

## CORNELLY v. MARKWALD.

(Circuit Court, S. D. New York. 1885.)

## PATENTS FOR INVENTIONS—INFRINGEMENT—COSTS—EXPENSE OF MODEL.

The expense of obtaining a model of an infringing machine cannot be deemed a taxable disbursement in favor of the prevailing party.

WALLACE, J. The clerk properly refused to tax the item of \$150 in plaintiff's bill of costs for the expense of obtaining a model of the defendant's infringing machine. Irrespective of any question as to the propriety or necessity of procuring such a model, the expense incurred cannot be deemed a taxable disbursement in favor of the prevailing party. The reasons why such an item should not be allowed, are fully stated in the opinion of the court in *Woodruff v. Barney*, 1 Bond, 528, and in *Hussey v. Bradley*, 5 Blatchf. 210. It is obvious that it would subject litigants in patent cases to onerous and sometimes to oppressive burdens, if parties were permitted, at their discretion, to procure models, and tax their unsuccessful adversaries with the expense. The question is not an open one. See, also, *Wooster v. Barker*, 23 FED. REP. 49.

The taxation is affirmed.

## BUST v. CORNELL STEAM-BOAT Co.

(Circuit Court, S. D. New York. July 1, 1885.)

## TOWAGE—NEGLIGENCE—EVIDENCE—INSTRUCTION—NEW TRIAL.

Under the circumstances of this case the question of negligence was a question for the jury to determine, and the verdict not being so manifestly against the weight of the evidence as to warrant the court in setting it aside, and the instructions of the court fairly presenting the question of negligence to the jury, a motion for a new trial is denied.

## Motion for New Trial.

This action is brought to recover damages occasioned by the negligence of the defendants in failing to tow properly the plaintiff's canal-boat Minnie F. Howe from Newburgh to New York on the evening of October 4, 1881. In the last tier, directly behind the canal-boat, was a spile-driver, which became disengaged and was forced by the winds and waves violently against the stern of the canal-boat, causing the loss and injury complained of. Evidence was given tending to show that the spile-driver became unmanageable because of the giving way of a cleat to which the backing-line was fastened. The spile-driver drew but little water and carried no crew. Her deck was nearly covered by a house which caught the wind, no matter from what quarter it was blowing. She was an unwieldy, top-heavy, and dangerous craft to place in proximity to other boats. The action was tried at the April circuit, 1885, and resulted in a verdict for the plaintiff. The defendants now move for a new trial upon the grounds,—*first*, that the verdict is against the weight of evidence; and, *second*, that there was error in one of the instructions to the jury.

*James L. Bishop*, for plaintiff.

*Enos N. Taft*, for defendants.

COXE, J. The verdict was not so manifestly against the weight of evidence as to warrant the court in setting it aside. The proposition now to be determined is, not whether the court is in accord with the jury upon the facts, but was there a question of negligence which should have been submitted to them? If so, the court cannot disturb the verdict without intrenching upon the province of the jury, unless it is so clearly against the evidence as to justify the conclusion that they, through ignorance, depravity, or gross partiality, failed to comprehend their duty. There is nothing here to warrant such a presumption. It may be conceded that the defendants' version of the transaction was maintained by witnesses, who, in number and intelligence, more than balance those produced by the plaintiff; but this concession avails the defendants nothing. The jury were justified in finding, if they saw fit to do so, that the defendants had not, in the fulfillment of their contract with the plaintiff, done all that a careful and prudent navigator should do in the making up and management of the tow. It was permissible for them to say that it was not