

forward or hinted at by any of the complainant's 16 or 17 witnesses, either in their direct or cross examination. The patent in its specifications, states explicitly why the edges of the metallic diaphragm are to be turned down over the edges of the lower box containing the perishable product, which is "to prevent the water from the melting ice entering the receptacle containing the products being transported." There is no requirement that the metal should be turned down in such a way as to allow the water to flow over the wooden sides and ends of the box. So far as the specifications go, these edges might just as well be turned down so as to stand out an inch or half inch from the wood, so that it would drop to the floor without wetting the box. Indeed, there is nothing in the specifications requiring that the box should be made of wood at all, though this is no doubt intended, as comporting more completely with the patentee's purpose of making a cheap box. But, allowing the invention to be patentable, there can be no doubt that the making of a pulp or metal box after the same construction would constitute an infringement. There is clearly nothing in the patent to show that the box, if made of wood, must be of any particular kind or quality, whether porous or dense. Allowing that it should be cheap, to facilitate the purposes of a cheap box, there are many of the cheapest woods, like birch, maple, and spruce, that are not porous in their tissue. It seems quite impossible that so many things can be read into the patent that the inventor never claimed in his patent or specifications. It may be possible that a porous wooden box, with the sides kept wet by the drippings from the ice, would preserve the product better than a box with ice on these same sides instead of wet boards. But whether that is so is a mere conjecture or theory, which is wholly unsupported by testimony, and seems highly improbable in itself.

In every merit that is fairly presented by the patent, the complainant is anticipated by the previous patents and the state of the art at the time the patent was issued. And in its great cheapness, which is, no doubt, its principal merit, the complainants are anticipated by the common practice of merchants and shippers, who have made cheap boxes ever since boxes have been made of wood. The decree of the circuit court is affirmed.

PETTIT v. BOARD OF CHOSEN FREEHOLDERS OF CAMDEN COUNTY,
NEW JERSEY.

(Circuit Court of Appeals, Third Circuit. January 13, 1899.)

NAVIGABLE WATERS—BRIDGES—NEGLIGENCE IN MANAGEMENT.

In attempting to open a drawbridge maintained by the county across a navigable stream, for the passage of a vessel in tow of tugs, the casting which moved the bridge broke. The bridge tender then refused to permit the tugs to swing the bridge, and the vessels were delayed from 3 o'clock in the afternoon until 10 o'clock the following morning, until repairs could be made. It appeared that the tender had complained to the county board that the bridge was difficult to swing, and workmen had been sent to repair it, whose defective work caused the breakage. *Held*, that none of such facts established negligence on the part of the county

authorities or their servants which rendered them liable in damages for the delay of the vessels.

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

Joseph Hill Brinton, for appellant.

Henry S. Scovel, for appellee.

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

DALLAS, Circuit Judge. The nature of this case as it was presented in the court below is sufficiently stated in its opinion (87 Fed. 768), as follows:

"The libel in this case is filed to recover damages for the detention of the schooner Oscar G. Schmidt and the steam tugs Israel H. Duncan and Laura, in Cooper creek, Camden county, in this district. It appears from the record that on February 17, 1897, the schooner, in tow of the tugs, passed up the creek through the draw of the bridge which spans the same, and that upon their return trip they were unable to pass through the bridge. The cause of the failure was that, in attempting to open the draw, the main casting, which operated the pivot on which the draw swung, broke. It is charged that this breakage was due to the careless and negligent conduct of the servants of the respondents, and that they failed to have the same repaired within a reasonable time."

The court below, being of the opinion that the evidence failed to show negligence on the part of the respondents or their agents, or that the bridge was not repaired and the draw opened with all reasonable dispatch, entered a decree dismissing the libel, with costs, and the case is now before us on appeal from that decree.

The appellant, in his brief, rests his contention upon the proposition "that the respondents were negligent (1) In that they had notice of the defective condition of the drawbridge for some time prior to the detention, and failed to have it mended; (2) that the boats were unnecessarily and unreasonably detained, by reason of the keeper's refusal to have the draw opened; and (3) in that the respondents were unquestionably tardy in having the draw opened."

This proposition, in each of its parts, asserts matter of fact which could not, in any instance, have been found from the evidence. It does not appear that the respondents had knowledge of any defective condition of the drawbridge which contributed to cause the delay complained of. The report which had been made by the bridge tender to the board of freeholders was not of any condition of the bridge which interfered with navigation, but only of its "binding," and making his "duty onerous." The delay resulted from the breaking of a casting, and this was caused, not by a failure of the respondents to act upon the complaint of the bridge tender, but by the defective manner in which the workmen who were employed, two or three days before the casting broke, to remedy the quite distinct subject of the bridge tender's complaint, had performed their work. There is nothing to show that the board of freeholders did not suppose, or that they were not justified in supposing, that the repairs which they had ordered had been properly made. Under

these circumstances, the court below was unquestionably right in holding that negligence could not be ascribed to them by reason of the existence of a defective condition of the drawbridge which they knew but made no effort to remedy. There is nothing in the evidence which would have justified a finding that the bridge tender violated any duty which was owing to the appellant, by refusing to allow the tug to open the bridge. So far as appears, he honestly believed that, if the tug were permitted to attempt to swing the bridge, it would be likely to cause further breakage. He had a right to exercise his best judgment upon the subject, and would have been derelict if he had not done so; and, indeed, we see no reason to doubt that the judgment which he acted upon was a just one. There was no lack of diligence in causing the bridge to be opened. The period which ensued, from 3 o'clock in the afternoon of one day until before 10 o'clock the next morning, was not an unreasonable one, under the circumstances. The decree of the district court is affirmed.

MEMORANDUM DECISIONS.

AMERICAN BONDING & TRUST CO. OF BALTIMORE CITY v. GEORGE A. FULLER CO. (Circuit Court of Appeals, Eighth Circuit. January 13, 1899.) No. 1,129. In Error to the Circuit Court of the United States for the Eastern District of Missouri. M. W. Huff, W. J. Stone, and G. S. Hoss, for plaintiff in error. W. F. Boyle, H. S. Priest, and F. W. Lehmann, for defendant in error. Dismissed at costs of plaintiff in error, per stipulation of parties, and mandate waived.

AMERICAN HOIST & DERRICK CO. v. MINNEHAHA GRANITE CO. (Circuit Court of Appeals, Eighth Circuit. January 3, 1899.) No. 1,142. In Error to the Circuit Court of the United States for the District of South Dakota. T. B. McMartin, Frank R. Aiken, and Harold E. Judge, for plaintiff in error. Charles O. Bailey and John H. Voorhees, for defendant in error. Dismissed, without costs to either party in this court, per stipulation of parties.

AMERICAN SURETY CO. OF NEW YORK v. CITY OF SENECA. (Circuit Court of Appeals, Eighth Circuit. December 6, 1898.) No. 1,090. In Error to the Circuit Court of the United States for the District of Kansas. John Martin and H. L. Heald, for plaintiff in error. Frank Wells, Ira K. Wells, W. H. Rossington, Charles Blood Smith, and Clifford Histed, for defendants in error. Dismissed, with costs, on motion of the defendant in error, for want of jurisdiction.

CARR v. TILLINGHAST. (Circuit Court of Appeals, Ninth Circuit. February 16, 1898.) No. 411. In Error to the Circuit Court of the United States for the District of Washington. George D. Schofield and T. W. Hammond, for plaintiff in error. P. Tillinghast, for defendant in error. Dismissed by agreement, pursuant to the twentieth rule. See 82 Fed. 298.