 1, 1898.) No. 498. On petition for rehearing. For former opinion, see 32 C. C. A. 216, 89 Fed. 308.

**PER CURIAM.** It is now here ordered that, in lieu of the words "dismiss the bill," there be inserted in the opinion the words "proceed in accordance with this opinion"; and in the decree of this court there be inserted, in lieu of the words "dismiss the bill," the words "proceed in accordance with the opinion of this court"; and it is further ordered that the petition for rehearing in this cause be, and the same is hereby, denied.

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**ATWATER et al. v. CASTNER et al.** (Circuit Court of Appeals, First Circuit. November 17, 1898.) No. 239. Appeal from the Circuit Court of the United States for the District of Massachusetts. This was a suit to enjoin the infringement of an alleged trade-mark or trade-name in the word "Pocahontas," as applied to coal. The circuit court having made an order granting a temporary injunction, defendants took an appeal, and this court on June 1, 1898, rendered an opinion affirming the order. 32 C. C. A. 77, 88 Fed. 642. The cause is now heard on a petition filed by the appellants, asking that the mandate be recalled and a rehearing ordered. Causten Brown and Jennings