

ness with which counsel, in applying for rehearings, sometimes asseverate their convictions of the errors of the court; and, to repeat what is there said, "that if any judge should be so unstable in his views, or so feeble in his judgment, as to yield to them, he would not only surrender his independence, but betray his duty. However humble may be his own talents, he is compelled to treat every opinion of counsel, however exalted, which is not founded in the law and the facts of the case, to be voiceless and valueless." 3 Story, 303. Nothing can be gained by the strong language expressed by counsel in presenting the petition as to the supposed errors of the court, nor by the statement as to what may have been said of the decision by other counsel, who have neither examined, studied, nor understood the case.

ALLIS and others v. STOWELL.

(Circuit Court, E. D. Wisconsin. December 9, 1880.)

1. EQUITY PLEADING—RULE 66.—A suit will not be dismissed under the sixty-sixth rule in equity, for want of a replication to an amended answer, where a motion is pending to strike such answer from the files for irregularity and insufficiency.
2. SAME.—It seems that the filing of exceptions is not the only method of testing the sufficiency or regularity of an answer.—[Ed.
Strange v. Collins, 2 Veasey & Beames, 162.

In Equity. Motion to Dismiss.

W. G. Raney, for complainants.

E. H. Bottum, for defendant.

DYER, D. J. This is a bill to restrain the infringement of two patents for saw-mill dogs, known as the Selden and Beckwith patents. On a previous hearing upon bill, answer, and proofs, a decree was entered in favor of complainants, sustaining the validity of both patents. Subsequently the defendant moved that the cause be opened for a rehearing on the ground of newly-discovered evidence. The court granted a rehearing as to the Selden patent, but denied it as to the Beckwith patent, and it was ordered that the defendant have

leave to amend his answer as prayed in said petition for a rehearing. By this order it was intended and understood that the controversy between the parties should be re-opened, but only to let in the newly-discovered matter, and to the extent only that the Selden patent might be thereby affected. The defendant filed an amended answer, which set up the new matter relied on to defeat the Selden patent, and also embraced all the original defences to both patents. The complainant then filed a motion to strike the answer from the files for the reason that it was not limited in form and substance to the new matter, and therefore was not, as it is claimed, such an answer as the order for a rehearing authorized. The defendant then moved to dismiss the suit, under the sixty-sixth rule in equity, for the reason that no replication had been filed to the amended answer, and this is the motion now to be decided.

It is claimed by counsel for defendant that if the complainant desired to raise any question as to the regularity or sufficiency of the amended answer, he should have excepted to it; that a motion to strike from the files is irregular and cannot be entertained; and that as the answer was not excepted to, and a replication was not filed, he is entitled to have the suit dismissed, as of course, under the rule.

It is not intended now to pass upon the merits of the motion to strike the amended answer from the files. The only question to be presently determined is, is the defendant entitled, in the face of that motion, to have the suit dismissed for want of a replication? In other words, is the complainant in such default as to entitle the defendant to such action by the court as he invokes? It must be presumed that the motion to strike the amended answer from the files was made in good faith, and an inspection of the answer shows that it contains all the defences which appeared in the original answer, in addition to those embraced in the new matter, on account of which a rehearing was granted. Whether this form of pleading, in the present attitude of the case, be regular or not, I do not, as before remarked, now decide. But it seems very clear that the court cannot treat the motion to

strike the amended answer from the files as such an act of non-conformity to correct practice as leaves the complainant in default, and as entitles the defendant to a dismissal of the suit for want of a replication. Rule 66 provides that "whenever the answer of the defendant shall not be excepted to, or shall be adjudged or deemed sufficient, the plaintiff shall file the general replication thereto on or before the next succeeding rule day thereafter. * * * If the plaintiff shall omit or refuse to file such replication within the prescribed period, the defendant shall be entitled to an order, as of course, for a dismissal of the suit."

So it appears that if the answer shall be excepted to, or shall be adjudged or deemed insufficient, a replication is not to be filed. And I do not think that the only method that may be pursued to test the sufficiency or regularity of an answer, is that of filing exceptions. Where a question is presented like that here involved, I am of opinion that it may be raised by motion to strike the answer from the files, and the rule does not necessarily exclude such a course of procedure.

Whether or not, in a given case, exceptions should be filed, or a motion should be made to strike the pleading from the files, may depend upon the character of the objections which are made to the pleading. Authority upon the correct course of practice is meager, but in *Strange v. Collins*, 2 Veasey & Beames, 162, it was held by Lord Eldon that where a supplemental answer contained not only the new matter which the party had obtained leave to allege, but also other matter which was contained in a former answer, the supplemental answer could be ordered off the file, on motion. In the case at bar, the pleading involved is an amended and not a supplemental answer, but that ought not to make any difference in the application of a rule of practice.

It is understood to be true, as claimed by counsel for defendant, that exceptions to this answer could not, in the present aspect of the case, be filed without leave. *Barnes v. Tweddle*, 10 Simons, 481. But I hardly think that leave of the court was a necessary prerequisite to a motion to strike the pleading from the files. On the whole, I am of opinion

that whether that motion can be ultimately sustained on its merits or not, the complainant cannot be regarded as in such default for want of a replication as to entitle defendant to a dismissal of the suit.

The motion to dismiss will be denied; and, as it seems desirable that proper issue in the cause shall be joined without unnecessary delay, the motion to strike the answer from the files may be brought to a hearing on 10 days' notice by either party.

DUANE and others v. STEAM-TUG EMMA J. KENNEDY, etc.

(*District Court, S. D. New York. October 8, 1880.*)

1. COLLISION—SLOOP AND BRIG LYING IN SAME PIER—NARROW CHANNEL—REFUSAL OF SLOOP TO HAUL OUT.—A sloop and brig were lying stern to stern on the north side of the same pier, about 50 feet apart, the sloop being just inside the pier, with her bow towards the river, while the brig was further up the slip, with her starboard side to the pier. The brig drew about 14 feet of water, and there was not sufficient depth of water to haul her out, except along the dock where the sloop was lying. The sloop refused to pull out by the end of the pier in order to permit the brig to be hauled out by a tug *Held*, that the tug was liable for all damage caused by an attempt to pull the stern of the bring by the stern of the sloop as she lay at the pier.
The tug could have herself hauled the sloop out of the way first or have sent for a harbor-master to compel the sloop to move away.
2. SAME—COSTS.—*Held*, further, under these circumstances, and where the sloop had only proved an insignificant part of the damages claimed, that the libellants were not entitled to costs.—[Ed.]

F. A. Wilcox, for libellants.

W. H. McDougall, for claimants.

CHOATE, D. J. This is a libel brought to recover damages for a collision between a brig in tow of the steam-tug and the libellants' sloop, the S. S. Howell, on the eighth day of September, 1879. The sloop was lying on the north side of the pier at the foot of Thirtieth street, North river, with her bow towards the river, and just inside the end of the pier. The brig was lying further up the slip, with her starboard side to the pier. They were thus lying stern to stern, with a space