court to decline to grant discharge until said defect or informality is corrected, and properly supplied.

Without here taking the time to state in detail the reasons impelling me to such conclusion, I may say that I have carefully considered each of the specified grounds of opposition as contained in the objections filed by the opposing creditor. No useful purpose would be subserved by here taking up and considering in detail the specified grounds. I find that none of them are sufficient, under section 14 of the act, to justify refusing discharge. The motion to strike out the specifications of grounds of opposition as filed by the opposing creditor must be sustained. This leaves the application for discharge of the bankrupt as unopposed, and the same, under rule 12, will regularly come before the court for action on the next rule day.

AMERICAN GRAPHOPHONE CO. v. HAWTHORNE et al.

(Circuit Court, E. D. Pennsylvania. February 25, 1899.)

No. 42.

PATENTS—INFRINGEMENT—SALE OF MACHINE PRODUCING INFRINGING ARTICLE.

A person who sells a machine which is useful only for making a patented article, or makes such sale with knowledge that the thing sold is to be used to produce an infringing article, is himself liable as an infringer.

This was a suit in equity by the American Graphophone Company against Ellsworth A. Hawthorne, Horace Sheble, and others, for alleged infringement of letters patent No. 341,214, issued May 4, 1886, to C. A. Bell and S. Tainter, for an invention relating to devices for recording and reproducing sounds. The cause was heard on motion for preliminary injunction.

Philip Mauro, for complainant.

E. Clinton Rhoads, for respondents.

DALLAS, Circuit Judge. This is a motion for a preliminary injunction in a patent cause. The only legitimate purpose of such an injunction is to preserve the existing state of things until the rights of the parties can be thoroughly investigated and disposed of upon final hearing, and any unnecessary expression of the views of the court should, in the meantime, be avoided. The complainant is, in my opinion, entitled to the order he asks, upon facts which the proofs, as now presented, clearly establish; and therefore no others will be discussed. The letters and the bill of the defendants Hawthorne and Sheble to the Allen Phonograph Company show a sale by the former to the latter of a machine which cannot be used for any purpose except to make duplicates of sound records described and claimed in the patent in suit; and the validity of the patent, and that the unlicensed making of such sound records would violate it, being conceded, there is no room for question that this sale of a machine, which it is admitted by the affidavits of Hawthorne and of Sheble was a duplicator, constituted an infringement. Their letters plainly show

that they perfectly well understood that the purchaser intended to use it for making sound records; and, this being so, the statement in Hawthorne's affidavit that his firm did not make it, and did not themselves make any records upon it, is wholly immaterial. Where a person sells a machine which is useful only for the purpose of making a patented article, or makes such sale with knowledge that the thing sold is to be used to produce an infringing article, the seller is himself liable as an infringer. Walk. Pat. (3d Ed.) § 407. Careful consideration of the affidavits has also fully satisfied me that the defendants Snediker and Carr have made for their co-defendants Hawthorne and Sheble phonographs, or at least parts thereof, with knowledge that they were to be used, or to be put together for use, as duplicators to make sound records. Without the affidavit of James P. Bradt, the proof of this fact would, I think, be complete, and that affidavit places it beyond possibility of question. It is to the effect that Mr. Snediker admitted that his firm had made parts of such machines for Hawthorne and Sheble, and that he understood that they were parts of phonographs. This is a distinct statement of fact, which, if false, could, with equal distinctness, have readily been denied; but no denial of it has been made. In considering this motion I have regarded with solicitude the familiar principle that a preliminary injunction should be awarded with extreme caution, and never where the right is doubtful or the wrong uncertain; but here the right is admitted, and of its invasion there can be no reasonable doubt. The complainant's motion for a preliminary injunction is granted.

EGBERT v. ST. PAUL FIRE & MARINE INS. CO.[1]

(District Court, S. D. New York. February 10, 1896.)

MARINE INSURANCE — TOWER'S LIABILITY POLICY — EXPENSES OF DEFENDING SUIT—COUNSEL FEES.

A policy of insurance was issued on a steam tug to cover tower's liability for loss or damage arising from collision or stranding, for which the tug or its owners should be legally liable, and provided that the insurer should not be liable unless the liability of the tug for such loss or damage should be determined by a suit at law. In an action upon the policy, the assured sought to recover, as a part of the loss, his expenses in defending the suit which established the liability of the tug for a loss by collision. *Held*, that the insurer was liable on the policy for such expenses, but excluding counsel fees.

This was a libel by Alice P. Egbert against the St. Paul Fire & Marine Insurance Company to recover upon a tower's liability policy. On settlement of the decree for libelant.

Nelson Zabriskie, for libelant.
Chas. C. Burlingham, for respondent.

BROWN, District Judge. On the settlement of the decree a further question is presented whether the defendant is liable to make good as a part of the loss, the libelant's expenses in defending the

[1] Case edited by Leroy S. Gove, of the New York bar.

suit which established the liability of the Morris. The policy required the liability of the steam tug for the accident to be established by suit.

In the case of Xenos v. Fox, L. R. 3 C. P. 630, on a policy insuring the ship Smyrna, but containing also a running-down clause, that is, covering any liability of the ship for running down another vessel, it was held that the costs and counsel fees incurred by the owners of the Smyrna in successfully resisting a damage claim for collision could not be recovered under the policy. But this was put upon the ground that the collision liability was a wholly independent subject of contract, and that the terms of this part of the contract could not be made to include such costs, the agreement of the insurers being only to pay a certain "proportion of what the assured should pay in pursuance of any judgment recovered." Manifestly that agreement did not embrace the costs of a successful defense, since there was no payment under any judgment recovered.

In the present case, the policy declares that the insurers are "to fully indemnify the assured for loss and damage arising from or growing out of any accident caused by collision," etc., "for which said steam tug or its owners may be legally liable." This clause, I think, embraces the necessary expenses of the suit which the insured was by the policy required to resist, in order that the liability of the steam tug for the accident might be legally determined. The owners are "legally liable" for those expenses. The expenses are also a "loss and damage" necessarily growing out of the accident, because the policy requires those expenses to be incurred before any claim can be made under the policy. The case in this regard differs from the numerous class in which such expenses are disallowed, as having been voluntarily incurred, and hence at the suitor's risk. Unless the insurers pay the expenses of the suit, which they have themselves required, they do not keep their agreement "to fully indemnify the assured" for this item of "loss and damage growing out of the accident."

The subsequent clause does, indeed, say that the company shall not be liable unless the liability of the said steam tug for such loss or damage shall be determined by a suit at law, etc.; and the first description of the insurance is also "against such loss or damage as the steam tug may become legally liable for." If the intent of the policy was to limit the company's liability to charges for loss and damage which were a lien upon the tug, the expenses and counsel fees incurred in resisting the suit evidently would not be covered by the policy; for such charges, incurred by the owners, are no lien upon the tug.

I do not think, however, that the phrase "liability of the steam tug" is used in this policy in this specific sense; for the main body of the policy that sets forth specifically what the insurers are "content to bear and take upon themselves," states that the "insurance is to fully indemnify the assured for loss and damage growing out of any accident," etc., "for which said steam tug, or its owners, may be legally liable." This is an express extension of the insurance beyond what constitutes a lien on the vessel, to any and every personal

liability that "grows out" of the accident. Had it been the intention to limit the insurers' liability to charges which were a lien on the vessel, that language would naturally have been employed. The subsequent provision that the liability "of the steam tug" must be determined by suit, is complied with when it is shown by the result of a suit that the steam tug is responsible for the accident. When that is established the previous clause requires that the insurers shall indemnify the assured for any loss, damage or expense for which the "owners may be legally liable," growing out of the accident. In no other way can the inharmonious language of the policy be satisfied.

The expenses are allowed.

On further argument I am satisfied that the counsel fees incurred by the assured in defending the suit are not within the terms of the policy, and cannot be constructively included within its intention. Such expenses are, therefore, disallowed.

THE ALICE BLANCHARD.

(District Court, N. D. California. February 17, 1899.)

No. 11,777.

SEAMEN—CONSTRUCTION OF SHIPPING ARTICLES—TIME OF REPORTING FOR DUTY.

Shipping articles, which required a seaman to report on board on a day named, but specified no hour, are to be construed most favorably to the seaman; and where he reported for duty on the day named, several hours before the time fixed for the vessel to sail, he will be held to have complied with the contract. The fact that, after the articles were signed, the master told him verbally to report at an earlier hour, cannot affect the construction of the contract.

This was a libel by J. Downs against the steamer Alice Blanchard to recover damages for an alleged breach of a contract of employment as cook.

D. T. Sullivan, for libelant.

Edward J. Pringle, Jr., for respondent.

DE HAVEN, District Judge. The libelant signed articles to serve as a cook on the steamer Alice Blanchard, bound on a voyage from San Francisco to Clipperton Island, off the coast of Mexico, and thence to San Diego, Cal., and on two other voyages between San Diego and Clipperton Island, and upon their completion to return to the port of San Francisco. The articles provided that he was to present himself on board of the steamer, for service, on June 29, 1898, but at what hour was not stated. The oral evidence tends to show that after the articles were signed he was told by the captain to be on board on the morning of that day in time to cook breakfast. The libelant replied that he might not be able to come so early, and he did not in fact go on board the steamer until between the hours of 12 and 1 o'clock of the day named. The captain was then on shore, and did not return to the steamer until late in the afternoon, when he refused to accept

the services of the libelant, and compelled him to go ashore. The steamer left San Francisco at 8 o'clock p. m. of that day, the hour appointed for her departure. The libelant claims that he was wrongfully discharged, and seeks in this action to recover damages therefor. The contention of the claimant is that the libelant was in fault in not going on board the steamer on the morning of the day upon which he was to commence work, and that he thereby forfeited his right to proceed upon the voyages for which he had shipped.

Section 4511 of the United States Revised Statutes furnishes the rule to be observed in the shipment of crews on vessels bound from the United States to foreign ports not therein excepted, and also for the shipment of crews on vessels engaged in trade between the United States and Mexico (26 Stat. 320), and is applicable to a vessel bound on the voyages named in the shipping articles signed by the libelant. That section provides that a master, before proceeding upon any of the voyages covered by its provisions, must make an agreement in writing with each member of the crew, and that such agreement shall specify, among other matters, "the time at which each seaman is to be on board to begin work." As before stated, the shipping articles signed by the libelant did not specify the precise hour of the day at which he was to be on board to commence work,—whether on the first minute of that day, or at the hour of 5, 6, 7, or 8 o'clock a. m., or any other particular hour. Upon the part of the claimant it is argued that the articles should be construed as requiring the libelant to be on board, ready for work, at the usual hour for the commencement of work on the morning of the day named therein; while the libelant insists that in reporting himself ready for service on the day named in the articles, and several hours before the time appointed for the steamer to proceed on her voyage, he substantially complied with his agreement. It is apparent that neither contention is clearly unreasonable, and much can be said in favor of both. In such a case it is the duty of the court to adopt that construction of the shipping articles which is most favorable to the seaman. Goodrich v. The Domingo, 1 Sawy. 182, Fed. Cas. No. 5,543; Jansen v. The Theodor Heinrich, Crabbe, 226, Fed. Cas. No. 7,215; The Disco, 2 Sawy. 474, Fed. Cas. No. 3,922. The duty of putting the written agreement with seamen in plain and unambiguous language is one which devolves upon the shipowner or master; or, to state the rule in the language of Deady, J., in delivering the opinion in The Disco, above cited: "Shipmasters and owners have ample means and facilities for putting their contracts with seamen in plain language; and so the law, both in Great Britain and America, intends and requires." If it is the desire of the owner or master to have the seaman to become bound to go on board to begin work at some particular hour of a day named, the shipping articles should so state. If, through negligence or design, the articles executed do not make such special provision, the court is not authorized by construction to supply such omission, and hold that a seaman who reports himself ready for duty on the day named in the articles, and several hours before the time appointed for the departure of the vessel, has forfeited his rights under the articles because he did not appear at an earlier hour of

the day. In my opinion, the libelant substantially complied with his agreement in tendering his services on the day named in the articles signed by him, and the master was not justified in refusing to allow him to go to work. The fact that the master, after the articles were signed, directed him to be on board the steamer in the morning in time to cook breakfast, cannot be allowed to change the legal effect of the articles; that is to say, the articles cannot be read as if such direction of the master were written therein. The libelant was to receive $50 per month as wages, and under section 4527 of the United States Revised Statutes he is entitled to recover in this action a sum equal to the amount agreed to be paid him as wages for one month, and costs of suit. So ordered.

THE DEFIANCE and THE EDWIN DAYTON.

(District Court, S. D. New York. March 15, 1899.)

COLLISION—TUG AND TOW—RIGHT OF WAY—FAILURE TO OBSERVE SIGNALS.

The steam tug Defiance, with two canal boats lashed to her side, on approaching the gap leading into the Atlantic Basin, Brooklyn, while some distance away, gave the usual long whistle to indicate that she was going in, and again, when near the entrance, twice signaled by two whistles. The tug Dayton, with a tow, was approaching the gap from the inside, and when the second signal was given by the Defiance was from 100 to 200 feet from the entrance. She did not stop, and there was a collision between the tows in passing in the gap, without fault in navigation on the part of the Defiance. *Held*, that the Defiance was the privileged vessel, entitled to the right of way, and the Dayton was alone in fault for the collision, in failing to observe the signals, and to keep inside until the Defiance had passed through the gap.[1]

This is a libel by Edgar Van Buren against the steam tug Defiance and the steam lighter Edwin Dayton, for collision.

Cowen, Wing, Putnam & Burlingham, for libelant.
Davies, Stone & Auerbach and Herbert Barry, for the Dayton.
James J. Macklin, for the Defiance.

BROWN, District Judge. At about 11 o'clock in the forenoon of September 15, 1898, as the steam tug Defiance was passing through the gap at the entrance of the Atlantic Basin, Brooklyn, with two canal boats lashed to her starboard side, the starboard boat came in contact with a scow on the starboard side of the tug Edward Dayton, which was then coming out of the gap. The libel was filed to recover the damages thereby sustained by the libelant. The wind at the time was high from the N. W. and the ebb tide strong, which swept down directly in front of the gap. These circumstances, made it impossible for the Defiance to go upon a straight line through the gap. More or less of swinging was unavoidable, and the line of her entrance was necessarily more or less uncertain. Some little time before

[1] As to signals of meeting vessels, see note to The New York, 30 C. C. A. 630.