

harrow pointed out in the specifications on which patents had issued, so that all that remained for the inventor to do was to widen and stiffen the teeth, did not anticipate Garver's invention, it is impossible to hold that the Willett harrow anticipated it.

The argument on the present hearing covered (and almost necessarily so) the whole range of the cases upon their merits, and it was stoutly claimed on behalf of the defendants that we should now adjudicate upon the controversy *de novo*. Although, if we were at liberty to go over the ground already passed by the court at former hearings, we would have great difficulty in reaching the results already attained by adjudication thereon, and especially in regard to the validity of the second reissue of the Garver patent, still the fact is to be remembered that these adjudications have been made by a judge whose great abilities ought to insure respect, and (what we are constrained to think would be obligatory upon us,) whose superior rank in the judicial order should restrain us from annulling his decisions. The cases have been twice heard, before the justice of the supreme court allotted to this circuit.

It would be doing violence to the rightful and decorous course of judicial practice, if upon the pretext of a rehearing, had for the purpose of considering the effect of newly-discovered evidence, which it is found cannot disturb the decree, we should proceed to overhaul the result hitherto declared by superior authority, however widely we might differ, if the matter were fairly open to us.

The result is that the decree made on the rehearing in 1885, and which was vacated for the purpose of letting in the newly-discovered evidence, must be restored.

JACKSON, J., concurs in this opinion.

TORRENT v. DULUTH LUMBER CO.

(Circuit Court, D. Minnesota. October 15, 1887.)

APPEAL—REHEARING—MISQUOTATION OF TESTIMONY.

A rehearing will not be granted because the court in its opinion misquoted the testimony, where such misquotation does not change the opinion.

Parker & Burton and *P. H. Gunczel*, for complainant.

West & Bond, for defendant.

NELSON, J. This is a petition for a rehearing and reargument of the case. In the opinion of the court heretofore delivered in this case (30 Fed. Rep. 830) the court (page 835) misquotes the testimony, viz.: "It has to have it on," quoted from Robert Orm's testimony, should read: "They all have to have something to hold the tooth-bar up to the log;" but such misquotation does not change the opinion of the court.

The petition for rehearing and reargument is denied; final decree ordered; accounting waived; appeal taken and allowed; bond on appeal fixed at \$500.

THE TANGIER.¹

SOCIETA ANONIMA AGRUMARIA DI NAVIGAZIONE v. ANGLIER and others.

(District Court, S. D. New York. June 24, 1887.)

1. FREIGHT—DAMAGE TO CARGO—DISPUTE AS TO ALLOWANCE FOR DAMAGE.

Where a vessel delivers a consignment of fruit, a portion of which is damaged, it is incumbent upon her to ascertain the amount of damage before retaining a part of the consignment for balance of freight, in order that she may not, by retaining an unreasonable amount, become liable for the storage and selling charges.

2. SAME.

When a ship is, by her charter-party, entitled to her whole freight, "upon a true delivery" of the cargo, and she delivers a portion in a damaged condition, she is entitled only to the specified freight less the damages for the loss on the cargo.

3. SAME—TENDER BY CONSIGNEE—WAIVER OF.

When the cargo is partly damaged, the refusal of the ship's agents to deliver cargo, except on the payment of a precise sum by consignee, which is in excess of the amount due, dispenses with the necessity of a tender by the consignee.

4. SAME—STATEMENT OF CASE.

The steam-ship T. brought a consignment of fruit to the libelant, of which 54 boxes were missing, and others were damaged by theft of portions of the contents. Libelant refused, therefore, to pay the freight thereon without an allowance by the ship for the damage, and the ship, insisting upon payment of the "lump sum" for which the vessel had been chartered, retained 735 boxes of fruit pending payment of the balance of freight. This suit was brought against the agents of the ship for damages for refusal to deliver the balance of the consignment, and, after the filing of the libel herein, the 735 boxes were sold, under a stipulation between the parties that they should be so sold for account of whom it might concern, without prejudice to the claim in suit. The charter-party provided that the lump freight was to become due "on a true delivery of the cargo." Each party made an offer of settlement, which was not accepted. Neither party made efforts for an actual adjustment of the loss. The evidence before the court was not sufficient to determine the exact loss to the consignment. *Held* that, if the amount demanded by the ship in its offer of settlement was in excess of the amount actually payable by libelant for balance of freight, the ship should account to the libelant for the value of the packages retained by her, less the amount first due the ship. If the ship's demand was not in excess of what was justly due her, the expenses of the subsequent detention and sale were a charge against the libelant, and it would be entitled only to what might remain of the proceeds of the sale after payment of the freight due, and the expenses of storage and sale. A reference was ordered to ascertain the exact amount due.

The libel in the above case was filed to recover damages for refusal to deliver certain boxes of fruit forming part of the cargo of the steam-ship Tangier from Palermo to New York. The libelants on the thirteenth of March, 1884, chartered the steamer from the owners to take a cargo of

¹Reported by Edward G. Benedict, Esq., of the New York bar.