

judgments between your orator and the defendant herein was whether or not the electric cigar lighter then in evidence and before the court was an infringement of said Chambers patents, and inasmuch as those courts decided and adjudicated that it was not such infringement, it follows as your orator respectfully submits, that that question of infringement was finally adjudicated by said judgments as between your orator and the defendant herein both as to the particular cigar lighter in evidence and before the courts and all others of the same construction which your orator might make afterward; and further that as to all such lighters the right of your orator's customers to buy, sell or use the same was conclusively adjudicated by said judgments. Your orator shows further that he has assumed, as was his duty to do, the defense of said suit against John Breitwieser and Edward Breitwieser, and will be compelled in the proper discharge of his duty to assume the burden and expense of all suits which may be brought by said defendant herein against customers of his for alleged infringement of said Chambers patent in the purchase, use or sale of electric cigar lighters sold to them by him, which will lead to great multiplicity of suits and great and unjust expense to your orator.

V.

Your orator, further complaining, shows to the court that by many years of devotion to business he built up an extensive and profitable trade in electric cigar lighters, extending to all parts of the United States; that his customers are chiefly jobbers and wholesale dealers in cigars who give away the cigar lighters purchased by them to their customers with cigars sold to them as compliments or premiums to stimulate trade; that the defendant herein is also a manufacturer of electric cigar lighters and your orator's competitor in the

business; that in his said business he has adopted and manufactured a form of lighter substantially similar to that introduced and used by your orator and entirely dissimilar from that described in said Chambers patent; that it is not a matter of great importance to the jobbers and wholesale dealers in cigars whether they buy and use the lighters manufactured by your orator or those manufactured by the defendant, and it is, therefore, a comparatively easy matter for the defendant to deter buyers from dealing with your orator by fears of suit. From which circumstances it has happened that many of your orator's customers have been intimidated by said suit against John and Edward Breitwieser aforesaid and have ceased to send orders as they have been accustomed to do for lighters and have refused to pay for lighters heretofore sold and delivered to them by your orator.

Inasmuch, therefore, as your orator is without any remedy except in a court of equity, your orator prays that said defendant may be required to make full and direct answer to this bill (but not under oath, the answer under oath being hereby waived); that the defendant George S. Eldred may be enjoined against proceeding further with the prosecution of his said suit in the Circuit Court of the United States for the Western District of New York against John Breitwieser and Edward Breitwieser and also perpetually enjoined against bringing any suit or suits against any one in any court of the United States for alleged infringement of said patent to Josephus C. Chambers, numbered 492,913, dated March 7, 1893, by purchase, use or sale of any electric cigar lighter manufactured by your orator and identical or substantially identical with the electric cigar lighter which was in evidence and before the Circuit Court of the United States for the District of Indiana, and the United States Circuit Court of Appeals for the Seventh Circuit in the trial, hearing and adjudication of the said

suit by said George S. Eldred against William F. Kessler, your orator herein, heretofore specified; and that your orator may have such other and further relief as the equity of the case may require.

Your orator shows further that he has reason to fear and does fear that unless restrained by the order of this court pendente lite said defendant will continue to send threatening letters and circulars to your orator's customers, as he has done in the past, and to bring other suits against customers of your orator, as he has done in the past, all for the purpose of intimidating his said customers and deterring them and others from buying electric cigar lighters from your orator and from paying your orator for such lighters, already sold and delivered, so that before an injunction granted after final hearing can be issued your orator will have suffered remediless loss in his business, and the main object of this suit will have been defeated.

Wherefore your orator prays that upon notice hereafter to be served an injunction may issue pendente lite and until the further order of the court, restraining the defendant as your orator has hereinbefore prayed.

And may it please your honors to grant unto your orator a writ of subpoena ad respondendum issuing out of and under the seal of this honorable court and directed to the said George E. Eldred, and commanding him to appear and make answer to this bill of complaint and to perform and abide by such order and decree herein as to this court shall seem just.

And your orator will ever pray.

WILLIAM F. KESSLER,
R. S. TAYLOR,
Solicitors for Complainant.

TAYLOR & HULSE,
Solicitors and of counsel.

State of Indiana, }
 County of Allen. }

William F. Kessler, having been duly sworn, on his oath says that he is the complainant named in the foregoing bill; that he has read the same, and that the same is true of his own knowledge except as to those matters which are stated upon information and belief, and that as to those matters he believes them to be true.

Subscribed and sworn to before me this 11th day of February, 1905.

EDWIN M. HULSE,
 Notary Public.

[SEAL.]

Commission expires January 23, 1909.

(Endorsed.) Filed February 13, 1905, Marshall E. Sampsell, Clerk.

BILL OF COMPLAINT, TO ENJOIN BREACH OF PRICE RESTRICTION.

(From Victor Talking Machine Company, United States Gramophone Company and Berliner Gramophone Company vs. The Fair, 123 Fed. Rep. 424, 61 C. C. A. 58.)

To the Honorable Judges of the Circuit Court of the United States for the Northern District of Illinois:

The Victor Talking Machine Company, a corporation duly organized and existing under the laws of the State of New Jersey, and having its principal office in the City of Camden, State of New Jersey, the United States Gramophone Company, a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, having its principal office in Harper's Ferry, State of West Virginia, and the Berliner Gramophone Company, a corporation duly organized and existing under the laws of the State of Virginia, having its principal office in the City of Roanoke, State of Virginia,

bring this their bill of complaint, against The Fair, a corporation organized and existing under the laws of the State of Illinois, having an office and store and regular and established place of business in the City of Chicago, State of Illinois, and within the Northern District of Illinois.

And thereupon your orators complain and say:

1. That Emile Berliner, of the City of Washington, District of Columbia, was the original, first and sole inventor of certain new and useful improvements in gramophones being improvements relating to recording and reproducing speech, and other sounds, which improvements were not known or used by others in this country before his invention thereof, and were not patented or described in any printed publication in this or any foreign country before his invention thereof, and were not in public use or on sale in the United States for more than two years prior to his application for a patent therefor and which have not been abandoned.

2. Your orators further show unto your honors, that the said Emile Berliner, being as aforesaid, the first inventor and discoverer of the said new and useful improvement in gramophones or improvements relative to recording and reproducing speech and other sound, did, on the thirtieth day of March, 1892, duly make application to the Honorable Commissioner of Patents at Washington, D. C., for Letters Patent of the United States for said invention, and on the said date filed his application with the said Honorable Commissioner of Patents in due and proper form, and thereafter duly filed and fully prosecuted said application.

3. Your orators further show that the said Emile Berliner, being then the sole and exclusive owner of the said invention, and of Letters Patent of the United States to be issued therefor, did during the pendency of the said application, by instrument in writing duly ex-

ecuted the twenty-ninth day of January, 1895, and recorded at the Patent Office at Washington, D. C., in Liber C 51, p. 185, etc., of Transfers of Patents, assign, sell, transfer and set over unto your orator, the United States Gramophone Company, the exclusive and entire right, title and interest in and to the said invention, and in and to all letters patent to be issued therefor, and all rights of the said Berliner therein and thereunder whatsoever, as by reference to the said instrument, or a duly authenticated copy thereof, in court to be produced, will more fully and at large appear.

4. Your orators further show, that upon the said application of the said Emile Berliner, letters patent of the United States were issued in the name of the said Emile Berliner, to your orator, the United States Gramophone Company, as assignee of the entire right, title and interest therein as aforesaid, in due form of law, in the name of the United States of America, under the seal of the Patent Office of the United States, signed by the Secretary of the Interior, and countersigned by the Commissioner of Patents of the United States, and duly delivered, bearing date the nineteenth day of February, 1895, and numbered 534,543; whereby there was granted and secured to your orator, the United States Gramophone Company, its successors and assigns, for the term of seventeen years from the date of said letters patent, and within the United States and its Territories, the full and exclusive right and liberty of making, constructing, using and vending the said invention and improvements, as set forth in the said letters patent, a duly certified copy of which is ready here in court to be produced, and by virtue whereof, and of the said assignment, your said orator, the United States Gramophone Company became the sole owner of all rights and privileges, granted and secured, by the said letters patent, and of all rights of the said Emile Berliner in the

premises. A copy of said Letters Patent No. 534,543 being annexed hereto, and marked Exhibit "A."

5. Your orators further show unto your honors, that by agreement dated the second day of September, A. D. 1895, and recorded in the United States Patent Office in Liber S, 52, pages 207, etc., your orator, the United States Gramophone Company, as licensor, made and entered into an agreement with William C. Jones, of the City of New York, State of New York, as licensee, subject to the conditions therein contained, by which said Jones acquired as licensee, the sole and exclusive right to manufacture, sell, lease and deal in, in the United States, the said invention hereinbefore referred to, patented by Letters Patent No. 534,543, dated February 19, 1895, together with other inventions and letters patent issued to the said Emile Berlinger, assignor to said United States Gramophone Company relating to sound recording and reproducing with the right to assign the same to others. That by agreement also dated the second day of September, A. D. 1895, between the said Emile Berliner and the said William C. Jones, and recorded in the Patent Office of the United States in Liber S, 52, pages 314, etc., the said agreement above noted, was *inter alia*, confirmed by the said Emile Berliner unto the said William C. Jones.

That by agreement dated the fourth day of October, A. D. 1895, between the said United States Gramophone Company and the said William C. Jones, recorded in the said Patent Office at Washington, D. C., in Liber S, 52, pp. 216, etc., the said agreement of September 2, 1895, between the same parties was modified in matters relative to the payment of royalty.

6. And your orators further show unto your honors that by declaration of trust dated the fifteenth day of October, A. D. 1895, recorded in the Patent Office at Washington, D. C., in Liber S, 52, pp. 219, etc., and by

agreement dated the first day of November, A. D. 1895, recorded in the said Patent Office at Washington, D. C., in Liber P 52, pp. 326, etc., the said William C. Jones transferred and assigned to your orator, the Berliner Gramophone Company, its successor and assigns, his entire right, title and interest as sole and exclusive licensee in and to the said Letters Patent No. 534,543, and in and to the said invention therein described and claimed, and in and to the aforesaid agreement and assignments, and in and to all inventions, letters patent and rights therein and thereunder.

7. And your orators further show that by agreement dated the twenty-eighth day of September, 1901, recorded in the Patent Office at Washington, D. C., April 16, 1902, in Liber Z 64, p. 323 of the Transfer of Patents, the said Berliner Gramophone Company, being the sole owner of the said exclusive license in the said invention and inventions, did grant and convey, assign and set over unto Eldridge R. Johnson, of the City of Philadelphia, State of Pennsylvania, the said exclusive license and all its rights therein and thereunder, to manufacture, sell, use and deal in said invention and inventions, with the right to the said Johnson to assign the same unto your orator, the Victor Talking Machine Company.

8. Your orators further show unto your Honors that by agreement dated the fifth day of October, 1901, recorded in the Patent Office at Washington, D. C., April 16, 1902, in Liber Z 64, p. 325, of the Transfer of Patents, the said Eldridge R. Johnson, being then the sole owner of the said exclusive license in the said invention and inventions, did grant and convey, assign and set over your orator, the Victor Talking Machine Company, a corporation organized and existing under the laws of the State of New Jersey, the said exclusive license and all his right therein, and thereunder to manufacture, sell, use and deal in the said invention and inventions.

9. And your orators further show unto your Honors that by virtue of the premises your orator, the United States Gramophone Company, is now, and has been at all times since the date of the said assignment to it, the sole and exclusive owner of the said Letters Patent No. 534,543, and that your orator, the Victor Talking Machine Company, is now and has been at all times since the date of the said agreement with it, and the said transfers and assignments of the said rights to it, the sole and exclusive licensee as aforesaid under the said Letters Patent No. 534,543 for the manufacture and sale of said invention patented in said letters patent throughout the United States. Your orators show unto your Honors that they are now and were at the time of the commission of the acts hereinafter complained of the sole and exclusive owners of the legal and equitable title in and to the said Letters Patent No. 534,543, and in and to the improvements therein contained, and of all rights of action thereto pertaining, as will more fully and at large appear by reference to the said agreements, assignments and proofs in court to be produced.

10. And your orators further show unto your Honors that they have expended large sums of money in practicing said invention and improvements patented in said Letters Patent No. 534,543, and in introducing the same into public use, and the same are of great commercial value and practical utility; that a great public interest has been manifested therein, and a large demand created for apparatus constructed in accordance with, or embodying the same, which demand your orators are ready and able to supply; that the public generally in all parts of the United States have recognized and acquiesced in the facts that the said Emile Berliner was the first and original inventor of the said invention, and that the Patent No. 534,543, is good and valid; that the public have also acknowledged the claims of your orators to

the exclusive right of the said invention under said patent; and that, but for the infringements and wrongs hereinafter complained of and a few recent infringements encouraged by the unlawful acts of this defendant, your orators would be now in peaceful possession and enjoyment of the said letters patent and invention, and of the income derivable therefrom; and that your orators and the said Berliner have never acquiesced in any infringement of their rights in the premises at any time.

11. And your orators further show, that they have given notice to the public that the same invention is patented, and have affixed, or caused to be affixed, to the apparatus and devices manufactured and sold under the authority of your orators the word "patented," together with the day and year of the grant of the said patent, of which notice the said defendant has had full knowledge.

12. Your orators further show that your orator the Victor Talking Machine Company, the said exclusive licensee under the said patent (as well as of other patents, under which the said talking machines and records are and have been made and sold by it) has caused to be placed and securely fixed upon each of the said talking machines manufactured by it under the said patent, since about March of the present year, a large conspicuous label having printed thereon in clear, legible type the following notice containing the conditions and restrictions under which each of the said machines were licensed for sale and use and under the subject to which they were purchased, as follows:

“NOTICE.

“This machine, which is registered on our books as No. ——— is licensed by us for sale and use only when sold to the public at a price not less than \$——. No license is granted to use this machine when sold at a less price.

Any sale or use of this machine when sold in violation of this condition will be considered as an infringement of our United States patents under which this machine, and records used in connection therewith, are constructed, and all parties so selling or using this machine contrary to the terms of this license will be treated as infringers of said patents, and will render themselves liable to suit and damages.

“This license is good only so long as this label and the above noted registered number remains upon the machine; and erasures, or removals, of this label will be construed as a violation of this license. A purchase is an acceptance of these conditions. All rights revert to the undersigned in the event of any violation.

“VICTOR TALKING MACHINE COMPANY.

“March 1st, 1902.”

(The number of the machine and the minimum price is left blank in the above conditions of license. This being the blank form which is filled in before the machine leaves the factory.)

13. That prior to April, 1902, your orator, the Victor Talking Machine Company, manufactured a certain talking machine under the patent in suit of the type known as the “Victor Monarch, Jr.,” and securely attached to the bottom of the said machine a large, conspicuous label having printed thereon in clear, legible type the said notice above noted containing all the conditions and restrictions therein noted. That the said label in addition contained the number “23,157” on the first line, which was the number of the said machine given to it by your orator, the Victor Talking Machine Company, before it left the factory, and the price “\$25,” was printed on the third line of the label, being the minimum at which the machine was licensed legally to be sold under the conditions of the license

That on or about the 18th day of April, 1902, your orator, the Victor Talking Machine Company, sold the said machine to a jobber under and subject to all the conditions and restrictions as set forth on the said notice and label, which restrictions and conditions the said purchaser accepted and agreed to at the time of the purchase.

That the said notices containing the said conditions and restrictions have always heretofore been and are brought by your orator, the Victor Talking Machine Company, conspicuously to the attention of the trade when the said machines containing the said labels are sold or licensed for sale, and all said machines are purchased by the jobbers and dealers, and all who buy, under and subject to each and all of the said conditions and restrictions, and a purchase is, and always has been, an acceptance of the said conditions and restrictions.

That in addition to the said notice on the said patented machine your orator, the Victor Talking Machine Company, has always, since about March, 1902, supplied all purchasing jobbers and dealers with a discount card upon which the said notice and conditions of sale were also clearly printed.

14. That the defendant herein, having knowledge at the time of the said conditions and restrictions under which the said machine of your orators was sold to the said jobber, purchased and acquired possession of the said machine, No. "23,157," with other similar machines, subsequently to the eighteenth day of April, 1902, directly or indirectly, from the jobber or dealer to whom your orator sold the said machine, as hereinbefore set forth. That the said machine at the time the same was so purchased by the said defendant contained the said label having the said notice of conditions and restrictions conspicuously thereon, which said machine is ready in court to be produced.

The said defendant for some time past has been and is doing business at the corner of Adams and Dearborn streets, in the city of Chicago, State of Illinois, as a dealer in musical and other instruments, and as a general department store.

15. That the said defendant well knowing the conditions and restrictions under which it purchased the said machine (and other similar machines) subsequently advertised and sold the said machine, "23,157" at its said store in the city of Chicago, in the Northern District of Illinois at eighteen (\$18.00) dollars, on or about the 11th day of August, 1902, without any right or license whatsoever so to do, and in direct violation of the terms and conditions of the said license under which the said machine was privileged to be sold and in violation and infringement of the said Letters Patent No. 534,543, of your orator.

16. That the defendant has now in its possession and is selling and advertising for sale, and threatening to sell to the public at the same cut price and in the same unlicensed manner, in infringement of your orator's said rights, many other similar talking machines manufactured by your orator, the said Victor Talking Machine Company, under the said patent in suit, similarly marked and licensed by your orator for sale only under the said restrictions and conditions. And the said defendant is now engaged in securing possession of many others of said machines from sundry dealers for a similar purpose with intent to damage and injure your orator's business.

17. That your orators since the early part of March, 1902, have done a business in the sale of the said talking machines and records manufactured under the said patent in suit, of several hundred thousand dollars, and all of the said machines sold by it during that time have been licensed for sale only under the said restrictions and conditions, and so purchased.

Your orators further show that your orators are obliged to treat all jobbers and dealers alike, and cannot grant unequal licenses and privileges but are required to maintain as far as in their power reasonable uniform prices; they are and have been, therefore, obliged in selling their goods to impose a restricted license upon all, a violation of which is an infringement of the said patent in suit, as well as of other patents of your orators not involved in this suit. Your orators further show that the said restrictions and conditions are reasonable and tend to a fair and even distribution of the said goods to the public generally throughout this country, at a fair and reasonable price, a violation of which said licenses immediately destroys, and tends to destroy, the profits of the jobbers and dealers and to prevent them from freely handling said goods, to the great and irreparable damage and injury of your orators.

18. Yet, as your orators are informed and believe, and further show unto your Honors, that the said defendant herein named, well knowing all the facts herein set forth, but contriving to injure your orators and deprive them, and each of them, of the benefits and advantages which might and otherwise would accrue to them, and each of them, from said patented devices, methods and things, has made, sold and used and is now making and selling and using, and is threatening to make, sell and use apparatus and things relative to sound recording or reproducing, having and containing the devices and things patented in said Letters Patent No. 534,543, particularly in claims numbered 5, 32, 35, and employing methods covered by the said letters patent, or in all substantial respects the same; the exclusive right to make, use and vend which to others to use is legally vested in your orators.

19. And your orators further show unto your Honors, that notwithstanding the fact that the said defend-

ant has been duly notified by your orators of your orators' rights in the premises, and of the fact that the said defendant was infringing the said letters patent of your orators, and that the said defendant should desist from such infringements, the said defendant has continued, and is still continuing, to the great and irreparable damage and injury of your orators, the manufacture, sale and use of the said infringing devices and things.

20. And so it is, may it please your Honors, that the said defendant as your orators are informed and believe, without the license of your orators or any of them, and without any license whatsoever, against the will of your orators, and in violation of their rights, has made and sold, and intends to continue to make and sell, within the Northern District of Illinois, and elsewhere within the United States, said patented devices and things, each having and containing the said patented features, substantially the same in all material respects in construction, operation and effect as in your orators' said letters patent mentioned, and employing methods covered by said letters patent; and that the said defendant is largely advertising said infringements, to the great damage and injury of your orators, and that the said defendant refuses to pay unto your orators any of the profits which the said defendant has made by such unlawful sale and use or to desist from the further infringement of the said letters patent, though requested so to do; all of which acts and doings are in violation of the exclusive rights and privileges, so as aforesaid, vested in your orators under and by virtue of the said letters patent; are contrary to equity and good conscience; tend to the manifest injury of your orators in the premises, and will, if said defendant is allowed to continue said infringements, irreparably damage and injure your orators, and each of them, depreciate or destroy the value of the exclusive franchises to which your orators are en-

titled under the patent aforesaid, and will deprive your orators of the benefits and advantages for the loss of which there exists no adequate legal remedy.

And your orators, therefore, pray as follows:

I. That the said defendant be required by decree of this Honorable Court to account for and pay over to your orators such gains and profits as have accrued or risen or been earned or received by the said defendant and all such gains and profits as would have accrued to your orators but for the unlawful doings of said defendant, and all damages your orators have sustained thereby.

II. That the said defendant may be compelled by the order of this Honorable Court to deliver up to the judicial custody for destruction, in manner to be provided for in said order, all infringing apparatus in the possession of or under the control of said defendant.

III. That the said defendant, its associates, attorneys, servants, agents and workmen, may be perpetually enjoined and restrained, by a writ of injunction issuing out of and under the seal of this Honorable Court, from directly or indirectly, making or causing to be made, using or causing to be used, selling or causing to be sold, any machine or apparatus or sound record, embodying or constructed or operated in accordance with the invention or improvements set forth in the letters patent aforesaid.

IV. That your Honors will grant unto your orators a preliminary injunction issuing out of and under the seal of this Honorable Court, enjoining and restraining the said defendant, its associates, servants, clerks, agents and workmen to the same purport, tenor and effect as hereinbefore prayed for with regard to said perpetual injunction; and

V. That this defendant be decreed to pay the costs of this suit; and

VI. That your orators may have such other and further relief as the equity of the case may require.

To the end, therefore, that the defendant may, if it can, show why your orators should not have the relief prayed and may full, true and direct answer make, but not under oath (answer under oath being expressly waived) according to the best and utmost of its knowledge, information, remembrance and belief to the several matters hereinbefore averred and set forth, as fully and particularly as if the same were repeated paragraph by paragraph, and said defendant thereto severally and specifically interrogated, may it please your Honors to grant your orators a writ of *subpoena ad respondendum* issuing out of and under the seal of this Honorable Court, directed to said defendant, The Fair, commanding it to appear and make answer to this bill of complaint and to perform and abide by such order and decree herein as to this court may seem just.

And your orator will ever pray.

HORACE PETTIT,

Of Counsel for Complainant.

August, 1902.

PIERCE & FISHER,

Solicitors for Complainants.

STATE OF PENNSYLVANIA, }
CITY AND COUNTY OF PHILADELPHIA, } ss.

Leon F. Douglass, being duly sworn, deposes and says: That he is Vice President and General Manager of the Victor Talking Machine Company, one of the complainants named in the foregoing bill; that he has read the same and knows the contents thereof, and that the same is true of his own knowledge, save of the matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

LEON F. DOUGLASS.

Sworn to and subscribed before me this 25th day of August, 1902.

JOHN F. GRADY,

(Notarial Seal.)

Notary Public.

ANSWER.

(From *Westinghouse vs. Boyden Power Brake Co.*, 170 U. S. 537, 42 L. Ed. 1136.)

In the Circuit Court of the United States for the District of Maryland.

GEORGE WESTINGHOUSE, JR., and THE WESTINGHOUSE AIR BRAKE COMPANY.

vs.

BOYDEN POWER BRAKE COMPANY; GEORGE A. BOYDEN, President; CHARLES B. MANN, Secretary; WILLIAM WHITRIDGE, Treasurer.

In Equity.

To the Honorable, the Judges of the Circuit Court of the United States in—for the District of Maryland.

The joint and several answer of the Boyden Power Brake Company of Baltimore City and of George A. Boyden, Charles B. Mann, and William Whitridge to the bill of complaint of George Westinghouse, Jr., and the Westinghouse Air Brake Company against these defendants in this court exhibited.

These defendants now and at all times hereinafter saving and reserving to themselves all manner of benefit and advantage of exception to the many errors, insufficiencies and inaccuracies in the complainants' said bill of complaint contained, for answer thereto or unto so much and to such parts thereof as these defendants are advised that it is material to make answer unto, say:

1. They admit that the first-named defendant is a corporation created under the laws of the State of Maryland and doing business in the said State, and that the said Boyden, Mann and Whitridge are, respectively, the president, secretary and treasurer of the said company and that they reside in the city of Baltimore and are citizens of the State of Maryland.

2. They admit that the said company is engaged in manufacturing and selling a fluid-pressure brake; but they deny that the said brake, or any part thereof, is an infringement on the letters patent issued to the complainants and described in said bill of complaint and they deny all the allegations contained in the said bill except such as may be specially admitted in this answer.

3. For further answer they deny, on information and belief, that the said George Westinghouse, Jr., was the true and original and first inventor of the apparatus covered by the letters patent mentioned in the said bill; and they further say, on information and belief, that the said apparatus was not an invention when produced by the said George Westinghouse, Jr., and that it was not novel, but that an apparatus substantially identical in character therewith was previously patented in letters patent of the United States granted to George Westinghouse, Jr., on March 5, 1872; and that like apparatus was previously described in the following patent of the United States:

No. 138,827 to George Westinghouse, Jr., May 13th, 1873.

No. 144,006 to George Westinghouse, Jr., October 28th, 1873.

No. 163,089 to Henry E. Marchand, May 11th, 1875.

No. 166,405 to H. Lansing Perine, August, 3, 1875.

No. 168,359 to George Westinghouse, Jr., October 5, 1875.

No. 172,064 to George Westinghouse, Jr., January 11th, 1876.

No. 220,556 to George Westinghouse, Jr., October 14, 1879.

No. 280,285 to George A. Boyden, June 26, 1883.

4. And these defendants further answering, on information and belief, say that the said alleged invention was in public use more than two years before the said George Westinghouse, Jr., made any application for let-

ters patent thereon, and that the said George Westinghouse, Jr., actually abandoned the said invention before any application was made.

5. And further answering so much of the said bill as alleged an infringement of the seventh claim of letters patent No. 168,359, they say that the said claim can only be construed as covering the specific construction named in the said claim, and that these defendants do not use the said construction; and that the construction used by these defendants cannot infringe the subject-matter of the said claim, for the reason that it is substantially found in several of the prior patents above cited.

6. And for answer to so much of said bill as alleges an infringement of the first, fourth and fifth claims of letters patent No. 360,070, these defendants say that the valve used by them does not embody the combination of parts set forth in the said claims and does not infringe any patent included therein.

7. And in respect to the alleged infringement of the second claim in the said letters patent, these defendants say that the said second claim is invalid and should not have been granted, because the combination of parts therein named is inoperative to perform and incapable of performing the function set forth in said claim; and that if the said claim be considered merely as the combination of parts therein set forth and without reference to the function described as performed by it, it is invalid for the reason that the same combination of parts is shown in most of the prior patents above cited, and has been publicly used by the complainants for a long time prior to the date of the said letters patent No. 360,070.

8. And, further, these defendants say that the said second claim is uncertain and ambiguous, and that if the functions which are recited in the said claim should be so construed as amplifying the description of the elements or parts composing the combination as to distinguish this

combination from that shown in most of the prior patents above cited, then the defendants say that the said claim is anticipated by the prior patent issued to George A. Boyden on June 26, 1883; for the reason that air-brake valves made in accordance with the last mentioned patent embody the same combination of parts, and will perform the same functions and operate in substantially the same manner as stated in the said second claim.

Wherefore, these defendants humbly pray to be hence dismissed with their reasonable costs and charges in that behalf wrongfully sustained.

BOYDEN POWER BRAKE COMPANY,
By G. A. BOYDEN, President.
BARTON & WILMER,
COWEN & CROSS,
Solicitors for all the Respondents.

(Seal of Company.)

DISTRICT OF MARYLAND,
UNITED STATES OF AMERICA, } To wit:

I, George Morris Bond, a Commissioner of the United States of America in and for the District of Maryland, do hereby certify that on the 3d day of February, in the year eighteen hundred and ninety, personally appeared before me in my said district, George A. Boyden, and made oath that the matters and things stated in the foregoing answer as of his own knowledge are true, and that the matters and things therein stated as upon information and belief, are true to the best of his knowledge, information and belief.

GEORGE MORRIS BOND,
United States Commissioner for the District of Maryland.

(Commissioner's Seal.)

G. A. BOYDEN, President.

ANSWER.

(From Kessler vs. Eldred, 206 U. S. 285, 51 L. Ed. 1065.)

*Circuit Court of the United States, for the District of
Indiana, sitting at Fort Wayne.*

GEORGE S. ELDRED, Complainant, <i>vs.</i> WILLIAM KESSLER, Defendant.	}	In Equity. No. 135.
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ANSWER.

The answer of the defendant, William F. Kessler, to the bill of complaint of the complainant, George S. Eldred.

Said defendant for answer to the bill, or to so much and such parts thereof as he is advised are material for him to answer, says:

He admits that a United States Patent, No. 492,913, and dated March 7, 1893, for alleged improvements in lamp lighters was granted to Josephus C. Chambers; and that another United States Patent, No. 532,727, and dated July 10, 1894, for alleged improvement in electric lamp lighter was granted to Josephus C. Chambers; and that another United States Patent No. 522,934, and dated July 10, 1894, for alleged improvement in Electric cigar lighters, was granted to John J. Eberhard and Carl G. Schimkatt; but whether said patents and each of them were duly applied for and issued according to law the defendant does not know, and whether the complainant has acquired title to any or all of said patents the defendant does not know; and upon all said matters the complainant is required to make proof.

Said defendant denies that said Josephus C. Chambers was the true, original and first inventor of the apparatus covered by said patent 492,913; and he avers that said

apparatus in said patent described was not an invention when produced by said Chambers; and that it was not novel at that time and that in the state of the art then existing it required not invention but only mechanical skill to produce said apparatus; and that the same when produced by said Chambers was not a patentable combination, but a mere aggregation.

Said defendant further denies that said Josephus C. Chambers was the original, true and first inventor of the apparatus covered by said patent 522,727; and he avers that said apparatus in said patent described was not an invention when produced by said Chambers; and that it was not novel at that time; and that in the state of the art then existing it required, not invention, but only mechanical skill to produce said apparatus; and that the same when produced by said Chambers was not a patentable combination, but a mere aggregation.

Said defendant further denies that said Eberhard and Schimkatt were the true, original, first and joint inventors of the apparatus covered by said patent No. 522,934; and he avers that said apparatus in said patent described was not an invention when produced by said Eberhard and Schimkatt; and that in the state of the art then existing it required, not invention, but only mechanical skill to produce said apparatus; and that the same when produced by said Eberhard and Schimkatt was not a patentable combination, but a mere aggregation; and further that the invention, if any there was, was not the joint invention of said patentees, but was the sole invention of one of them.

Said defendant answering further as to all the patents mentioned in said bill says that he denies that the validity of said patents or any of them has been generally recognized or acquiesced in by the public; and he denies that he has ever made, sold or used any apparatus covered by all or any of said patents in said bill of com-

plaint mentioned; and he denies all infringement of said patents and each of them; and likewise denies that he ever derived any profit from such making, selling or using; and likewise denies that the complainant ever incurred any damage from any such transactions committed or caused to be committed by the defendant.

All of which defenses said defendant is ready to aver, maintain and prove as this Honorable court shall direct; and he prays to be dismissed hence with his costs in this behalf sustained.

WILLIAM F. KESSLER,
By R. S. TAYLOR,
His Solicitor.

**STIPULATION FOR USE OF UNCERTIFIED
COPIES OF PATENTS; FOR EXCHANGE OF
COPIES; THAT ANY OFFICER HAVING SEAL
MAY ACT AS SPECIAL EXAMINER, ETC.**

(From *H. F. Brammer Mfg. Co. vs. Witte Hdw. Co.*, 159 Fed. Rep. 726, 86 C. C. A. 207.)

It is hereby admitted and stipulated by and between counsel for the respective parties to the above entitled cause, as follows:

I. That the uncertified printed copies of United States Letters Patent as issued by the United States Patent Office, and the blue book or printed copies of British or other foreign patents issued by the respective foreign countries and uncertified, may be introduced as exhibits in this cause by either party, subject to the usual objections as to relevancy and competency, with the same force and effect as though the Letters Patent so offered were duly certified by the proper authorities issuing the original of such patents, and subject also to the correction at any time for typographical errors.

II. That each party will furnish to the other party without cost or charge a legible copy of all depositions taken by him, and also, so far as practicable, copies or duplicates of exhibits.

III. That in order to save undue expense the depositions may be taken by either party before any notary public or other officer having a seal and acting as special examiner, subject, of course, to the usual objections with respect to the introduction of proofs; and that the depositions and proofs when filed may be used with the same force and effect on the final or other hearing in this cause as if they had been taken before a commissioner of this court or an examiner specially appointed for the purpose.

IV. That all exhibits offered in evidence may be retained in the custody or control of the counsel offering the same until the final hearing of this cause, subject, however, to inspection at all reasonable times by the opposing counsel or his expert or agent, all such exhibits to be produced at the final hearing, and also to be produced at such other hearing as may be had when notice is served upon opposing party for the production of such exhibits for such special hearing.

V. It is further stipulated and admitted by counsel for the defendant that complainant's Exhibit No. 2 was manufactured by the defendant, The Michigan Washing Machine Company, at Muskegon, Michigan, and that it was sold by the defendant, The Witte Hardware Company, at St. Louis, Missouri, after the date of the Plagman patent in suit, complainant's Exhibit No. 1, and prior to the filing of the bill of complaint herein.

DECREE OF DISMISSAL.

(From *H. F. Brammer Mfg. Co. v. Witte Hardware Company*, 159 Fed. Rep. 726, 86 C. C. A. 207.)

(Caption.)

This cause came on to be heard at this term and has been argued by counsel for the respective parties and submitted to the court upon the pleadings and proofs ad-

duced; the court now being advised in the premises, doth find the issues herein joined in favor of said defendants; and it is therefore ordered, adjudged and decreed that the bill of complaint in this cause be and the same is hereby dismissed for want of equity at costs of said complainant.

JOHN C. POLLOCK,
Judge.

REPLICATION.

(From *Westinghouse vs. Boyden Power Brake Co.*, 170 U. S. 537,
42 L. Ed. 1136.)

United States Circuit Court, District of Maryland.

GEORGE WESTINGHOUSE, JR., and THE
WESTINGHOUSE AIR BRAKE COMPANY,

vs.

THE BOYDEN POWER BRAKE COMPANY;
GEORGE A. BOYDEN, President;
CHARLES B. MANN, Secretary, and
WILLIAM WHITRIDGE, Treasurer.

In Equity.
No. 321.

The replication of George Westinghouse, Jr., and The Westinghouse Air Brake Company, complainants, to the answer of The Boyden Power Brake Company; George A. Boyden, president; Charles B. Mann, secretary, and William Whitridge, treasurer, defendants.

These repliants, saving and reserving to themselves all and all manner of advantage of exception to the manifold insufficiencies of the said answer, for replication thereunto say, that they will aver and prove their said bill to be true, certain and sufficient in the law to be answered unto; and that the said answer of the said defendants is uncertain, untrue and insufficient to be replied unto by these repliants; without this that any other matter or thing whatsoever in the said answer contained,

material or effectual in the law to be replied unto, confessed and avoided, traversed or denied, and not herein replied unto, confessed and avoided, traversed or denied, is true; all which matters and things these repliants are and will be ready to aver and prove, as this honorable court shall direct; and they humbly pray, as to and by their bill they have already prayed.

GEORGE H. CHRISTY,
Solicitor for Complainants.

DECREE.

(From *Westinghouse vs. Boyden Power Brake Co.*, 170 U. S. 537, 42 L. Ed. 1136.)

And now, to-wit, this 25th day of April, 1895, the above-entitled cause having come on regularly for hearing, before the Honorable Thomas J. Morris, district judge, holding circuit court, on bill, answer, replication and proofs taken by and on behalf of the respective parties hereto, and having been argued by Mr. George H. Christy and Mr. Frederic H. Betts, for complainants, and by Mr. Lysander Hill, Mr. Skipwith Wilmer and Mr. Hector T. Fenton, for defendants, and the court having considered the same, and being duly advised in the premises, it is thereupon ordered, adjudged, and decreed:

1st. That the letters patent recited in complainant's bill of complaint, to-wit, letters patent of the United States, No. 360,070, dated March 29, 1887, and granted to George Westinghouse, Jr., for a new and useful improvement in fluid-pressure automatic brake mechanism, are a good and valid patent in all respects as regards and to the extent of the subject-matter of invention referred to and summed up in the several claims declared upon herein, to-wit, claims numbered one, two and four of said recited patent; that George Westinghouse, Jr.,

was the true original and first inventor thereof; and that the complainants have a good and sufficient title thereto, and are entitled to the exclusive right therein and thereunder.

2d. That the defendants above named, by the manufacture, use and sale of fluid-pressure automatic brake mechanism, as set forth and shown in and by the proofs herein, and (for greater certainty herein) more particularly as shown and described in certain letters patent of the United States, No. 481,134 and No. 481,135, both dated August 16, 1892, and both granted to The Boyden Brake Company, assignee of George A. Boyden, defendants herein, have infringed the said second claim of said recited patent No. 360,070, and have violated the exclusive right of the complainants therein and thereunder, and that a writ of injunction, conformable to the prayer of said bill, and in the usual form, be issued by the clerk, perpetually enjoining and restraining the said defendants and each of them from any further manufacture, use or sale of the apparatus, mechanism and devices complained of herein, and of any other apparatus, mechanism or devices substantially such in construction and operation as that which is referred to in and constitutes the subject-matter of said second claim, and from doing any act or thing in infringement of said second claim, or in violation of the exclusive right so as aforesaid vested in said complainants therein and thereunder.

3d. That reference be made herein to G. Morris Bond, Esq., as master, to take, state and make return of an account of the gains and profits made by said defendants, as also of the damages suffered by said complainants by or on account of said infringement, and that the parties appear before the master and produce books and papers and render accounts as he may, from time to time, direct.

4th. That as regards claims one and four of said patent No. 360,070, the court being of the opinion that de-

fendants' device hereinbefore referred to does not infringe the same, injunction is refused and the bill of complaint is, in reference to such claims, hereby dismissed.

5th. And it is further ordered that all questions of the allowance of costs are reserved until the final decree.

THOS. J. MORRIS, Judge.

PETITION FOR APPEAL.

(From H. F. Brammer Mfg. Co. vs. Witte Hardware Company, 159 Fed. Rep. 726, 86 C. C. A. 207.)

The above named complainant, conceiving itself aggrieved by the order and decree made and entered on the 3d day of July, 1907, in the above entitled cause, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and it prays that this appeal may be allowed, and that a transcript of the record, proceedings and papers upon which said order and decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Eighth Circuit.

St. Louis, Missouri, July 6th, 1907.

TAYLOR E. BROWN,
THOMAS G. RUTLEDGE,
Solicitors for Complainant.

TAYLOR E. BROWN,
C. CLARENCE POOLE,
Of Counsel.

Filed July 9, 1907. James R. Gray, Clerk.

ASSIGNMENT OF ERRORS.

(From *Westinghouse vs. Boyden Power Brake Co.*, 170 U. S. 537, 42 L. Ed. 1136.)

And *eo die* come the complainants in the above-entitled cause and file, with their foregoing petition for appeal, these their assignments of error:

1st. That the court erred in finding that defendant's apparatus did not contain an auxiliary valve within the meaning of claims one and four of patent No. 360,070, and of each of them.

2d. That the court erred in holding that it is an essential feature of the auxiliary valve of the patent in suit that it "performs none of the functions of the main valve of the ordinary triple-valve device."

3d. That the court erred in finding that the quick action or emergency valve 22 of defendants' apparatus is in any practical or operative or commercial sense a main valve, or that in practical use it has the capacity or does the work of a main valve, or that to any practical or material extent it "performs the functions of a main valve of the triple valve."

4th. That the court erred in holding that the valve *i j k* of defendants' apparatus is not a main valve within the meaning of claims one and four of patent No. 360,070 and of each or either of said claims.

5th. That the court erred in holding that the defendants' apparatus did not contain the invention of claims one and four and of each of them.

6th. That the court erred in not holding that in defendants' apparatus, and for the purposes of this case, the valve *i j k* is or represents the valvular appliance by or through which the ordinary service work of the brake is done, and valve 22 is or represents the valvular appliance by or through which quick action or emergency work is done, and also in not holding that such use and

operation of defendants' apparatus involves an unauthorized use of the invention of claims one and four of patent No. 360,070, and is an infringement thereof.

7th. That the court erred in refusing and in not granting an injunction under each and both of said claims.

Wherefore, these appellants, George Westinghouse, Jr., and The Westinghouse Air Brake Company, pray that the decree of the Circuit Court of the United States for the District of Maryland may be reversed by this Honorable Court in respect of the matters herein appealed, and that the said circuit court be directed by the mandate of this court to enter a decree for an injunction and account under claims one and four of the patent in suit, No. 360,070, with costs to the appellants herein and complainants below.

BERNARD CARTER,
Solicitor for Appellants.

Service of copy of the within admitted this 13th day of May, 1895.

BARTON & WILMER,
Solicitors for Defendant.

ORDER FOR BOND IN LIEU OF INJUNCTION.

(From H. F. Brammer Mfg. Co. vs. Witte Hardware Company, 159 Fed. Rep. 726, 86 C. C. A. 207.)

H. F. BRAMMER MANUFACTURING COMPANY,	} In Chancery.
<i>vs.</i>	
THE WITTE HARDWARE COMPANY.	} No. 5171.

This cause having come on to be heard on June 8, 1905, upon motion of complainant for an injunction *pendente lite*, and in pursuance of the order of Hon. John H. Rogers, United States Judge, entered herein May 22, 1905, and upon reading notice of said motion and of said order and proof of service thereof, and of the affidavits

filed on behalf of the defendant, and said matter having been argued by A. C. Denison, Esq., counsel for defendant, as well as by Taylor E. Brown, Esq., counsel for complainant, and briefs having been submitted by the respective counsel, and the same having been duly considered by the court; now, therefore, it is hereby ordered, adjudged and decreed:

That if the defendant, or some one on its behalf, will on or before Monday the 10th day of July, 1905, give a bond in the sum of five thousand dollars, with good and sufficient surety to be approved by the court or the clerk thereof, conditioned that defendant will pay, or cause to be paid, to complainant all damages, profits and costs, judgments or awards, that may be adjudged, ordered or found in favor of the said complainant and against the said defendant, if any, upon the final hearing of this cause, on account of infringing the letters patent described in the bill of complaint, and if defendant will file with the clerk of this court every sixty days a statement setting forth the number of "Guarantee Washing Machines" sold during the sixty days then last past, together with the number of machines then on hand, then the writ of preliminary injunction prayed for by complainant shall not issue until the further order of the court or a judge thereof.

But should the defendant fail or refuse to furnish said bond, or file said statements within the time fixed herein, then and in such case a temporary writ of injunction shall issue restraining the defendant, its officers agents, clerks and employees, until the further order of this court, from selling, or causing to be sold, giving away or disposing of in any manner any washing machines such as are known by the name "Guarantee," or such as are similar to "Complainant's Exhibit, Defendant's Infringing Machine," or which in any manner are constructed in accordance with or embody the invention set

forth and claimed in complainant's letters patent No. 608,220: Provided that such temporary injunction shall not issue until the complainant, or some one in its behalf, has filed a bond in the penal sum of five thousand dollars, to be approved by the court or clerk, with good and sufficient sureties, conditioned that if on final hearing said bill of complaint be dismissed for want of equity or other cause, complainant will pay to the defendant such damages, if any, as it may have sustained in consequence of the issuance of said injunction or the interruption of its business during the time that such temporary injunction shall remain in force.

(Signed.)

G. A. FINKELNBURG, Judge.

ORDER ALLOWING APPEAL.

(From *H. F. Brammer Mfg. Co. vs. Witte Hardware Company*, 159 Fed. Rep. 726, 86 C. C. A. 207.)

Now at this day comes said complainant by its solicitor and files and presents to the court its assignment of errors and petition for appeal from the final decree heretofore rendered herein to the United States Circuit Court of Appeals for the Eighth Circuit; upon due consideration whereof the court doth order that said appeal be and the same is hereby granted as prayed and that the amount of the appeal bond to be given for costs be fixed at two hundred and fifty dollars; and now said complainant presents such a bond conditioned as required by law, which is approved by the court and filed, and a citation citing and admonishing said defendants to be and appear at and before said Court of Appeals within sixty days from this date is signed by the judge, and it is further ordered that the clerk of this court make out and certify to said Court of Appeals a full, true and complete transcript of the record and proceedings in this

cause, omitting therefrom any and all exhibits heretofore or hereafter withdrawn by the party offering same, leave for such withdrawal being now and here given.

July 9, 1907.

DAVID P. DYER, Judge.

Filed July 9, 1907, James R. Gray, Clerk.

APPEAL BOND.

(From H. F. Brammer Mfg. Co. vs. Witte Hardware Company, 159 Fed. Rep. 726, 86 C. C. A. 207.)

Know all men by these presents, That we, H. F. Brammer Manufacturing Company, as principal, and the National Surety Company as surety, are held and firmly bound unto the Witte Hardware Company and Michigan Washing Machine Company, in the full and just sum of two hundred and fifty dollars (\$250.00) to be paid to the said Witte Hardware Company and Michigan Washing Machine Company, their heirs, executors, administrators, successors or assigns; to which payment well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals, and dated this ninth day of July, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at the March term, A. D. 1907, of the Circuit Court of the United States for the Eastern Division of the Eastern District of Missouri, in a suit depending in said court between H. F. Brammer Manufacturing Company, complainant, and Witte Hardware Company and Michigan Washing Machine Company, defendants, a decree was rendered against the said H. F. Brammer Manufacturing Company, and the said H. F. Brammer Manufacturing Company has obtained an order of the said court allowing an appeal to reverse the decree in the aforesaid suit, and a citation directed to the said Witte Hardware Company and Michigan Wash-

ing Machine Company, citing and admonishing them to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the city of St. Louis, Missouri, sixty days from and after the date of said citation.

Now the condition of the above obligation is such, that if the said H. F. Brammer Manufacturing Company shall prosecute said appeal to effect, and answer all damages and costs if it fail to make good its plea, then this obligation to be void, else to remain in full force and virtue.

H. F. BRAMMER MANUFACTURING COMPANY,

By TAYLOR E. BROWN, Its Attorney.

(Seal)

Signed and delivered in the presence of Marie I. McDonald, as to National Surety Company.

NATIONAL SURETY COMPANY,

By PAUL W. GRAY, Its Attorney in fact.

(Seal.)

Approved by David P. Dyer, Judge.

ORDER OF SUPERSEDEAS, EMBRACED IN ORDER GRANTING APPEAL.

(From Rice-Stix Dry Goods Co. vs. J. A. Scriven Co., 165 Fed. Rep. 639, 91 C. C. A. 475.)

The above named defendant, Rice-Stix Dry Goods Company, having duly filed its assignment of errors and petition for appeal, on motion of S. L. Swarts, Esq., and F. W. Lehmann, Esq., solicitors for the defendant, it is ordered that an appeal to the United States Circuit Court of Appeals for the Eighth Circuit, from the order, judgment and decree entered hereon on the 7th day of December, 1907, be, and the same is hereby, allowed to the defendant, and that a certified transcript of the record, testimony, stipulations and all proceedings herein other than the original exhibits, be forthwith transmitted to the said United States Circuit Court of Appeals.

It is further ordered, complainant consenting, that the clerk of the court also send up with said transcript the original exhibits filed herein.

It is further ordered that the appeal bond be fixed at the sum of ten thousand dollars (\$10,000.00), conditioned that if the said defendant shall prosecute its appeal to effect, and answer all costs and damages that may be awarded against it if it shall fail to make good its said plea, then the bond to be void; otherwise in full force and virtue.

And it is further ordered that upon giving such bond the injunction ordered herein is suspended, pending the appeal of this case.

And the defendant thereupon presents its appeal bond, as hereinbefore provided, and the same is approved and ordered filed herein.

DAVID P. DYER, Judge.

PETITION FOR REHEARING, IN THE UNITED STATES SUPREME COURT.

(From *Westinghouse vs. Boyden Power Brake Company*, 170 U. S. 537. 42 L. Ed. 1136.)

Your petitioners George Westinghouse, Jr., and the Westinghouse Air Brake Company, complainants and appellees, hereby respectfully represent to this court as follows:

First. That, as they are advised and believe, this court has been led into error in its opinion filed May 9th, 1898, in finding that the "auxiliary valve" of Boyden (valve 22) is *located* and *arranged* in combination with the other parts of the triple-valve structure, in a substantially different manner from that of the auxiliary valve of the Westinghouse patent in suit (valve 41), and so as to be productive of different results from those produced by the Westinghouse auxiliary valve; and in finding that a passage for train-pipe air (admitted by

said valve) *through* the valve chamber, is substantially different from a by-passage for train-pipe air *around* said valve chamber.

Whereas, as your petitioners believe, this difference in location of the auxiliary valves, and passages opened thereby, is *not* material, and has been so proved in the record, and is in substance so admitted on the part of the defendants in one of the Boyden Patents No. 481,136 (Record, pp. 817,823).

Second. That, as they are advised and believe, this court has been led into error in its finding that there is "*no partition in the proper sense of the word,*" in the valve structure of the Westinghouse Patent in suit, "*or at least, none located as in the Boyden device,*" and "*no aperture in such partition open for the express purpose of maintaining differential pressures on opposite sides of a check-valve which opens in emergencies to admit train-pipe air to the brake cylinder.*"

Whereas, as a matter of fact, there has always existed in the said Westinghouse "quick-action" structure, and is described in the Westinghouse Patent in suit a restricted port 35, in an extension of the main valve, which constitutes a partition substantially of the character of that in the Boyden structure, and is located in substantially the same relation to the other parts of the structure, and said restricted aperture necessarily operates to produce "differential pressures" on opposite sides of the Westinghouse check-valve, and is productive of substantially the same results as those produced by the said restricted aperture in the Boyden structure, and this is substantially admitted in the record, and is clearly to be inferred from the said Boyden Patent No. 481,136 (Record, pp. 823-4).

Third. That this court has been led into error in supposing that the device of the defendants' is substantially different from that of Westinghouse, and "*is a novel one*

and a manifest departure from the Westinghouse Patent," because, as was supposed by the court, Boyden "made a more perfect brake than the one described in the Westinghouse Patent."

Whereas, there is no proof in the record that the defendants' device is, in any way, or to any degree, better, simpler or more efficient in producing "quick action" or quickened "serial action" or "quick action without shocks," at the rear end of a long train, than the exact form of apparatus described and illustrated in the patent in suit, but, on the contrary, the proof is that the said Boyden valve is, if anything, inferior to that of the patent in suit.

In support of the first paragraph or section of this petition your petitioners respectfully represent as follows:

The location of the Boyden auxiliary valve 22 upon one side—viz., on the auxiliary-reservoir side—of the triple valve piston (and hence *in* the valve chamber), instead of upon the other, or the train pipe side, of the triple valve piston (and hence *outside* of the valve chamber), and the consequent difference of flow of train-pipe air admitted by said valve *through* the valve chamber (as described by Boyden), instead of *around* the valve chamber (as described by Westinghouse) is admitted in the patent of Mr. Boyden himself to be a difference which does not affect either essential features of the structure, or the mode of operation or the result.

The Boyden Patent No. 481,136 (August 16, 1892, Record, pp. 817-828) describes a form of quick-action valve operating by the same "momentary differential pressures" (See Rec., p. 821, 5th line from foot of page), as the form involved in this suit, but differs therefrom by using a *slide* valve, instead of a *poppet* valve. Said patent contains several illustrations of *essentially* the same structure.

In one form (Figs. 2 and 11) train pipe air is admitted by a *by*-passage (containing a check valve) *around* the triple valve chamber, and, in another form (Fig. 12) train pipe air is admitted to produce quick action *through* the triple valve chamber.

Also in one form (Fig. 2) the "partition 9," with the "restricted port B" therein is movable (substantially as illustrated in the Westinghouse Patent in suit), and in other forms (Figs. 11 and 12) the "partition" and "restricted port" therein (B^1 in Fig. 11, B^2 in Fig. 12) is *stationary*.

This Boyden Patent expressly admits that the two organizations of the structure *are substantially alike*. It says (p. 823, 8th line from bottom of page):

"The restricted passage B for the supply of auxiliary reservoir air when applying the brakes for emergency stops is shown in Figs. 2, and 10, for the purpose of clear illustration, as a small hole through the partition 9; but a special hole or passage is not necessary, as the partition 9 may fit the bushing *b* loosely enough to leave a small space between the rim 9^a of the partition and the wall of the bushing. Such looseness of fit or the space formed thereby, may constitute the restricted passage, and I have used valves constructed in this manner. The restricted passage may also be formed as a distinct channel in the case, as at B^1 in Fig. 11 or as B^2 in 12. *The partition may be located differently* from what is shown in Figs. 2 and 11. It is obvious that it may be anywhere on the stem g^2 , so that it is not withdrawn from the bushing when the piston completes its stroke to the left. *It may also be stated that the piston may, under certain conditions, be made to serve as a partition.* This is illustrated in Fig. 12.

Fig. 12 illustrates a modification in the construction and arrangement of the parts of a valve embodying my

invention. This form of valve, *although differently organized from that shown in Figs. 2 to 11, inclusive, has the same parts, or their equivalents, and has the same mode of operation and produces the same result.* The valve shown in Fig. 12 differs from that shown in the other figures chiefly in that slide valve of Fig. 12 is *located on the train-pipe side* of the actuating piston, where as in the other figures it *is located on the auxiliary-reservoir side* of said piston.” (Italics ours.)

In further support of your petitioner’s contention that the location of the partition, with its restricted aperture, and the location of the “auxiliary” valve, are not substantially different in the Boyden structure from those illustrated in the Westinghouse structure, your petitioner respectfully represents as follows:

In the Boyden structure in suit the “partition 9” is a fixed partition, located between the auxiliary reservoir and the triple valve chamber, and the “restricted aperture” of said partition restricts the free flow of air from the auxiliary-reservoir to the brake cylinder for three purposes:

(a) To hold the high pressure at the back of the triple valve piston, so as to cause the piston to move when train-pipe pressure on the opposite side is reduced.

(b) To prevent high pressure from existing under the check valve (in the passage from the train pipe), and thus permit said check valve to open.

(c) To supplement train-pipe air with reservoir air (*slowly admitted*).

In the Westinghouse structure the part which acts as a “partition,” and “restricted aperture” therein, is a *moving* part instead of a *fixed* part. It is the extended end of the main valve with the restricted port 35.

The operation and effect of that partition, and restricted aperture therein, is precisely the same as the corresponding parts of the Boyden structure, viz.:

(a) To hold the high pressure at the back of the triple valve piston, to cause it to move when train pipe pressure on the opposite side is reduced.

(b) To prevent high pressure from existing under the check valve (in the passage from train pipe) and thus permit said check valve to open.

(c) To supplement train-pipe air with reservoir air (*slowly admitted*).

The fact that the partition in one case is a moving one, and in the other case a fixed one; and that in one case it restricts the flow of auxiliary reservoir air *into* the valve chamber, and in the other case *out of* the valve chamber (in *both* cases *on its way to the brake cylinder*), are shown to be in material differences by the express admissions already quoted from the patent to Boyden, No. 481, 136.

In support of the second section or paragraph of this petition, your petitioners respectfully represent that, while it is true that the Westinghouse Patent in suit does not describe the restriction of size of the "Port 35" as being "*for the express purpose of maintaining differential pressures on opposite sides of a check valve which opens in emergencies to admit train-pipe air to the brake-cylinder,*" and although it is true that the Westinghouse Patent does not, in itself, state such "*express purpose,*" yet the evidence shows that the Westinghouse valves made under said patent were always so constructed, and that the structure could not possibly have been operated to produce "*quick action*" unless so constructed as to contain a restricted passage through a separating partition (which prevents the *free* flow of auxiliary reservoir air at the time quick action is to be effected), and that

this was well understood long prior to Boyden's alleged invention of the "partition" and "restricted port B."

Hence, as your petitioners respectfully represent, the use of a partition, and a restricted passage therein, cannot be claimed as a *novelty* by Mr. Boyden or those acting under him.

In support of the third section or paragraph of this petition, your petitioners respectfully represent that there is no proof in the record that the defendants' device is better, simpler or more efficient than that of Westinghouse, or has ever been introduced into public use on railroads to any considerable extent. But, on the contrary, the proof is that the said Boyden apparatus has never gone into extensive practical use, and is not to be distinguished from that of Westinghouse by reason of any greater efficiency, as will fully appear by reference to the citations from the record (and from public documents) in the brief accompanying this petition.

Your petitioners further represent, as a reason for a rehearing of this cause, upon the points specified in this petition, that the aspect in which this case has heretofore been presented upon the question of infringement has been principally, if not wholly, such as not to call the proofs relating to the specific contentions here presented, to the attention of the court.

The contentions of the respective parties, as heretofore presented, have been chiefly upon the question whether the Boyden "valve 22" was or was not an "auxiliary valve" which performed the function of the auxiliary valve 41 of the Westinghouse Patent in suit in admitting train-pipe air to the brake cylinder in "quick action."

The contention on behalf of the defendants has been that the said Boyden structure contained only and solely a "main valve" and a "graduating valve," but *no* "auxiliary valve" for "quick action."

The contention on behalf of the complainant has been that the valve 22 of the Boyden structure was essentially a "quick-action" "auxiliary valve," and not the "main valve" of a triple valve structure.

The question has not been, as your petitioners believe, thoroughly, if at all, argued, whether, *if* it should be held (*as this court has now held*) that the valve 22 is *in fact* an "auxiliary valve" for "quick-action," the mere location of the same inside of the valve-chamber (on the auxiliary-reservoir side of the triple valve piston) instead of outside the valve-chamber (or on the train-pipe side of the triple-valve piston), and the consequent incident of a passage for train-pipe air *through* the valve-chamber, instead of *around* it, and the further consequent incident of the location of the part which acts as a "partition" and "restricted port," to prevent free flow of auxiliary-reservoir air, at the place where *it enters* the valve chamber, instead of at the place where it *leaves* said valve chamber, constitute material differences of structure or are productive of any materially different results.

Wherefore, your petitioners respectfully ask that this cause be reheard upon the specific question, whether the difference in location of the auxiliary valve 22 of the Boyden structure from that of the auxiliary valve 41 of the Westinghouse structure, and the consequent incident of a passage for train-pipe air through the valve chamber, instead of around it, constitutes a material and substantial difference between the two structures, and whether the difference in location and form of the restricted aperture to prevent the free flow of air from the auxiliary reservoir in "quick action," by locating the same in one case at the point where the air enters the valve chamber on its way to the brake cylinder (as in the Boyden structure), instead of locating the same at the point where the air leaves the valve chamber on

its way to the brake cylinder (as in the Westinghouse structure), is a material and substantial difference; or whether either of said differences are sufficient to avoid the charge of infringement.

And your petitioners will ever pray, etc.

(Sd.) WESTINGHOUSE AIR BRAKE Co.,
By GEORGE WESTINGHOUSE,
President.

(Sd.) GEORGE WESTINGHOUSE, JR.

We hereby certify that in our opinion the foregoing petition is well founded in point of law and in point of fact, and is not presented for delay.

FREDERIC H. BETTS,
GEORGE H. CHRISTY,
Counsel.

SUPERSEDEAS BOND AND ORDER APPROVING SAME.

(From Rice-Stix Dry Goods Co. vs. J. A. Scriven Co., 165 Fed. Rep. 639, 91 C. C. A. 475.)

Know all Men by These Presents, That we, Rice-Stix Dry Goods Company and National Surety Company of New York, are held and firmly bound unto J. A. Scriven Company in the full and just sum of Ten Thousand Dollars (\$10,000), to be paid to the said J. A. Scriven Company, its successors or assigns, to which payment, well and truly to be made, we bind ourselves, our successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 7th day of December, in the year of our Lord one thousand nine hundred and seven.

Whereas, lately at the September term of the United States Circuit Court for the Eastern Division of the Eastern Judicial District of Missouri, in a suit depending in said court between J. A. Scriven Company, complain-

ant, and Rice-Stix Dry Goods Company, defendant, a decree was rendered against the said Rice-Stix Dry Goods Company, defendant, and the said Rice-Stix Dry Goods Company, defendant, has prayed its appeal to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, to reverse the final judgment and decree rendered in the above entitled cause on the 7th day of December, 1907, and a citation directed to the said J. A. Scriven Company, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, Therefore, The condition of this obligation is, that if the said Rice-Stix Dry Goods Company shall prosecute its said appeal to effect, and answer all costs and damages that may be awarded against it if it shall fail to make good its said plea, then this obligation to be void; otherwise in full force and virtue.

RICE-STIX DRY GOODS COMPANY,

By ELIAS MICHAEL, President.

NATIONAL SURETY COMPANY OF NEW YORK,

[SEAL.] By W. D. HEMENWAY, Resident Vice President.

ATTEST: FRANK R. GRAY,

Resident Assistant Secretary.

Taken and approved by me this 7th day of December, 1907.

DAVID P. DYER,

United States District Judge.

PETITION AND ORDER MAKING AN ADDITIONAL
PARTY DEFENDANT.

(From *Westinghouse vs. Boyden Power Brake Co.*, 170 U. S. 537, 42
L. Ed. 1136.)

*In the Circuit Court of the United States for the Dis-
trict of Maryland.*

GEORGE WESTINGHOUSE, JR., and THE WESTING-
HOUSE AIR BRAKE COMPANY,

vs.

BOYDEN POWER BRAKE COMPANY; GEORGE A. BOY-
DEN, President; CHARLES B. MANN, Secre-
tary, and WILLIAM WHITRIDGE, Treasurer.

PETITION OF THE BOYDEN BRAKE COMPANY.

*To the honorable the judges of the Circuit Court of the
United States for the District of Maryland:*

The petition of the Boyden Brake Company respect-
fully represents that since the filing of the bill in this
case, the said Boyden Power Brake Company assigned
unto your petitioner all its right, title and interest in
the patents mentioned in said bill of complaint, and also
all the property of the said Boyden Power Brake Com-
pany of every kind and description; all its property,
choses in action and estate of every description whatso-
ever; and that it is the successor of the said Boyden
Power Brake Company, and as such is engaged in the
manufacture of the fluid pressure of the brake appara-
tus mentioned in said bill of complaint, and it prays this
honorable court that it may be substituted as defendant
in said case, and have leave to answer the said bill of com-
plaint.

And as in duty, etc.

COWEN & CROSS,
BARTON & WILMER, Solicitors.

ORDER.

On the foregoing petition, it is, this 10th day of February, 1890, ordered by the court that the said Boyden Brake Company be made party defendant in said cause, and that it have leave to answer therein.

THOS. J. MORRIS, Judge.

PETITION FOR REHEARING.

(From *Lockwood vs. Wickes*, 75 Fed. Rep. 118, 21 C. C. A. 257.)

To the Honorable United States Circuit Court of Appeals for the Eighth Circuit:

Your petitioners, the above-named appellants, J. E. Lockwood, C. H. Upton and N. Nyberg, co-partners as Lockwood, Upton & Co., respectfully petition this Honorable court for a rehearing of the appeal herein, and that the opinion of this court heretofore filed be set aside and judgment entered sustaining the appeal and reversing and setting aside the decree for injunction below; and for reasons submit as follows, to-wit:

That the court erred—

First. In finding that the injunction was granted at the instance of defendants.

Second. In finding that the defendants were not entitled to appeal from the interlocutory decree granting the injunction.

Third. In holding that error in granting the decree excluded the defendants from relief by appeal.

Fourth. In holding that the appeal from the interlocutory decree granting the injunction was not authorized by law.

Fifth. In holding that an appeal from an interlocutory decree granting an injunction was not intended to be authorized by Congress.

Sixth. In holding that it has generally been supposed that the Act of March 3, 1891, was intended to apply

only to orders for preliminary injunctions, and that there are no decisions to the contrary.

Seventh. In holding that to permit an appeal from an interlocutory decree granting an injunction would increase the burden of expense of litigation.

Eighth. In holding that such appeal would involve more than one hearing of the same questions by the Appellate Court.

Ninth. In that it did not find that the decree for injunction was improperly granted; that complainant's patent was neither valid nor infringed; and reverse the interlocutory decree and order that the injunction be set aside and the decree be dismissed at complainants' cost.

J. E. LOCKWOOD,
C. H. UPTON and
N. NYBERG,
Appellants.

By ROBERT H. PARKINSON.

We hereby certify that the foregoing petition for rehearing is, in our opinion, well founded in law and ought to be granted.

By ROBT. H. PARKINSON.
P. H. GUNCKEL,
Counsel for Appellants.

**BILL FOR SPECIFIC PERFORMANCE, BASED ON
ORAL CONTRACT TO CONVEY PATENTS;
WITH ANSWER.**

(From *Pressed Steel Car Company vs. Hansen*, 137 Fed. Rep. 403, 71 C. C. A. 207.)

BILL.

The Pressed Steel Car Company, a corporation duly created, organized and operating under and by virtue of the laws of the State of New Jersey and having its principal office in Jersey City, in said district and State

of New Jersey, and a citizen and inhabitant thereof, brings this, its Bill of Complaint, against John M. Hansen, of Pittsburg, in the State of Pennsylvania, and a citizen of and an inhabitant within the State and Western District of Pennsylvania.

And thereupon your orator complains and says that your orator was incorporated under the laws of the State of New Jersey on or about the 12th day of January, 1899, and to, as thereafter it did, succeed to the business, good will, patents, trade-marks, etc., of the Schoen Pressed Steel Company, with manufacturing works located at Pittsburg, in the State of Pennsylvania, where it had been for several years prior thereto successfully carrying on the manufacture of trucks, truck-frames, bolsters, center plates and frames and pressed steel cars, and of the Fox Pressed Steel Equipment Company, with manufacturing works located at both said Pittsburg and Joliet, in the State of Illinois, where it had likewise for several years prior thereto successfully carried on the manufacture of similar pressed steel articles and shapes, and that since its said incorporation, it has and is now continuing such manufacturing business on, however, an enormously enlarged and increasing scale, especially in the manufacture of trucks, truck-frames and pressed steel cars, the designs and construction of which are throughout and in all substantial and essential details, covered by letters patent of the United States owned by your orator, and mostly acquired by it from its aforementioned predecessors, in addition to such as has since been issued to it as assignee, for inventions and improvements made and developed in its works by this respondent and other of its employees within the scope of their employment, and duly assigned to it in obedience to an understanding and agreement to duly assign to your orator all such inventions and improvements made while in its employ.

And your orator further shows unto your honors, that the respondent, John M. Hansen, was, for several years prior to your orator's incorporation, in the employ of the afore-mentioned Schoen Pressed Steel Company, in various capacities, and finally in that of Chief Engineer, whereupon the said respondent entered your orator's upon its incorporation, succeeded to the business, good will, etc., of the said Schoen Pressed Steel Company, which position he continued to occupy until your orator, employ as its Chief Engineer, under an agreement and understanding to devote his entire time, ability and skill to your orator's business and its advancement, and that all inventions or improvements that he might make during the period of his said employment, and all letters patent that might be obtained therefor, should be the sole property of your orator, which position he continued to occupy—in addition to that of assistant to the president, to which he was assigned on or about October 1, 1900—until the 1st day of January, 1902, when he left your orator's employ; that as your orator's Chief Engineer, the respondent had the charge, direction and control of the drafting, engineering and construction department of your orator's business, and especially that of the developing of working drawings and the designing, inventing and developing of new constructions and improvements upon, or relating to, the trucks, truck-frames, pressed shapes, pressed steel cars, and other articles manufactured by your orator, and for the manufacture of which your orator was incorporated.

And your orator further shows unto your honors, that the respondent, by reason of his ability and the training and experience which he has acquired while in the employ of your orator's predecessor, the Schoen Pressed Steel Company—for when he entered the employ of that company he had substantially no training or experience in, or relating to, the designing or constructing of pressed

steel cars, or of any parts relating thereto, all such training having been acquired by him while in the employ of that company,—was, when he entered your orator's employ an engineer, having a thorough knowledge of the business, for the carrying on of which your orator was incorporated, and, of what was still requisite and necessary to fully perfect and develop that manufacturing business and in every way qualified for the position of its Chief Engineer,—a position of great trust and responsibility,—and with every probability that he would by reason of his aforesaid ability, training and experience, succeed, as he thereafter did, in making valuable inventions and improvements in the line of your orator's manufacture, and in realization thereof by your orator, it was a condition of his employment, as Chief Engineer, and in part consideration for the salary paid to him as such and his employment as such implied, and as upon the express understanding and agreement by him, that all designs, inventions and improvements that he might make or develop, while in your orator's employ, and all letters patent that might be obtained therefor, should become, and be, the sole and exclusive property of your orator, and that for all such designs, inventions and improvements, if found or regarded as patentable, he would, from time to time, as he made or developed such designs, inventions or improvements, disclose the same to your orator's solicitor, and, through him, and at your orator's expense, make all necessary and proper applications for letters patent, and execute all necessary and proper papers to that end, and that he would, from time to time, as such applications were executed and filed, likewise execute and deliver to your orator, with such applications, properly executed assignments, of all such applications, inventions therein specified and letters patent that might be granted thereon and therefor, with directions to the Commissioner of Patents to issue all such let-

ters patent to himself as assignor to your orator, of all his right, title and interest in and to all such letters patent, which should be the entire right, title and interest therein; that such being the terms and conditions of the respondent's employment by your orator, and in full appreciation and consideration therefor, and of the inventions and improvements that he might make and letters patent that he might obtain therefor, he was paid by your orator a salary at the rate of \$4,000 per year to January 1, 1900; at the rate of \$5,000 per year to September, 1900; at the rate of \$6,000 per year to October 1, 1901; and at the rate of \$10,000 per year down to January 1, 1902, when he left your orator's employ.

And your orator further shows unto your honors that the respondent, having entered into the employ of your orator, as its Chief Engineer, upon the terms and conditions hereinbefore set forth, proceeded to, and did thereafter, and until about the middle of December, 1901, devote his entire time, ability and skill to your orator's business and to its advancement, and in the course thereof made many valuable inventions and improvements in, for and relating to your orator's manufacture, and in obedience to and in compliance with the implied and express terms of his said employment, as Chief Engineer and from time to time as he made such inventions and improvements, disclose the full character and extent thereof to your orator's solicitor, who thereupon prepared all necessary and proper applications for letters patent therefor, which were duly executed by the respondent, and who, at the same time, duly executed proper assignments to your orator, of all such inventions and applications for letters patent therefor and letters patent that might be granted thereon and therefor, except as hereinafter set forth, with directions to the Commissioner of Patents to issue all such letters patent to himself as assignor to your orator; that all such

letters patent did so issue to your orator, as assignee of the respondent, that is to say, letters patent of the United States No. 32,543, of April 17, 1900, to John M. Hansen, Assignor to your orator, for "Design for an End Sill for Cars;" No. 647,927, of April 17, 1900, to Charles T. Schoen and John M. Hansen, Assignors to your orator, for "Metallic Car;" No. 648,884, of May 1, 1900, to Charles T. Schoen and John M. Hansen, Assignors to your orator, for "Door-Operating Device for Hopper-Bottom Cars;" No. 649,981, of May 15, 1900, to John M. Hansen, Assignor to your orator, for "Brake-Beam;" No. 650,791, of May 29, 1900, to John M. Hansen, Assignor to your orator, for "Pressed Steel Pole;" No. 650,792, of May 29, 1900, to John M. Hansen, Assignor to your orator, for "Underframe for Railway Cars;" No. 662,698, of November 27, 1900, to Charles T. Schoen and John M. Hansen, Assignor to your orator, for "Draft-Rigging for Railway Cars;" No. 34,080, of February 12, 1901, to John M. Hansen, Assignor to your orator, for "Design for a Stop for Double Doors;" No. 673,849, of May 7, 1901, to Charles T. Schoen and John M. Hansen, Assignors to your orator, for "Metallic Cars;" No. 688,777, of December 10, 1901, to John M. Hansen, Assignor to your orator, for "Extension Side for Railway Car Bodies;" and No. 688,809, of December 10, 1901, to John M. Hansen, Assignor to your orator, for "Center-Dump Ballast Car;" all of which said letters patent were applied for and obtained at the sole expense of your orator and are now its sole and exclusive property, including two pending applications, serial No. 21,244, for "Underframe for Railway Cars," filed August 21, 1901; and Serial No. 73612, for "Body Bolsters for Railway Cars," filed August 28, 1901, and both of which were duly assigned to your orator by the respondent.

And your orator further shows unto your honors, that during the summer of 1901, and prior to October, 1901,

and while still in your orator's employ, the respondent made and developed in your orator's works, within its time, and by the aid of its other employees, and at its sole expense, certain other valuable inventions and improvements in, for and relating in its manufacture, the full character and extent of which he promptly communicated to your orator's solicitor, who thereupon prepared and forwarded to him for execution the proper and necessary applications for letters patent, embracing the said several improvements and inventions and accompanied, as usual, with proper assignments to your orator and containing the usual directions to the Commissioner of Patents that the letters patent granted thereon and therefor should issue to the respondent, assignor to your orator, whereupon the respondent did duly execute said applications for letters patent and returned them to your orator's solicitor for filing, but unaccompanied with the usual assignments therefor to your orator, which assignments the respondent has not only neglected, but still declines and refuses to execute and deliver to your orator, transferring to it the entire right, title and interest in and to the said inventions, applications for letters patent and letters patent that may be granted therefor and thereon, notwithstanding the fact that the said inventions, applications for letters patent, and letters patent may be granted therefor and thereon, belong to and are the sole and exclusive property of your orator; that the extent and character of the said inventions and improvements were by the respondent, in his capacity as your orator's Chief Engineer, and in the usual course of business, communicated to your orator's solicitor, in the form of blue prints of working drawings, and full accompanying description, during the month of October, 1901, and with instructions to prepare the necessary applications for letters patent therefor and to return the same for execution; and that thereupon your orator's solicitor

proceeded to and did prepare the proper and necessary applications for letters patent therefor, which applications—seven in number—he forwarded by mail to respondent, at your orator's office in Pittsburg, Pennsylvania, on November 8th, November 18th, December 7th, December 10th, December 12th, December 14th and December 16th, 1901, and accompanied with the usual and proper assignments of said applications and letters patent that might be granted therefor and thereon, with directions to the Commissioner of Patents to issue the same to the respondent, assignor to your orator, and with request that the respondent promptly execute said applications and assignments, and so executed return them to your orator's solicitor for filing and properly recording in the Patent Office in accordance with the past practice; that said applications were retained by the respondent until on or about the 7th day of January, 1902, when, having properly executed them, he returned them to your orator's solicitor for filing, but unaccompanied with the usual assignments to your orator, which had been sent to him for execution with the said applications, with the single exception of the application for "Underframe for Box Cars," the assignment for which to your orator he did duly execute and return to your orator's solicitor with the said applications, and assigning as his reason for neglecting and refusing to execute the other assignments to your orator covering the other six applications, that, "In view of the fact that I have left the Pressed Steel Car Company, and have organized a new company, it is my desire to retain what of these patents I can for myself;" that the said applications having been so returned to your orator's solicitor, and wherein he was appointed the solicitor to prosecute said applications to an allowance in the Patent Office, he, on the 9th day of January, 1902, filed the said applications, viz: Serial No. 89,053, for "Truck-Frame for Railway

Cars;" Serial No. 89,054, "Truck-Frame for Railway Cars;" Serial No. 89,055, "Truck-Frame for Railway Cars;" Serial No. 89,056, "Under-Frame for Box Cars," Serial No. 89,057, "Swinging-Motion Truck-Frames for Railway Cars;" Serial No. 89,058, "Hopper-Bottom Cars;" Serial No. 89,059, "Bolster Truck for Railway Cars," and which applications are now pending in the Patent Office of the United States; and with the single exception of the application Serial No. 89,056, the respondent has neglected and refused to assign said applications to your orator, to whom they belong, and at whose sole expense said applications were prepared and filed by your orator's said solicitor.

And your orator further shows unto your honors, that your orator's executive officer did not know, and was not advised until on or about the 10th day of January, 1902, of the neglect and refusal of the respondent to assign to your orator the said six pending applications and letters patent that might be granted thereon or therefor, and with the necessary and usual directions to the Commissioner of Patents to issue all such patents to your orator as his assignee; whereupon your orator, through its executive officer, notified this respondent of his neglect and refusal to so assign, and demanded that he forthwith execute such proper assignments to your orator of the said pending applications and letters patent that might be issued thereon or therefor, to whom they belong, the inventions and improvements of the said applications having been made and developed by the respondent while in your orator's employ, and, consequently, subject to and within the implied and express terms and conditions of his employment, as your orator's Chief Engineer, as hereinbefore set forth; yet, notwithstanding said notice and demand, respondent has refused, and still continues to refuse, to assign to your orator the said

inventions, pending applications therefor and letters patent that may be granted thereon or therefor.

And your orator further shows unto your honors that the aforesaid inventions and improvements of the respondent, as embodied in said six unassigned pending applications for letters patent, are of great value to your orator in its said manufacturing business, and that the respondent, while still in your orator's employ, and certainly as early as the months of October and November, 1901, took an active part in procuring two large contracts for cars embodying certain of the aforementioned inventions and improvements involved in said six unassigned pending applications, and that at no time during the period of the respondent's employment by your orator did he assert ownership or interest in the said inventions, pending applications therefor, and letters patent that might be granted or issued therefor or thereon, nor any right title or interest therein or thereto adverse to your orator's sole and exclusive right, title and interest therein and thereto.

And your orator further shows unto your honors, that the respondent, while still in your orator's employ, together with certain other of your orator's employees, including H. J. Gearhart and Peter F. McCool, conspired and confederated together for the formation of a corporation to engage in a competing business with your orator, and, in furtherance thereof, and, to that end, this respondent, and the said Gearhart and McCool, did, on the 13th day of December, 1901, and while still in your orator's employ publish in the "Pittsburg Dispatch" notice of their intention to apply for a charter for a corporation to be known as "the Standard Steel Car Company," to engage in "The Manufacture of Iron or steel or both, or of any other metal, or any article of commerce from metal or wood, or both, at Pitts-

burg, Pennsylvania;” and, thereafter, and after leaving your orator’s employ on the 31st day of December, 1901, they did obtain a charter for, and incorporate, The Standard Steel Car Company, the incorporators of which were this respondent and the said H. J. Gearhart and Peter F. McCool, with the avowed intention of engaging in the manufacture of pressed trucks, truck-frames, pressed steel cars, and like articles, in duplication of, and in competition with, like articles manufactured by your orator; and your orator believes that the respondent’s neglect and refusal to assign the said inventions, pending applications therefor and letters patent that may be granted and issued therefor or thereon, are a part of the conspiracy and confederacy under which the said Standard Steel Car Company was incorporated, and are prompted by the desire and intention, if possible, on the part of the respondent, to wrongfully reserve said inventions, applications for letters patent, and letters patent that may be granted and issued therefor or thereon, to the benefit, use and advantage of the Standard Steel Car Company, of which he is the majority stockholder, the articles of association of the said Standard Steel Car Company showing that: while it has a nominal capital of \$3,000,000, only 3,000 shares thereof, of the par value of \$300,000 have been issued, of which the said John M. Hansen subscribed for 2,500 and the said H. J. Gearhart and Peter F. McCool for 250 each.

And your orator further shows unto your honors that the amount involved in this controversy exceeds the sum of two thousand (\$2,000) dollars.

And so it is, may it please your honors, that the said respondent, well knowing the premises, and that your orator is the sole and exclusive owner of the said inventions embodied in the said six unassigned pending applications for letters patent, and, as such, entitled to

have assigned to it the said applications and letters patent that may be granted thereon, with directions to the Commissioner of Patents to issue such letters patent to himself as assignor to your orator, and that he should have so assigned, and ought now to duly assign them over to your orator, yet has neglected and refused, and still neglects and refuses so to do, all of which is contrary to equity and good conscience and tends to the manifest and irreparable injury of your orator in the premises.

In consideration whereof, and for as much as your orator is without remedy at law, and can have adequate relief only in this court, sitting as a Court of Equity, wherein alone matters of this and a like nature are properly cognizable and relievable: Now, to the end, therefore, that the respondent may, if he can, show reason why your orator should not have the relief herein and hereby prayed, and that he may make a full disclosure and discovery of all the matters aforesaid, and according to the best and utmost of his knowledge, remembrance, information and belief, full, true, direct and perfect answer (answer under oath being hereby expressly waived) make to the several allegations of this bill, as though specially interrogated relative thereto, and more especially that he answer particularly:

1st. Whether he did not enter your orator's employ as its Chief Engineer on its incorporation and remain in its employ until and including the 31st day of December, 1901.

2d. Whether he did not make the inventions or improvements set forth in the hereinbefore referred to pending applications for United States letters patent, Serial No. 89,053, 89,054, 89,055, 89,056, 89,057, 89,058, and 89,059, while in the employ of your orator and prior to the 1st day of November, 1901, and did not, during the month of October, 1901, disclose full information

as to those inventions or improvements, in the form of blue prints, drawings, tracings and accompanying descriptions, to William H. Finckel, the patent solicitor of your orator, with instructions to said Finckel to prepare the necessary applications for letters patent covering the said inventions or improvements.

3d. Whether the said Finckel, as solicitor of your orator, did not, in accordance with such instructions, prepare the necessary applications for letters patent, embodying the said inventions or improvements, and between the 8th day of November and the 17th day of December, 1901, forward such applications to him, and which were duly received by him in due course of mail, and each accompanied by an assignment, to be executed by him, assigning to your orator such application and the letters patent to be granted and issued thereon, with directions to the Commissioner of Patents to issue such patents to himself as assignor to your orator.

4th. Whether the referred to assignments which accompanied said applications for letters patent were not the same as those previously sent to him by your orator's patent solicitor, the said Finckel, accompanying the applications which said Finckel had previously prepared and forwarded to him, based upon and covering the inventions and improvements which he had previously made while in the employ of your orator, and which assignments he had always executed and returned with the corresponding applications for letters patent.

5th. Whether he did not retain the said above referred to seven applications for letters patent,—all of which he received from the said Finckel between the 6th day of November and the 18th day of December, 1901,—until on or about the 7th day of January, 1902, and then execute and return the same to the said Finckel,—by whom they were received on or about the 8th day of

January, 1902,—without executing and returning to the said Finckel the accompanying assignments intended to assign to your orator the said applications and letters patent to be granted thereon, with the single exception of the assignment of the application which became, when filed, Serial No. 89,056, which assignment he did execute and return to the said Finckel.

6th. Whether he has not neglected and refused, and does not still neglect and refuse, to assign to your orator the aforesaid six pending applications known as Serial No. 89,053, 89,054, 89,055, 89,057, 89,058, 89,059; and the letters patent that may be granted thereon, with instructions to the Commissioner of Patents to issue to your orator such patents, when granted.

7th. Whether he did not write to the said Finckel the several letters which are annexed to the said Finckel's affidavit entitled for use on motion for injunction herein and filed simultaneously with this Bill of Complaint, and did not send to the said Finckel the blue prints, drawings, and tracings referred to in the said several letters, the blue prints therein referred to being those referred to in the affidavit of the said Finckel.

And your orator prays that the respondent may be ordered and compelled to specifically convey and assign to your orator, by proper assignments and instruments in writing, each and every of the hereinbefore specified pending applications for letters patent of the United States, viz., Nos. 89,053, 89,054, 89,055, 89,057, 89,058; and 89,059; and the letters patent of the United States that may be granted thereon or for the inventions or improvements therein set forth, and with authority and direction to the Commissioner of Patents to issue all such patents to himself as assignor of the entire right, title and interest therein to your orator, or, if such letters patent issue *pendente lite*, that he be ordered and

compelled to so convey and assign each and every of them, and that, upon his failure to so convey, and assign to your orator, a Master be appointed by this Honorable Court, who shall be directed and authorized to, in the name of the respondent, make such conveyances and assignments to your orator as will fully possess it of all the right, title and interest in and to the said inventions and improvements, applications for letters patent and letters patent; and that the respondent be restrained and enjoined *pendente lite* and perpetually from conveying or assigning to any party or parties whomsoever, other than your orator, the said inventions or improvements embodied in the said six pending applications for letters patent, or the said six pending applications for letters patent, or the letters patent that may be granted or issued therefor or thereon, either in whole or part, or any right, title or interest therein, thereto or thereunder, and from granting any rights, privileges or licenses therein, thereto, or thereunder, and from cancelling the Power of Attorney given by him to William H. Finckel, of Washington, D. C., to prosecute said pending applications in the Patent Office, and from in any way interfering with the prosecution of the said pending applications in the Patent Office, and from abandoning or withdrawing the said pending applications, or any of them, and from in any manner interfering with the grant and issue of letters patent thereon and therefor, until the further order of this court, and that your orator may have such further and other relief as to this Honorable Court may seem meet and the equity of the case may require.

May it please your honors to grant unto your orator not only a restraining order and a writ of injunction *pendente lite* and perpetual, but also a writ of subpoena of the United States of America, directed to the said John M. Hansen, commanding him to appear and answer unto

this Bill of Complaint (answer under oath being hereby waived) and to abide and perform such order and decree in the premises as to the court shall seem meet, and be required by the principles of equity and good conscience.

PRESSED STEEL CAR CO.,
By F. N. HOFFSTOT, President.

BAKEWELL & BYRNES,
Solicitors for Complainant.

KNOX & REED,
JOHN R. BENNETT,
W. C. STRAWBRIDGE,
Of Counsel for Complainant.

UNITED STATES OF AMERICA, }
STATE OF NEW YORK, } ss.
COUNTY OF NEW YORK, }

F. N. Hoffstot, President of the Pressed Steel Car Company, the complainant in the foregoing bill named, being duly sworn, deposes and says: That he has read the said bill by him subscribed and knows the contents thereof, and that so far as the statements therein contained are within his own knowledge, they are true, and so far as they are derived from the information of others, he verily believes them to be true.

F. N. HOFFSTOT.

Subscribed and sworn to before me }
this third day of March, in the year }
nineteen hundred and two (1902). }

GEORGE H. SONNEBORN,
Notary Public,
New York County.

(Seal.)

ANSWER.

To the Honorable, the Judges of the Circuit Court of the United States in and for the Western District of Pennsylvania.

The answer of John M. Hansen, defendant, to the bill of complaint of the Pressed Steel Car Company, complainant.

This defendant saving and reserving unto himself, all and all manner of benefit and advantage of exception which can or may be had or taken to the many errors, uncertainties and other imperfections in said bill of complaint contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for him to make answer unto, answering, says as follows:

1. This defendant is not sufficiently informed as to the alleged incorporation of the complainant, the Pressed Steel Car Company, or of the Schoen Pressed Steel Company, or of the Fox Pressed Steel Equipment Company, set forth in the first paragraph of the bill of complaint, or of the right of succession of one company to its predecessor, or of the manufacture and sale by the said companies of each and all the specific articles enumerated in said first paragraph to admit the same as therein stated, and he therefore formally denies the same and leaves the complainant to make such proof thereof as it may be advised.

2. This defendant denies that the designs and constructions of the trucks and truck-frames and pressed steel cars made by complainant are throughout and in all substantial and essential details, covered by letters patent of the United States owned by the complainant and mostly acquired by it from its predecessors; and further denies that any of the letters patent issued to

the complainant as assignee of this defendant, or of any other of its employees known to this defendant, were duly assigned to the complainant in obedience to any understanding and agreement to assign to such complainant all such inventions and improvements made while in its employ, as stated in said first paragraph; and this defendant avers that all assignments to said complainant of inventions made by him and of patents procured by him as recited in said bill were voluntarily made by him without consideration, and were not made in accordance or compliance with any contract, agreement or mutual understanding, of any kind.

3. This defendant denies that when he entered into the complainant's employ as its chief engineer, or in any other capacity at any other time, he did so under any contract, agreement or mutual understanding that all inventions or improvements he might make during the period of his employment, or that all letters patent that might be obtained therefor, should be the sole property of complainant, as set forth in the second paragraph of the said bill of complaint; or that it was a condition of his employment as chief engineer, or in part consideration for the salary paid to him as such, or that his employment as such implied, or that it was upon the express understanding and agreement by him that any designs, inventions, or improvements that he might make or develop while in complainant's employ, or any or all letters patent that he might obtain therefor, should become and be the sole and exclusive property of the complainant; or that he should disclose the same to the complainant's solicitor, or through him or at the complainant's expense make application for letters patent for the same or execute assignments of such applications or inventions to the complainant; or that it was upon such terms or conditions that he was paid the salaries he received from the complainant as its chief engineer, or as

assistant to the president, as set forth in the third paragraph of said bill of complaint; or that he entered the employ of the complainant upon the terms and conditions so as above set forth; or that in obedience to or in compliance with the implied or expressed terms of his said employment as chief engineer, or as assistant to the president, he made application for letters patent, and assigned the same to the complainant, as set forth in the fourth paragraph of said bill of complaint. But this defendant avers that there never was any contract, agreement or understanding between him and the said complainant, or its predecessors, the Schoen Manufacturing Company, or the Schoen Pressed Steel Company, or with any officer or representative of the said complainant, or the other companies, providing either in substance or in terms or effect that he should assign any design, inventions or improvements made or developed by him, or any patent obtained by him relating to car construction, or to any other subject to either or any of the said companies; that when he entered the complainant's employ as its chief engineer there was no agreement or understanding of any kind that all or any designs, inventions or improvements he should make or develop should become the sole property of the complainant; that it was not a condition of his employment, or in part consideration of the salary or upon understanding or agreement of any kind that any designs, inventions or improvements made or developed by him should be the sole and exclusive property of the complainant, or that he should make application and execute assignments to the complainant for the same or for patents thereon; and further avers that all assignments to the complainant of inventions made by him and of patents procured by him were made voluntarily by him and without consideration, and were not made in accordance or compliance with any contract, agreement or mutual understanding of any kind.

4. This defendant further answering avers that he was employed as chief engineer of the complainant company by Mr. Charles T. Schoen, who was then president of the said company and appointed the heads of the different departments; that prior to that time he had been in the employ of the Schoen Pressed Steel Company and its predecessor, the Schoen Manufacturing Company in different positions, being gradually advanced from draftsman into the engineering work, and finally appointed chief engineer; and that upon the formation of the complainant company, its said president, Mr. Schoen, informed him that he would be the chief engineer of the company, and that the engineering departments of the Schoen Pressed Steel Company and the Fox Pressed Steel Equipment Company would be consolidated and placed in his charge; and that he assumed the duties of chief engineer simply under such direction from Mr. Schoen, the said president, and without any question as to any inventions made or to be made by him or any right to patents therefor, and without any contract or agreement or understanding that he should make any assignment or other grant of any inventions made or patents procured by him to the complainant company.

5. This defendant further avers that the salaries paid to him by the complainant company were not in part in consideration of the assignments of inventions made by this defendant, but solely for his services as chief engineer, and later also as assistant to the president; that his salary was raised from time to time without request by him, and as the voluntary act of the company on account of his said services, as a large portion of the most important and valuable work of the company was intrusted to him; and that there was no contract, agreement or mutual understanding at any time when his salary was so increased, or at any other time, that such salary included in part a consideration for assignments

to the complainant of any inventions made by him or of patents granted to him; that his said service included the general supervision of the mechanical work of the company and the direction of the inspection of the cars manufactured, the soliciting for and closing of contracts for the purchase of cars; and that as assistant to the president during the last year of his employment by the complainant company, he did the principal work in obtaining and closing contracts, approximating \$12,000,000, the entire orders received by the company during that year being about \$30,000,000; and that the salary paid to him was lower than the salaries paid to the other general officers of the company (and less than his services were actually worth to the company) though his work was more pressing than and equally as valuable as that of any of the other officers.

6. This defendant further answering states that he has made the several inventions set forth in the fifth paragraph of the said bill of complaint for which applications for letters patent of the United States were filed on the 9th day of January, 1902, Serial Numbers 89,053, 89,054, 89,055, 89,056, 89,057, 89,058, 89,059; that except as to application Serial No. 89,056 the said applications were filed by him through Mr. Finckel as a solicitor in his employ and who was notified at the time of the filing of the same that they were his personal property, and who accepted his position as solicitor with that knowledge. He further states that the said applications for letters patent, Serial Numbers 89,053 and 89,058, 89,059 related to inventions which were developed in the works of the complainant company and by the aid of its employees and for the most part at its expense, and this defendant recognizes and does not intend to dispute that the complainant is legally entitled to exercise a shop-right license limited to its own manufacture, for the use of the inventions set forth in said three last recited ap-

plications, but alleges that such is the utmost extent of its rights therein or thereunder. Defendant further avers that the inventions set forth in the said other three applications, Serial Numbers 89,054 and 89,055, 89,057, relates to improvements in a truck-frames, substantially different from anything used by the complainant company in its manufacture of cars, and that the said inventions thereof were not made or developed in the complainant company's time, or with its facilities or at its expense, and he denies that the complainant company has, or is entitled to claim any title therein or any right or license for the use of the same, or any right of any kind under the same or in, to or under any patent or patents which may be issued therefor. Complainant's payment of certain patent solicitor's and other fees appertaining to said last recited applications, was made voluntarily by complainant, after this defendant had offered payment of the same, and after complainant had knowledge of this defendant's claim of exclusive right therein.

7. This defendant further answering admits that the improvement in what was known as the "Hansen Diamond Frame Truck" was agreed to be embodied in the cars for which certain orders were taken by the Pressed Steel Car Company in October and November, 1901, and that this defendant took an active part in procuring said orders; but this defendant avers that the use of such improvements in the cars to be built under these orders by the complainant will give to the complainant profits largely in excess of anything expended by it in the development of the said invention or improvement, and this defendant denies that said complainant is entitled to have or claim, in respect of the said invention, anything more than a shop-right license.

8. This defendant without waiving the benefit of any demurrer he may file or be entitled to file, further an-

swering, denies that he entered into any conspiracy or federation with H. J. Gearhart and Peter F. McCool, or either of them, or with any other person or persons, or took any unlawful steps, or did any unlawful act for the organization of a company to manufacture steel cars, and the several parts thereof, in competition with the steel cars manufactured by the complainant company; or that he took any steps to wrongfully reserve any inventions made by him during his employ by the complainant company to the benefit, use and advantage of either himself or of the Standard Steel Car Company as alleged in paragraph eight of the said bill of complaint; or that any conspiracy or arrangement was entered into by the said parties relating to or having any connection with the pending applications referred to in this bill of complaint. And he prays the same benefit hereof as if on demurrer to that portion of the bill. Defendant avers that the Standard Steel Car Company of which this defendant is president, was organized in lawful manner, and was not the result of any unlawful conspiracy whatever, and that it was organized for the manufacture more particularly of what might be called structural steel cars, as distinguished from the pressed steel cars made by the Pressed Steel Car Company, in which a majority of the parts were pressed shapes, while it is the expectation and intention that the cars to be built by the Standard Steel Car Company on the completion of its works will be more particularly made up of structural shapes and plates, and will differ substantially from complainant's cars in respect of any and all features covered by complainant's patents. He further avers that the Standard Steel Car Company is capitalized at \$2,000,000, that more than \$2,500,000 of this has been subscribed at par by responsible parties, and that all of the stock is to be subscribed at par, and all payable in cash, so that the

company will have the full amount of its capital invested in its works and in the development of its business; that about \$1,000,000 of the stock of the company, has been paid in; that it has purchased property for the erection of its plant, and that the buildings and all the machinery are under contract, and that orders have been given for the same amounting to over \$800,000, and the contracts for machinery and building require the completion and delivery by July 15, 1902.

In answer to the interrogatories propounded in the bill of complaint, this defendant says:

1. To the first interrogatory he answers: "Yes."

2. He admits that he made the inventions referred to in the second interrogatory and that he sent drawings, blue prints and descriptions to W. H. Finckel, a patent solicitor of Washington, D. C., to prepare applications therefor, but he denies that the said Finckel was complainant's patent solicitor as to the said applications, Serial Numbers 89,053, 89,054, 89,055, 89,057, 89,058 and 89,059, but avers that he was defendant's solicitor as to the same, and he also avers that the inventions of applications Serial Numbers 89,054, 89,055 and 89,057 were not made or developed or perfected in complainant's time.

3. He admits that the said Finckel prepared applications for letters patent embodying said six inventions and forwarded them to him, each accompanied by an assignment to the complainant, as stated in the third interrogatory, but denies that he ever authorized or instructed the said Finckel to prepare or send to him such assignments, and states that upon returning the executed applications for patents he instructed the said Finckel that he did not desire to assign the same to the complainant company, and that the said Finckel filed the applications for patents after receiving such informa-

tion and when acting as defendant's personal attorney in fact, or solicitor for said applications.

4. Not having all the assignments before him, nor having access thereto, this defendant cannot answer this interrogatory further than he has already answered it in and by the averments and denials of his foregoing answers.

5-7. He admits the truth of the fact set forth in interrogatories 5, 6 and 7, but he denies any conclusions of law favorable to complainant otherwise than as already admitted, and he specifically denies that the complainant has any right to the assignments of said several unassigned applications for patents referred to in said bill of complaint, for the reason that there never was any contract or agreement providing that this defendant should assign to the complainant the inventions made or patents procured while in its employ, nor was any consideration ever paid, or agreed to be paid, therefor. This defendant prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

J. M. HANSEN.

KAY & TOTTEN,
Solicitors for Defendant.

JAMES I. KAY,
G. H. CHRISTY,
WM. SCOTT,
Of Counsel.

UNITED STATES OF AMERICA,
WESTERN DISTRICT OF PENNSYLVANIA, } ss.

Before me, the subscriber, duly authorized to administer oaths, personally came John M. Hansen, the defendant named in the foregoing answer, who being duly sworn, deposes and says that so far as the statements

therein contained are within his own knowledge they are true, and so far as they are derived from the information of others he verily believes them to be true.

J. M. HANSEN.

Sworn to and subscribed before me this 29th day of April, A. D. 1902.

ARTHUR L. OVER,
Notary Public.

(Seal)

(My commission expires February 27, 1905.)

**BILL FOR SPECIFIC PERFORMANCE, BASED ON
WRITTEN CONTRACT TO CONVEY PATENTS;
WITH ANSWER AND EXHIBITS.**

(From *Mississippi Glass Company vs. Nicklas Franzen*, 143 Fed. Rep. 501, 74 C. C. A. 135.)

Your orator, The Mississippi Glass Company, a Missouri corporation, brings this, its bill of complaint, against Nicklas Franzen, a citizen of the State of Pennsylvania, and an inhabitant of the Western District of said State.

And thereupon, your orator complains and says:

First. That it is now and at all times hereinafter mentioned has been a corporation duly organized under and existing by virtue of the laws of the State of Missouri, and at all the times hereinafter mentioned was, and now is, engaged in the manufacture and sale of glass, wire glass and glassware, having a factory therefor at Port Allegany, in the county of McKean and State of Pennsylvania.

Second. The defendant is a citizen of the State of Pennsylvania and an inhabitant of the Western District of that State.

Third. The amount in controversy herein, exclusive of interest and costs, exceeds the sum or value of two thousand dollars (\$2,000).

Fourth. On or about the fourth day of September, 1901, the defendant entered into a contract in writing with your orator, a copy of which contract is attached to this bill, marked "Exhibit A" and made a part hereof. The defendant, at the time of the making of said agreement, was given employment by your orator and in consideration therefor covenanted as set forth in said contract that

"All inventions and discoveries made by (him) during the term of his employment, shall at all times and for all purposes be regarded as acquired and held by (him) in a fiduciary capacity and solely for the benefit of the employer (your orator)."

The contract contained the further covenant:

"That the employee (the defendant) will, when required, make and execute any and all assignments in writing which may be deemed by the employer (your orator) proper or necessary to transfer and vest in the employer (your orator) the entire right, title and interest in all inventions and discoveries made by the employee (the defendant) during the term of his employment."

Fifth. The defendant continued in the employment of your orator under the terms of the contract, "Exhibit A," up to the 9th day of May, 1903, and during the term of said employment, as your orator is informed and verily believes, and now charges the fact to be, invented a certain new and useful improvement in the method of manufacturing wire glass, and thereafter, to-wit: on the 5th day of June, 1903, applied for letters patent of the United States thereon. Said application was filed in the Patent Office on June 17, 1903, and is Serial Number 161,901 and letters patent of the United States Number 741,125 were issued under said application on October 13, 1903.

Sixth. Your orator is informed and verily believes, and charges the fact to be that said letters patent are for an invention and discovery made by the defendant wholly at the expense of your orator and during the course of the employment of defendant, and that said defendant in devising and inventing the same was only performing his duty as an employee of your orator under the terms of the contract, "Exhibit A." The manufacture of wire glass is one of the businesses in which your orator is lawfully engaged under the terms of its charter and in which it was so engaged during the entire period of the employment of the defendant under the contract, "Exhibit A." Your orator says that it is in equity and good conscience the true and rightful owner of the Letters Patent No. 714,125, dated October 13, 1903, issued to the said defendant, as the equitable assignee of the defendant, and that said defendant is bound in equity and good conscience to make an assignment thereof to your orator.

Seventh. Your orator further shows, on information and belief, that during the term of the employment of the defendant the latter invented and devised certain other new and useful improvements in machinery or apparatus used in connection with the manufacture of wire glass by the method described in the before mentioned Letters Patent No. 741,125, and thereafter made application for letters patent of the United States therefor, which said application is now on file in the Patent Office and is Serial No. 164,495. Your orator charges on information and belief that said application is for letters patent on an invention or discovery made by the defendant wholly at the expense of your orator and during the course of the defendant's employment by your orator; and the said defendant in devising and inventing the same was only performing his duty as an employee of your orator under the terms of his contract, "Exhibit A."

Eighth. Your orator shows that it is in equity and good conscience the true and rightful owner of the invention described in application Serial Number 164,495, and that if the same includes any patentable claims, your orator is entitled to the patent to be issued thereon as the equitable assignee of the defendant and that the said defendant is bound in equity and good conscience to make an assignment to your orator of his rights in said application and of the letters patent to be issued thereon.

Ninth. Your orator further charges on information and belief that the defendant's resignation from the employment of your orator on the 9th day of May, 1903, was part of an attempt by the defendant to file the applications, Serial Numbers 161,901 and 164,495, and to obtain letters patent thereon without regard to the rights of your orator in the premises. Your orator is further informed and verily believes that the said defendant had no experience in the manufacture of wire glass prior to his employment by your orator and that whatever knowledge he has gained of such manufacture has been gained while in the employment of your orator under the terms of the said contract, "Exhibit A."

Tenth. The defendant has made no discovery to your orator of the inventions so made by him as above set forth and as described in the applications for letters patent, Serial Numbers 161,901 and 164,495, and though upon discovery of the fact that said applications had been filed your orator often requested defendant so to do, yet the said defendant has refused and continuously refused to make and execute assignments in writing to your orator for the purpose of transferring and vesting in your orator the entire right, title and interest in the said inventions and discoveries. That your orator has been, at all times, ready and willing and has offered to pay the costs and charges incident upon the making of such transfers and assignments and has offered to em-

ploy, at its expense, a solicitor for the purpose of drawing the same. That your orator has done and offered to do, and is now ready and willing to do all things required of it to be done under and by virtue of the said contract of employment, and to comply in every manner with all requirements reasonably made under the terms of said contract and the relationship between your orator and the defendant.

To the end, therefore, that your orator may have that relief which it can only obtain in a court of equity, and that the said defendant may answer the premises but not upon oath or affirmation, the benefit whereof is expressly waived by your orator, your orator now prays:

1. That your Honors may decree that the defendant, Nicklas Franzen, in specific performance of the agreement, Exhibit A, made between him and your orator, assign to your orator by proper instruments in writing, his entire right, title and interest in and to the Letters Patent No. 714,125, dated October 13, 1903, and in and to the application for letters patent, Serial Number 164,495, and the letters patent to be granted thereon.

2. That the defendant may be enjoined and restrained during the pendency of this action from in any manner disposing of or dealing with the Letters Patent No. 741,125 dated October 13, 1903, and the application for letters patent, Serial Number 164,495, and from granting any license thereunder.

3. That a writ of subpoena in due form of law, according to the rules of this Honorable Court, be directed to Nicklas Franzen, the defendant, commanding him on a certain day to appear and answer unto this bill of complaint, but not upon oath or affirmation, the benefit whereof is expressly waived, and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience.

4. That your Honors may decree such other and further relief as the equity of the case requires and to your Honors seems meet.

And your orator will ever pray, etc.

ARTHUR J. BALDWIN,

Solicitor for, and of Counsel for Complainant.

UNITED STATES OF AMERICA,
STATE OF NEW YORK,
COUNTY OF NEW YORK, } ss.:

Before the undersigned authority, a notary public of the State and county aforesaid, at New York City, on this 10th day of December, 1903, personally appeared Edward W. Humphreys, who, being duly sworn according to law, says that he is vice-president of the Mississippi Glass Company, a corporation of the State of Missouri, which is the complainant presenting the foregoing bill. That he has read the said bill. That so far as the averments and representations therein purport to be within the knowledge of the complainant's officers they are each and all true, and that so far as the said averments and statements purport to be upon information and belief they are stated in strict accord with credible information and are verily believed by affiant to be true.

EDWARD W. HUMPHREYS,

Sworn to before me this 10th day of December, 1903.

(L. S.) HENRY SCHOENKERR,
Notary Public, Kings County, certificate filed in New York City.

“Exhibit A.”

This agreement made this fourth day of September, 1901, by and between the Mississippi Glass Company, a Missouri corporation, hereinafter called “the employer,” and Nicklas Franzen, hereinafter called “the employee,”

Witnesseth, that in consideration of the employment

by said Mississippi Glass Company of the person above named as employee, it is agreed:

First. That the employer is engaged in the manufacture of glass, glassware, and mechanical devices in connection therewith, and that such manufacture is carried on by means of certain secret formulae, methods, processes, tools, machinery, patterns and appliances, and the same are the property of the employer, and intended to be kept and guarded by the employer as secrets; and that all knowledge and information which the employee now possesses or shall hereafter acquire respecting such secrets, and all inventions and discoveries made by said employee during the term of his employment shall at all times and for all purposes be regarded as acquired and held by the employee in a fiduciary capacity and solely for the benefit of the employer.

Second. That the employee shall not during the term of such employment, or thereafter, in any manner whatsoever, except to the extent authorized in writing by the employer, disclose, make known or give any information respecting any such secrets, and shall not permit any person or persons to acquire any knowledge or information respecting the same, if able to prevent.

The employees shall not at any time have in his possession any sort of a description or representation of such secrets, formulae, methods, processes, tools, machinery, patterns and appliances.

Third. No breach by the employer of any contract of employment or of any other contract, and no act of omission by the employer, shall be deemed or considered an excuse or justification for any violation of any of the obligations herein contained on the part of the employee.

Fourth. That the employee will, when required, make and execute any and all assignments in writing which may be deemed by the employer proper or necessary to

transfer and vest in the employer the entire right, title and interest in all inventions and discoveries made by the employer during the term of his employment.

In witness whereof, the employee above named has hereunto subscribed his name and affixed his seal the day and year first above written.

(Signed) NIK FRANZEN.

In the presence of

(Signed) LOUIS LEMAIRE,

(Signed) LASALLE GIRTS.

STATE OF PENNSYLVANIA, }
COUNTY OF MCKEAN. } SS.

Nik. Franzen, being duly sworn, says: I am the employee named in the foregoing instrument. I signed and sealed the same as my own free and voluntary act and deed, with full knowledge of its contents. I further promise and swear that I will in good faith keep and perform all the obligations of said agreement.

Sworn to before me this 29th day of March, 1902.

(Signed) M. C. FIELD,

Justice of the Peace, Port Allegany, Pennsylvania.

Commission expires May 7, 1906.

ANSWER.

The answer of Nicklas Franzen to the Bill of Complaint of the Mississippi Glass Company.

This defendant, now and at all times hereafter saving and reserving to himself all benefit or advantage of exception which can or may be had or taken to the many errors, uncertainties, and other imperfections in the said Bill of Complaint contained, for answer thereunto, or unto so much thereof as he is advised that it is material or necessary for him to make answer unto, answering, says:

First. This defendant is not advised, save by the Bill of Complaint herein, of the organization of the complain-

ant, nor of the powers conferred upon it by charter; denying therefore all material averments relative thereto, this defendant leaves complainant to make proof thereof.

This defendant admits that he is a citizen of the United States, and was, on the filing of the bill of complaint herein, resident within the Western District of the State of Pennsylvania.

Second. This defendant denies that on or about the fourth day of September, 1901, he entered into a contract in writing with the complainant, such as is set forth in "Exhibit A." He denies that he was given employment by complainant in consideration of either or any of the alleged covenants set forth in paragraph IV of the Bill of Complaint.

Defendant avers the facts to be these:

That on the 31st day of August, 1901, he entered into an agreement with the Mississippi Glass Company, and under that agreement entered the employ of the said Mississippi Glass Company upon September 4, 1901; that the copy of this agreement annexed hereto and marked "Defendant's Exhibit B," is a correct copy thereof; that subsequently, after he had continued in the employ of the Mississippi Glass Company for some time, and long after September 4, 1901, being requested so to do by the Mississippi Glass Company, he executed an agreement of which he believes "Exhibit A" to be a substantially correct copy. This agreement was in print; all the employees of the Mississippi Glass Company were required to sign duplicates thereof. Defendant signed this agreement because requested so to do by the Mississippi Glass Company, but received no additional consideration beyond the wages which he had up to that time received in the course of his employment.

Third. This defendant admits that from September 4, 1901, to May, 1903, he continued in the employ of the Mississippi Glass Company; he denies, however, that

this employment began or continued under the terms of the contract, "Exhibit A."

This defendant denies that during the said term of his employment, or during any term of employment by the Mississippi Glass Company, he invented a certain new and useful improvement in the method of manufacturing wire glass, as averred in paragraph V of the Bill of Complaint.

Fourth. Defendant admits that letters patent of the United States No. 741,125, were granted him on October 13, 1903. He denies that the said letters patent are for an invention and discovery made by him wholly or at all at the expense of complainant; denies that the said invention and discovery were made during the course of any employment by complainant; denies that in devising or inventing the said invention and discovery he was performing any duty as an employee of complainant under the terms of the contract, "Exhibit A," or under the terms of any other contract with said company.

Defendant denies that complainant is in equity or in good conscience the true and rightful owner of the said patent as equitable assignee thereof or otherwise; and denies that he is bound in equity or in good conscience to make an assignment thereof to complainant.

Defendant avers the facts to be these:

That prior to any employment by the Mississippi Glass Company, and prior to August 31, 1901, the defendant invented a certain new and useful improvement in the method of manufacturing wire glass, for which letters patent of the United States No. 741,125 were granted him on October 13, 1903; that subsequent to the termination of his employment by the Mississippi Glass Company, defendant took steps to protect the said invention made by him prior to August 31, 1901, as aforesaid; and that to that end he filed an application in the United States Patent Office on June 17, 1903, which application

bore Serial Number 161,901, and in pursuance of which the said Letters Patent No. 741,125 were granted.

Fifth. Defendant denies that during the said term of his employment, or during any term of employment by the Mississippi Glass Company he invented or devised certain other new and useful apparatus used in connection with the manufacture of wire glass, as averred in paragraph VII of the Bill of Complaint.

Sixth. Defendant admits that he has invented certain new and useful improvements in machinery or apparatus used in connection with the manufacture of wire glass; and that he has made application for letters patent of the United States therefor; and that such application is now on file in the Patent Office, and is Serial Number 164,495. He denies that the said application is for letters patent on an invention or discovery made by him wholly or at all at the expense of complainant; denies that the said invention or discovery was made during the course of any employment; denies that in devising and inventing the said invention or discovery he was performing any duty as an employe of complainant under the terms of the contract, "Exhibit A," or under the terms of any other contract with said company.

Defendant denies that the complainant is in equity or in good conscience the true and rightful owner of the invention described in application Serial Number 164,495; denies that complainant is entitled as equitable assignee thereof or otherwise to the patent which may be issued thereon; and denies that he is bound in equity or in good conscience to make an assignment to complainant of his rights in said application and of the letters patent which may be issued thereon.

Defendant avers the facts to be these:

That prior to any employment by the Mississippi Glass Company, and prior to August 31, 1901, he, the defendant, invented a certain new and useful improvement in

machinery, for making wire glass; that, subsequent to the termination of his employment by the Mississippi Glass Company, defendant took steps to protect the said invention made by him prior to August 31, 1901, as aforesaid; and that to that end he filed an application for letters patent in the United States Patent Office, which application bears Serial Number 164,495.

Seventh. Defendant submits that, in respect to any alleged invention made by him for which application for letters patent is, or may be pending, complainant is entitled to no disclosure and to no information; that all such applications are confidential as between the applicant and the Patent Office, and that until complainant shows itself entitled to disclosure respecting such matter, defendant is entitled to protection in maintaining all such matters secret. Defendant denies that during any employment of him by the Mississippi Glass Company he made any invention or discovery for which he has made application for letters patent. To seek to obtain information regarding any application for letters patent which is or may be pending and made by this defendant, under pretense of the enforcement of any alleged agreement between complainant and defendant, is an unlawful and inequitable expedient, which, it is submitted, is contrary to equity and to good conscience. Defendant denies the fact; and submits that, in so doing, he has fully answered complainant, in so far as complainant is entitled to any answer.

Eighth. Defendant avers in respect to the contract, "Exhibit A," that, in so far as it contains covenants or obligations not contained in the contract, "Defendant's Exhibit B," it was given without consideration and is void; and further that, in respect to its covenants and provisions, and particularly in respect to the covenants and provisions recited in paragraph IV of the Bill of Complaint, it is contrary to equity and good conscience, and is void.

Ninth. This defendant admits that he resigned from the employment of the Mississippi Glass Company in the month of May, 1903; he denies that his resignation was an attempt or any part of an attempt to file any application or applications, or to obtain any letters patent or letters patents in violation of any right or rights of complainant therein.

Tenth. This defendant, denying that he has done any act or thing, or is doing any act or thing, or proposes to do any act or thing in violation of any right secured to complainant by or under the contract, "Exhibit A," or any other contract, denies that complainant is entitled to an assignment of any invention, application for letters patent, or letters patents, or to an injunction, or to any other relief; without this, that any other matter or thing in the Bill of Complaint contained, material or effectual in law to be answered unto, confessed and avoided, traversed, or denied, and not hereinbefore well and sufficiently answered unto, confessed and avoided, traversed, or denied, is true. Wherefore this defendant prays to be hence dismissed with his reasonable costs most wrongfully sustained.

NICKLAS FRANZEN

CHRISTY & CHRISTY,

Solicitors for Defendant.

UNITED STATES OF AMERICA,

WESTERN DISTRICT OF PENNSYLVANIA. } ss.

Before me, the subscriber, duly authorized to administer oaths, personally came Nicklas Franzen, the defendant herein, who, being by me duly sworn, deposes and says that the averments and statements contained in the foregoing answer are true.

NICKLAS FRANZEN.

Sworn to and subscribed before me this——day of
January, 1904.

Notary Public.

(Seal)

F. E. GAITHER,

“DEFENDANT’S EXHIBIT B.”

Agreement made this (31st) thirty-first day of August, 1901, between the Mississippi Glass Company, a corporation represented by Louis Lemaire, its agent, party of the first part, and Nicklas Franzen, of Floreffe, State of Pennsylvania, party of the second part.

Witnesseth. That the said party of the first part hereby employs party of the second part to work for it as assistant superintendent at its factory at Port Allegany, State of Pennsylvania, first party paying to second party for his services the sum of one hundred (\$100.00) dollars, payable semi-monthly from date hereof.

During the continuance of employment, said second party covenants, promises and agrees to and with the party of the first part to devote his entire time and attention to said employment, and to diligently and faithfully fulfill the duties of said employment to the best of his skill and ability. He will not reveal to any person any of the secrets or anything relating to the business of said party of the first part.

It is agreed between the parties hereto that either party may terminate said employment and this agreement by giving fifteen days notice in writing to the other party.

In witness whereof, the party of the first part, has executed this agreement by its agent, and the party of the second part has hereunto set his hand and seal the day and year aforesaid.

MISSISSIPPI GLASS COMPANY,
By LOUIS LEMAIRE, Agent.

Attest:

LASALLE GIRTS.

INTERVENING PETITION.

(From Sanitary Devices Mfg. Co. v. Sanitary Compressed Air Vacuum Co., not reported; in The United States Circuit Court, District of Colorado.)

(Omitted caption).

Your petitioner, The General Compressed Air Housecleaning Company, respectfully shows unto your honors that it is a corporation organized and existing under and by virtue of the laws of the State of Missouri, a citizen of said State, and having its principal place of business in the City of St. Louis, in said State; and that it is engaged in the business of manufacturing compressed air housecleaning machinery.

And your petitioner further shows unto your honors that there has been a bill in equity recently filed in this court by the Sanitary Devices Manufacturing Company, charging said defendants, Sanitary Compressed Air Vacuum Co., with infringement of letters patent of the United States, No. 695,162, of March 11, 1902, granted to Augustus Lotz, on March 11, 1902, for an improvement in an apparatus for cleaning carpets, by making, using, and selling machines containing and embodying said alleged invention, praying process and injunction restraining the further use or sale by the said Sanitary Compressed Air Vacuum Co., et al., of the said apparatus for cleaning carpets, alleged to be an infringement of the patent aforesaid.

And your petitioner further shows unto your honors that the said apparatus for cleaning carpets, alleged to be an infringement of the patent aforesaid, was manufactured by your petitioner at St. Louis, under letters patent Nos. 634,042, October 3, 1899; 663,943, December 18, 1900; (naming several other patents), and was purchased from it by the said (respondents), and your petitioner says that it has a large number of vendees throughout this country who are selling its apparatus for cleaning

carpets, similar in construction to those sold by said (respondents), and that the (complainants) threaten to bring suit against other vendees of your petitioners, thereby greatly injuring its business and unnecessarily harrassing its customers and multiplying suits.

And your petitioner further says that said defendants have not sufficient interest in the result of this suit to properly defend the same, and that your petitioner has great interest in the result of this controversy, in that if a decree be entered against the said (respondents) herein, and an injunction granted, as prayed in the bill of complaint herein, your petitioner fears that the said (complainants) will pursue its vendees and file suits against them, as it threatens to do, and that preliminary injunctions will be granted in such suits on the ground of prior adjudication of the validity of the patent, all of which will tend to greatly injure the business of your petitioner to his irreparable loss.

And your petitioner further shows unto your honors that the said (complainants) has never brought suit against your petitioner charging it with infringement of said patent, although your petitioner has been manufacturing, advertising, and selling an apparatus for cleaning carpets like those alleged to be an infringement in the bill of complainant herein, and that said (complainants) knew well that your petitioner was so doing long before they filed their bill herein.

Wherefore your petitioner prays that it may be made party defendant herein and be allowed to intervene, and be made defendant herein and to file an answer and to defend the same, and for all other and further relief.

THE GENERAL COMPRESSED AIR HOUSECLEANING CO.

By John S. Thurman, President.

Higdon & Longan,

Solicitors and of Counsel for
Petitioner.

United States of America,
 State of Missouri, } ss.
 City of St. Louis. }

On this 29th day of August, 1905, before me personally appeared John S. Thurman, President of The General Compressed Air Housecleaning Company, the petitioner herein, who, having been by me duly sworn, deposes and says that he has read the foregoing petition, subscribed by the complainant corporation by him as its President, and that the said petition is true of his own knowledge, except as to matters therein which are stated as of information and belief, and, as to those matters, he believes them to be true.

JOHN S. THURMAN.

Subscribed and sworn to before me, the day and year last aforesaid.

MARTIN P. SMITH,
 Notary Public.

(Seal)

ORDER GRANTING PETITION FOR LEAVE TO INTERVENE.

From Sanitary Devices Mfg. Co. Sanitary Compressed Air Vacuum Co., not reported; in the United States Circuit Court, District of Colorado.)

This cause being heard this 5th day of September, 1905, upon petition of the General Compressed Air Housecleaning Co., for leave to intervene and defend the same, said petition showing the said General Compressed Air Housecleaning Co. to be the manufacturer of the devices charged as infringement of the patent sued on herein, and counsel having been heard for the respective parties, it is ordered that the said petitioner have leave to intervene as defendant and to defend the same.

MOSES HALLETT, Judge.

PETITION FOR WRIT OF CERTIORARI.

(From Dowagiac Manufacturing Company vs. Minnesota Moline Plow Co., No. 875. The petition was granted by the Supreme Court, October term, 1910.)

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Dowagiac Manufacturing Company, a Michigan corporation, respectfully represents:

I. That in the case at bar the United States Circuit Court of Appeals for the Eighth Judicial Circuit has specifically overruled the United States Circuit Court of Appeals for the Sixth Judicial Circuit, on the same patent, on substantially the same infringement, and on substantially the same record (many of the depositions being stipulated into the case from the case in the Sixth Circuit). The ruling of the said Circuit Court of Appeals for the Sixth Judicial Circuit is in the following language:

“Complainant offered proof tending to show the profits made by defendants in sales of the entire structure without making any apportionment of them to the patented feature, as distinguished from the balance of the drill. It claimed the doctrine of apportionment to have no application; first, because although the patent contains but one novel element, the combination of that element with the others constitutes an appropriation of all of them in combination. In other words, the contention is, that because the Hoyt patent is a combination patent in which one novel feature is combined with several not novel, each and all of the elements, associated in that combination, are, for the purposes of an accounting, to be considered as appropriated by the patentee and if there is an infringement of the novel feature all the profits made by the infringer upon the whole combined structure are recoverable, and

that proof of those made by reason of the novel feature alone is unnecessary. Reliance for this contention is placed upon the cases of *McSherry Mfg. Co. vs. Dowagiac Mfg. Co.*, 89 C. C. A., 26, 160 Fed. 948, and *Brennan Mfg. Co. vs. Dowagiac Mfg. Co.*, 89 C. C. A. 392, 162 Fed. Rep. 472.

Without now analyzing these cases, it serves our present purpose to say, that if they support the contention of the complainant they seem out of harmony with the doctrine of the Supreme Court and our court as disclosed in many cases and particularly the following: *Garretson vs. Clark* (supra); *Tilghman vs. Procter*, 125 U. S. 136; *McCreary vs. Pennsylvania Canal Co.*, 141 U. S. 459; *Crosby Valve Co. vs. Supply Valve Co.*, 141 U. S. 441, 453; *Sessions vs. Romadka*, 145 U. S. 29; *Keystone Mfg. Co. vs. Adams*, 151 U. S. 139, 147; *Westinghouse Elec. & Mfg. Co. vs. Wagner Elec. & Mfg. Co.*, — C. C. A. —, 173 Fed. 361.

These cases have recently been considered by us in an opinion written by Van Devanter, Circuit Judge, in the case of *Brown vs. Lanyon Zinc Co.*, — C. C. A. —, 179 Fed. 309, where a conclusion was reached adverse to complainant's present contention.

These authorities make it clear, we think, that an apportionment of profits between the patented and unpatented parts of the drill was indispensably necessary. The invention did not inhere in the entire machine as an entity, but was only an improvement in a single element of an otherwise well known device."

There is thus absolutely adverse and contrary decisions by the said Courts of Appeals on the same state of facts and law.

II. That the rule of law relative to profits established by this court is that:

Where the patented invention is for "a complete thing, consisting of a certain combination of elements," resulting in a new or improved machine or manufacture, and the defendant in violation of complainant's rights under the patent has sold machines or manufactures which embody in their construction such invention, "the whole of it," thereby having been guilty of selling the patented machine or manufacture; in such a case the complainant is entitled to recover all the profits made by the defendant in the manufacture and sale of such infringing machines or manufactures. *Elizabeth vs. Pavement Co.*, 97 U. S. 126, 141; *Hurlbut vs. Schillinger*, 130 U. S. 456, 472; *Crosby Valve Company vs. Safety Valve Co.*, 141 U. S. 441, 453, 454.

III. That this court has ruled that "since the Act of July 8, 1870, in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the defendant, the complainant is entitled to recover the damages he has sustained in addition to the profits received." *Coupe vs. Royer*, 155 U. S. 582:

"There is a difference between the measure of recovery in equity and that applicable in an action at law. In equity, the complainant is entitled to recover such gains and profits as have been made by the infringer from the unlawful use of the invention, and, since the Act of July 8, 1870, in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the defendant, the complainant is entitled to recover the damages he has sustained, in addition to the profits received. At law the plaintiff is entitled to recover, as damages, compensation for the pecuniary

loss he has suffered from the infringement, without regard to the question whether the defendant has gained or lost by his unlawful acts—the measure of recovery in such cases being not what the defendant has gained, but what plaintiff has lost. As the case in hand is one at law, it is not necessary to pursue the subject of the extent of the equitable remedy; but reference may be had to *Tilghman vs. Procter*, 125 U. S. (31 L. Ed. 664), where the cases were elaborately considered and the rule above stated was declared to be established.”

IV. That it further appears as the established rule of law, from decisions of this court, that, in the absence of proof establishing a specific royalty or an established license fee or the sale of the separated invention, general evidence must necessarily be resorted to, the rule of this court being in the following language (*Suffolk vs. Hayden*, 3 Wall. 315-320, 18 Law. Ed. 76; 7 Brod. 405):

“It is also urged that the value of the improvement was not a proper subject for the consideration of the jury in estimating the damages. This may be admitted. But looking at the term value, in the connection in which it was used, it is quite clear that it had reference only to the utility and advantages or value of the use of the improvement over the old mode of cleaning cotton; not the value of the patent itself.

“This question of damages, under the rule given in the statute, is always attended with difficulty and embarrassment both to the court and jury. There being no established patent or license fee in the case, in order to get at a fair measure of damages, or even an approximation to it, general evidence must necessarily be resorted to. And what evidence could be more appropriate and pertinent than that of the utility and advantage of the invention

over the old modes or devices that has been used for working out similar results? With a knowledge of these benefits to the persons who have used the invention, and the extent of the use by the infringer, a jury will be in possession of material and controlling facts that may enable them, in the exercise of a sound judgment, to ascertain the damages, or, in other words, the loss to the patentee or owner, by the piracy, instead of the purchase of the use of the invention.

“It is proper to say, as was said in the court below, that the jury, in ascertaining the damages upon this evidence, is not to estimate them for the whole term of the patent, but only for the period of the infringement. A recovery does not vest the infringer with the right to continue the use, as the consequences of it may be an injunction restraining the defendant from the further use of it.”

V. That it further appears as an established rule of law, approved by this court, that where all of the proofs possible are before the court, it becomes the duty of the court in the exercise of a sound judgment to ascertain the damages so that justice may be done, the specific language approved by the court being the following language of the Court of Claims, in *McKeever vs. United States*, 14 Brodix 414; 23 O. G. 1525, which was specifically approved by this, the Supreme Court on appeal:

“It is apparent here that the claimant has produced about all the evidence that the nature of his case admits of; and it is to be noted that the defendants have produced no evidence whatever to controvert it. The claimant perhaps might have produced experts to estimate the value of the other inventor's original improvement, but the manufactured article has been before us, and it is manifest that the testi-

mony of such witnesses would have been entirely conjectural, and would amount to nothing more than substituting their judgment, from an inspection of the article, for that of the court.

“The rate of damages in patent cases may now be said to be generally (1) that the plaintiff may recover in equity the profits which the infringer has made from the use of the invention, or (2) that he may recover at law the profits which he, the plaintiff, has lost by reason of the defendant’s infringement; and that these profits lost, where it can properly be done, will be regarded as simply the fee which would have been charged if the infringer had produced a license. But in cases where the plaintiff has evinced an intention to exercise an exclusive use of his invention, and in cases where the sales of licenses have been too few to establish a criterion of their actual or market value, courts have sought for other elements or evidences to determine the profits lost. In *Suffolk vs. Hayden*, 3 Wall. R. 15 (7 Am. & Eng. 405), Mr. Justice Nelson said:

“The question of damages under the rule given in the statute is always attended with difficulty and embarrassment both to the court and jury. There being no patent or license fee in the case, in order to get at a fair measure of damages or even an approximation to it, general evidence must necessarily be resorted to. And what evidence could be more appropriate and pertinent than that of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results? With a knowledge of these benefits to the persons who have used the invention, and the extent of the use by the infringer, a jury will be in possession of the material and controlling facts that may enable them, in the exercise of a sound judg-

ment, to ascertain the damages, or, in other words, the loss to the patentee or owner by the piracy instead of the purchase of the use of the invention.' ”

VI. Your petitioner further shows that in the case at bar a fundamental error consists in assuming that the invention of the patent in suit is to a novel element and not to a true combination, the error of the court appearing in the following language:

“It (complainant) claimed the doctrine of apportionment to have no application; first, because although the patent contains but one novel element, the combination of that element with the others constitutes an appropriation of all of them in combination. In other words, the contention is, that because the Hoyt patent is a combination patent in which one novel feature is combined with several not novel, each and all of the elements, associated in that combination, are, for the purposes of an accounting, to be considered as appropriated by the patentee and if there is an infringement of the novel feature all the profits made by the infringer upon the whole combined structure are recoverable and that proof of those made by reason of the novel feature alone is unnecessary.”

Whereas, a consideration of the patent and the prior art shows that there was not even a single element that was novel but the structure of the patent was a true and novel combination, as held in the following decisions by the judges named therein:

Dowagiac Mfg. Co. vs. McSherry Mfg. Co., 101 Fed. Rep. 716, in the United States Circuit Court of Appeals for the Sixth Circuit, Judges Taft, Lurton and Day, affirming the decision of the United States Circuit Court for the Southern District of Ohio, Western Division, by Judge Clark.

Dowagiac Mfg. Co. vs. Minnesota Moline Plow Co., 118 Fed. Rep. 136, in the United States Circuit Court of Appeals for the Eighth Judicial Circuit, Judges Sanborn and Carland, with Thayer dissenting as to one infringement.

Dowagiac Mfg. Co. vs. Brennan & Co., 127 Fed. Rep. 988, United States Circuit Court of Appeals for the Eighth Circuit, Judges Caldwell, Sanborn and Thayer.

Dowagiac Mfg. Co. vs. Brennan & Co., 127 Fed. Rep. 143, in the United States Circuit Court of Appeals for the Sixth Circuit, Judges Lurton, Severens and Richards.

Which position was also considered and specifically applied by the United States Circuit Court of Appeals for the Sixth Circuit in *McSherry vs. Dowagiac*, 160 Fed. Rep. 948, and in *Brennan vs. Dowagiac*, 162 Fed. Rep. 472, these being the cases specifically overruled in the case at bar.

VII. That heretofore, to-wit, on or about February, 1898, your petitioner filed its Bill of Complaint in the District of Minnesota, Fourth Division, alleging infringement of the Hoyt patent No. 446,230 of February 10, 1891, being the patent in suit.

That thereafter answer and replication were filed and proofs taken which were submitted to the court, and thereafter Judge Lochren in an opinion passed upon the matter and held, following the decisions of the United States Circuit Court of Appeals for the Sixth Circuit, as reported in *Dowagiac vs. McSherry*, 101 Fed. Rep. 716, that claims 1, 2 and 3 of the patent were infringed by one of defendant's structures and not infringed by the defendant's new structure.

That thereupon both parties appealed to the United States Circuit Court of Appeals for the Eighth Judicial

Circuit, and that upon a hearing upon said appeal, the finding of the court below was modified so that both structures were held to infringe, the opinion of the Court of Appeals being by Judge Carland, there being a dissenting opinion by Judge Thayer as to one infringement, the said decision accepting and following as authority the opinion of the United States Circuit Court of Appeals for the Sixth Circuit in the said McSherry case.

That this matter was then referred to Mr. George F. Hitchcock, Jr., as special master, to take an accounting of the profits and damages and that said special master held that the complainant had failed to apportion between the patented and unpatented features, and awarded nominal damages in the sum of one dollar, the master in making such finding saying:

“I am aware that a different conclusion has been reached in the accounting in the McSherry case in the Sixth Circuit, but the evidence presented to the Master there is not before us, and we do not know what it is. Certainly it must have been widely different from the evidence in this case * * *”

Whereas, the evidence was largely the same, and although the report of the master in the McSherry case had been affirmed by his Honor, Judge Clark, the same was overruled by this special master.

That thereafter exceptions were filed to the report of Master Hitchcock, as appears at page 67 of the record, where, on final hearing by the court, Judge Amidon, of South Dakota, presiding, he having been specially assigned, overruled the exceptions, thus ruling contrary to the decision of Judge Clark in the McSherry case.

That from the decision and decree of Judge Amidon, after he had overruled a petition for rehearing, an appeal was taken to the United States Circuit Court of Appeals for the Eighth Judicial Circuit, where there were

elaborate and complete assignments of error, and that on full hearing the decision of Judge Amidon was affirmed, the court of Appeals for the Eighth Circuit, consisting of Judge Hook, Adams and McPherson, specifically overruling the United States Circuit Court of Appeals for the Sixth Circuit in

Brennan & Co. vs. Dowagiac Mfg. Co., 162 Fed. Rep. 473,

McSherry Mfg. Co. vs. Dowagiac Mfg. Co., 160 Fed. Rep. 948,

affirming the ruling of Judge Amidon. This ruling was adhered to on a petition for rehearing.

VIII. That this ruling was fundamentally erroneous in that it takes into consideration an element of a combination where a claim is to a combination of elements, and requires an apportionment of both profits and damages between the patented and the unpatented features, where the particular structure produced, as had been repeatedly previously ruled, is to an entirety and a true combination of elements, like a new chemical compound.

IX. That the showing made to the court in this case at bar is as complete as it is possible to make in a patent case, the record being very voluminous and developing fully all the facts, showing completely the whole situation as to the marketing of complainant's grain drills, comparing the same with the only unpatented grain drill that was on the market, showing the facts fully by stipulation as to the defendant's grain drills, and including a large number of depositions of people familiar with the market, showing conclusively that the Hoyt grain drill had solved effectively the seeding problem for a limited territory, where special conditions obtain in the growing of spring wheat, and showing conclusively, when the structure is considered as a true combination, that the success of the device was due to such combina-

tion, and showing that the Dowagiac shoe grain drill made under the patent in suit was the first to effectively solve the problem,—all of which proofs should certainly have been considered by the court so that justice could be done.

Therefore your petitioner believes that the aforesaid opinion of the United States Circuit Court of Appeals for the Eighth Circuit affirming the decree of the United States Circuit Court for the District of Minnesota, Fourth Division, thus depriving your petitioner of a substantial recovery on account of the profits made by the respondent in the sale of its infringing grain drills accounted for before the master, is erroneous and in conflict with the decisions of this court in analogous cases, as well as in conflict with the decisions of the United States Circuit Court of Appeals for the Sixth Circuit and other circuits; and has resulted in depriving your petitioner of property rights granted to it by the statutes of the United States, and in accordance with the provisions of the Constitution of the United States; and that the patent laws, as construed in the case at bar by the opinion of the United States Circuit Court of Appeals for the Eighth Circuit, contrary to the opinion of this court rendered by Chief Justice Marshall in the case of *Grant vs. Raymond*, 6 Peters 242, have not been construed so as “to execute the contract” (the patent) “fairly on the part of the United States.”

Your petitioner also respectfully submits, for the reasons stated in this petition for *certiorari* and more fully amplified in its brief in support of the same, that the opinion of the Court of Appeals for the Eighth Circuit in the case at bar, in a matter of gravity, where a large amount is involved, establishes a precedent which must necessarily affect almost incalculable value in the way of property rights under letters patent for inventions.

Wherefore, your petitioner respectfully prays: That a writ of *certiorari* may be issued out of and under the seal of this court, directed to the United States Circuit Court of Appeals for the Eighth Circuit, commanding the said court to certify and send to this court, on a certain day to be therein designated, a full and complete transcript of the record of all proceedings of the said Court of Appeals in the said case therein, entitled Dowagiac Manufacturing Co., Appellant, v. Minnesota Moline Plow Company, et al., Appellees, in Equity No. 3041, to the end that the said case may be reviewed and determined by this court as provided in section 6 of Act of Congress entitled, "An Act to establish Circuit Courts of Appeal and define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes, approved March 3, 1901," and that your petitioner may have such other or further relief or remedy in the premises as to this court may seem appropriate and in conformity with the said act.

And your petitioner will ever pray.

FRED L. CHAPPELL,

Solicitor and of Counsel for Petitioner, the Dowagiac Manufacturing Co.

OTIS A. EARL, Of Counsel.

I hereby certify that I am solicitor and of counsel for the Petitioner herein, Dowagiac Manufacturing Company; that in accordance with the request of said Petitioner the foregoing petition has been prepared; that the allegations contained in said petition are true, to the best of my knowledge and belief; and that said petition is, in my opinion, well founded in law as well as in fact.

FRED L. CHAPPELL.

FORM OF SUPERSEDEAS OR COST BOND.

KNOW ALL MEN BY THESE PRESENTS,

That we, are held and firmly bound unto in the full and just sum of to be paid to the said heirs, executors, administrators, successors or assigns, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors or assigns, jointly and severally by these presents. Sealed with our seals, and dated this day of, in the year of our Lord one thousand nine hundred....

WHEREAS, lately at the term of the in a suit depending in said court between, plaintiff, and, defendant, was rendered against the said and the said has obtained of the said court to reverse the in the aforesaid suit, and a citation directed to the said citing and admonishing to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the date of said citation.

Now, the condition of the above obligation is such, that if the said shall prosecute said to effect, and answer all damages and costs if fail to make good plea, then the above obligation to be void, else to remain in full force and virtue.

Sealed and delivered in presence of

..... [SEAL.]

..... [SEAL.]

Approved by

..... [SEAL.]

.....

(The foregoing bond and citation is adapted for appeals in equity cases as well as in cases of writs of error in actions at law.)

MANDATE—FROM CIRCUIT COURT OF APPEALS
TO CIRCUIT COURT.

(From St. Louis Street Flushing Machine Co. vs. Sanitary Street Flushing Mach. Co., 178 Fed. Rep. 923, — C. C. A. —.)

UNITED STATES OF AMERICA, ss:

The President of the United States of America,
To the Honorable the Judges of the Circuit Court of
the United States for the Eastern District of Missouri.

GREETING:

Whereas, lately in the Circuit Court of the United States for the Eastern District of Missouri, before you, or some of you, in a cause between the Sanitary Street Flushing Machine Company, a Corporation, complainant, and the St. Louis Street Flushing Machine Company, William Ratican, Stephen Joseph Ratican and James C. Wilson, defendants, wherein the decree of the said Circuit Court in said cause, entered on the 29th day of July, A D. 1909, is in the following words, viz:

“This cause having come on to be heard, upon the pleadings, proceedings and proofs herein, on behalf of both parties, and after hearing James L. Hopkins, Esquire, counsel for complainant, and Henry W. Allen, Esquire, and James A. Carr, Esquire, counsel for respondents, and after due proceedings had, the court doth, upon consideration, order, adjudge and decree as follows:

First. That the letters patent of the United States, No. 736,135, issued on the 11th day of August, 1903, to Thomas M. Murphy, assignor of one-half to William Ratican, for improvements in Street Washers, are good and valid in law.

Second. That the said Thomas M. Murphy was the first true and original inventor of the inventions and improvements described and claimed in said letters patent, and set forth in Claims 1, 2 and 3 thereof, respectively.

Third. That the complainant, Sanitary Street Flushing Machine Company, is the sole and exclusive owner of the said letters patent.

Fourth. That the defendants, St. Louis Street Flushing Machine Company, William Ratican, Stephen Joseph Ratican and James C. Wilson have infringed upon the said letters patent and upon the exclusive rights of the complainant under the claims thereof.

Fifth. That the complainant have and recover of the defendants, and each of them, the profits, gains and advantages which the said defendants have derived by reason of their said infringement of said letters patent, and that the complainants have and recover of the said defendants any and all damages which the complainant has sustained, or may hereafter sustain by reason of said infringement of the said letters patent by the said defendants.

Sixth. And this cause is hereby referred to Rhodes E. Cave as a master of this court, who is hereby appointed and empowered to take and state the account of said gains, profits and advantages, and to assess such damages and to report thereon to the court with all convenient speed; and the defendant William Ratican, his agents, servants, and employees as well as the defendants Stephen Joseph Ratican and James C. Wilson, their agents, servants and employees, and the St. Louis Street Flushing Machine Company, its directors, officers, attorneys, clerks, servants and workmen, are hereby directed and required to attend before said master from time to time as required, and to produce before him such books, papers, vouchers and documents, and to submit to such oral examination as the master may require.

Seventh. That a perpetual injunction issue out of and under the seal of this court, directed to the said defendants William Ratican, Stephen Joseph Ratican and James C. Wilson, their agents, servants and employees,

as well as the said defendant St. Louis Street Flushing Machine Company, its officers, directors and stockholders, forever and perpetually enjoining and restraining them, and each of them, from directly or indirectly making or causing to be made, or using or causing to be used, or selling or causing to be sold, in any manner, any machine for flushing or washing streets, containing, embodying or employing the combinations described in either of the three claims of the said letters patent or from further infringing upon or violating the said letters patent in any way whatever.

Eighth. And it is further ordered, adjudged and decreed that the complainant have and recover of the defendants its costs herein to be taxed by the clerk under the direction of the court, and that execution issue therefor.

July 29, 1909.

(Signed) SMITH McPHERSON, Judge."

As by the inspection of the transcript of the record of the said Circuit Court, which was brought into the United States Circuit Court of Appeals, Eighth Circuit, by virtue of an appeal, agreeable to the Act of Congress, in such case made and provided, fully and at large appears;

And Whereas, in the present term of December, in the year of our Lord one thousand nine hundred and nine, the said cause came on to be heard before the said United States Circuit Court of Appeals, on the transcript of the record from the Circuit Court of the United States for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, reversed; and that the St. Louis Street Flushing

Machine Company, William Ratican, Stephen J. Ratican and James C. Wilson, have and recover against the Sanitary Street Flushing Machine Company and the sum of One Hundred Fifty-Six and 20/100 Dollars, the same being two-thirds of all of the costs in this court, and shall also recover against the said Sanitary Street Flushing Machine Company two-thirds of the fee for the transcript upon the appeal and that execution may issue for the collection of the above mentioned costs and fee.

It is further ordered that this cause be, and the same is hereby, remanded to the said Circuit Court with directions to enter a decree sustaining the patent and directing an accounting as to the "Nine London Wagons" only.

April 27, 1910.

You, therefore, are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Witness, the Honorable John M. Harlan, Senior Associate Justice of the Supreme Court of the United States, the Seventh day of July in the year of our Lord one thousand nine hundred and ten.

JOHN D. JORDAN,

Clerk of the United States Circuit Court of Appeals,
Eighth Circuit.

BOND FOR COSTS.

UNITED STATES OF AMERICA,
 Eastern Division of the
 Eastern Judicial District of Missouri. } ss.

*In the Circuit Court of the United States in and for
 said Division and District.*

A. B., Plaintiff,
 vs.
 C. D., Defendant. } No.

We, the undersigned, stand indebted for and undertake to pay all costs that have accrued, or may hereafter accrue, in the above entitled case; and hereby stipulate and agree that execution may issue against us, and each of us, for any costs taxed against the plaintiff herein in favor of the opposite party, or court officers, or that may be created by the plaintiff in the course of any proceeding in this case.

Signed with our names and sealed with our seals, and dated this 1st day of June, A. D. 1911.

A. B.
 E. H.

E. F., obligor, in the within bond, being duly sworn, on his oath deposes and says, that he resides as stated therein, and is worth, over and above all his debts and liabilities, the sum of Five Thousand dollars; and that he owns real estate to that amount, subject to execution, within the Eastern District of Missouri.

Subscribed and sworn to by said
 E. F. the above-
 named affiant, this 1st day of June,
 A. D. 1911, before me, at office, in
 the City of St. Louis, J. R. G. } E. F.

Notary Public.

FORMS RELATING TO THE TAKING OF
TESTIMONY IN EQUITY CAUSES.

1. NOTICE OF TAKING TESTIMONY.

(From General Compressed Air & Vacuum Mach. Co. vs. American Air
Cleaning Co., 177 Fed. Rep. 272.)

Please Take Notice that on Tuesday, August 10, 1909, at eleven o'clock in the forenoon, we shall proceed to take testimony on behalf of the defendant in the above entitled cause at our office, No. 800 Pabst Building, corner East Water and Wisconsin Streets, in the City of Milwaukee, County of Milwaukee and State of Wisconsin, before Chas. L. Goss, Esq., a notary public in and for the County of Milwaukee, State of Wisconsin, as Examiner.

The witness to be examined is Henry W. Carter, Esq., residing at Chicago, Illinois, and possibly others.

You are invited to attend the taking of said testimony and to cross-examine the witnesses examined.

The defendant desires the testimony to be taken orally by question and answer, and reduced to writing either in shorthand or directly upon the typewriting machine, and the testimony will be so taken under the statutes and the rules governing the taking of testimony in the Federal Courts.

Yours truly,
WINKLER, FLANDERS, BOTTUM & FAWSETT,
Solicitors for Defendant.

Dated, July 30, 1909,
To HIGDON & LONGAN,
Missouri Trust Bldg.,

St. Louis, Mo.

Service acknowledged this 2d day of August, 1909.

(Signed) HIGDON & LONGAN,
Solicitors for Complainant.

2. INTRODUCTION OF DEPOSITION.

(From Union Biscuit Company vs. Peters, 125 Fed. Rep. 601, 60 C. C. A. 337.)

(Omitting title of Court and Cause.)

Testimony of complainant's witnesses, taken at room 706 Lincoln Building, New York City, before John A. Shields, Esq., United States Commissioner, on the 27th day of March, 1902, under the substituted 67th rule in equity.

3. CERTIFICATE.

(From Union Biscuit Company vs. Peters, 125 Fed. Rep. 601, 60 C. C. A. 337.)

UNITED STATES OF AMERICA,
Southern District of New York. } ss.

I, John A. Shields, United States Commissioner for the Southern District of New York, do hereby certify that on the days indicated in the foregoing depositions, at Nos. 1 and 3 Union Square West, New York City, New York, I was attended by C. K. Offield, Esq., Edmund Wetmore, Esq., and Earl D. Bast, Esq., of counsel for complainant, and Paul Bakewell, Esq., and D. A. Jamison, Esq., of counsel for defendants, and by the witnesses who were of sound mind and lawful age, having been by me heretofore first carefully examined and cautioned and sworn to testify the truth, the whole truth and nothing but the truth in the above entitled cause, gave their testimony, which was taken down in the presence of the respective witnesses, and from their statements by a typewriter appointed by me for that purpose, and under my direction and control, and the said witnesses having read over their respective depositions subscribed the same, and swore to the same in my presence.

I further certify that the reason for taking the foregoing depositions is that the witnesses are material and

necessary in the cause in the caption of the said depositions named, and that they live at a greater distance than one hundred miles from the place of trial of the within entitled cause.

I further certify that a notification of the time and place of taking the said depositions signed by Boyle, Priest & Lehmann, Offield, Towle & Linthicum and Earl D. Bast, solicitors for complainant, was made out and served on Collins, Jamison & Chappell, solicitors for defendants, as appears from said notice which is hereunto annexed.

And I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any way interested in the event of the cause named in said caption.

In testimony whereof I have hereunto set my hand and seal, this ninth day of April, in the year of our Lord one thousand nine hundred and two, and of the Independence of the United States the one hundred and twenty-sixth.

(Signed) J. A. SHIELDS,
U. S. Commissioner Southern District of New York.

INTERNATIONAL CONVENTION FOR THE PROTECTION OF INDUSTRIAL PROPERTY.

Signed at Paris, March 20th, 1883.—Acceded to by Her Majesty's Government, March 17th, 1884.—Presented to both Houses of Parliament by Command of Her Majesty, 1884.—As modified by an additional Act, signed at Brussels, December 14th, 1900. Ratified by the United States March 29th, 1887. See § 503.

ARTICLE I.

The Governments of Belgium, Brazil, Spain, France, Guatemala, Italy, Holland, Portugal, Salvador, Servia, and Switzerland constitute themselves into a Union for the Protection of Industrial Property.

ARTICLE II.

The subjects or citizens of each of the Contracting States shall, in all the other States of the Union, as regards patents, industrial designs or models, trade-marks, and trade names, enjoy the advantages that their respective laws now grant, or shall hereafter grant, to their own subjects or citizens.

Consequently they shall have the same protection as the latter, and the same legal remedy against any infringement of their rights, provided they observe the formalities and conditions imposed on subjects or citizens of the internal legislation of each State.

ARTICLE III.

The subjects or citizens of States which are not parties to the Union shall be assimilated to the subjects or citizens of the Contracting States, provided that they are domiciled in or have industrial or commercial establishments, real and effective, in the territory of one of the States of the Union.

ARTICLE III. *bis*.

The patent, in each country, shall not be liable to forfeiture on account of failure to utilize it until after the expiration of at least three years from the date of the deposit of the application in the country concerned, and then only provided the patentee cannot show reasonable cause for his inaction.

ARTICLE IV.

Any person who shall have duly applied for a patent, industrial design, or model or trade-mark in one of the Contracting States, shall enjoy, in order to admit of such request being lodged in the other States, during the periods of time mentioned below, a right of priority, the rights of third parties being reserved.

Consequently, subsequent registration in one of the other States of the Union, before the expiration of such periods of time, shall not be invalidated by any acts accomplished in the interval—either, for instance, by another registration, by the publication of the invention, or by the working of it, by the sale of patterns of the design or model, or by the use of the trade-mark. The above-mentioned periods of time during which priority is guaranteed shall be twelve months for patents with respect to inventions, and four months for patents for industrial designs or models, as well as for trade or merchandise marks.

ARTICLE IV. *bis*.

Patents applied for in the various Contracting States by persons admitted to the benefits of the Convention in the terms of Article II. and III., shall be independent of the patents obtained for the same invention in the other States, whether such States be or be not parties to the Union.

This stipulation shall apply to patents already existing at the time when it shall come into effect.

The same stipulation shall apply, in the case of the accession of new States, with regard to patents in existence, either on one side or the other, at the time of accession.

ARTICLE V.

The introduction by the patentee into the country where the patent has been granted of objects manufactured in any of the States of the Union shall not entail forfeiture.

Nevertheless, the patentee shall remain bound to work his patent in conformity with the laws of the country into which he introduces the patented objects.

(Articles VI, to X, do not affect patents and thus are omitted.)

ARTICLE X. *bis.*

Persons resorting to the countries referred to in the Convention (Article II, and III.), shall enjoy in all the States of the Union the protection accorded to nationals against dishonest competition.

ARTICLE XI.

The High Contracting Parties shall, in conformity with the legislation of each country, accord temporary protection to inventions susceptible of being patented, and to industrial designs or models, as well as to trademarks or merchandise marks, in respects of products which shall be exhibited at official or officially recognized international exhibitions held in the territory of one of them.

ARTICLE XII.

Each of the High Contracting Parties agrees to establish a special Government Department for industrial property, and a central office for communication to the public of patents, industrial designs or models, and trademarks.

ARTICLE XIII.

An international office shall be organized under the name of "Bureau International de l'Union pour la Protection de la Propriete Industrielle" (International Office of the Union for the Protection of Industrial Property).

This office, the expense of which shall be defrayed by the Government of all the Contracting States, shall be placed under the high authority of the Central Administration of the Swiss Confederation, and shall work under its supervision. Its functions shall be determined by agreement between the States of the Union.

ARTICLE XIV.

The present Convention shall be submitted to periodical revisions, with a view to introducing improvements calculated to perfect the system of the Union.

To this end Conferences shall be successively held in one of the Contracting States by Delegates of the said States. The next meeting shall take place in 1885, at Rome.

ARTICLE XV.

It is agreed that the High Contracting Parties respectfully reserve to themselves the right to make separately, as between themselves, special arrangements for the Protection of Industrial Property, in so far as such arrangements do not contravene the provisions of the present Convention.

ARTICLE XVI.

States which have not taken part in the present Convention shall be permitted to adhere to it at their request.

Such adhesion shall be notified officially through the diplomatic channel to the Government of the Swiss Confederation, and by the latter to all the others. It shall imply complete accession to all the classes, and the admission to all the advantages stipulated by the present Convention.

ARTICLE XVII.

The execution of the reciprocal engagements contained in the present Convention is subordinated, in so far as necessary, to the observance of the formalities and rules established by the Constitutional laws of those of the High Contracting Parties who are bound to procure the application of the same, which they engage to do with as little delay as possible.

ARTICLE XVIII.

The present Convention shall come into operation one month after the exchange of ratifications, and shall remain in force for an unlimited time, till the expiry of one year from the date of its denunciation. This denunciation shall be addressed to the Government commissioned to receive adhesions. It shall only affect the denouncing State, the Convention remaining in operation as regards the other Contracting Parties.

ARTICLE XIX.

The present Convention shall be ratified, and the ratifications exchanged in Paris, within one year at the latest.

In witness whereof the respective Plenipotentiaries have signed the same, and have affixed thereto their seals.

Done at Paris, the 20th March, 1883.

(L. S.) (Signed) BEYENS, ETC.

COUNTRIES WITHIN THE CONVENTION.

The following is a complete list of the countries who are now adherents to the International Convention:

Austria.

Belgium.

Brazil.

Cuba.

Denmark with the Faroe Islands.

France with Algeria and Colonies.

Germany.

Great Britain with Australia, Ceylon, New Zealand, and Trinidad and Tobago.

Hungary.

Italy.

Japan.

Mexico.

Netherlands with the Dutch East Indies, Surinam, and Curacao.

Norway.

Portugal with the Azores and Madeira.

Santo Domingo.

Servia.

Spain.

Sweden.

Switzerland.

Tunis.

United States of America.

PROTOCOL OF THE CLOSE.

At the moment of proceeding to sign the concluded Convention of the present date between the governments of Belgium, Brazil, Spain, France, Guatemala, Italy, the Netherlands, Portugal, Salvador, Servia and Switzerland, for the protection of industrial property, the undersigned plenipotentiaries have agreed upon as follows:

1. The words *industrial property* are to be understood in their broadest acceptation, in the sense that they apply not only to the products of industry, properly speaking, but also to products of agriculture (wines, grain, fruits, cattle, etc.) and to mineral products delivered to commerce (mineral waters, etc.).

2. Under the name of patents of invention are comprised the different kinds of industrial patents admitted by the legislations of the contracting states, such as patents of importation, patents of improvement, etc.

3. It is mentioned that the final stipulation of Article 2 of the Convention is in no way prejudicial to the legislation of each of the contracting states, as regards the procedure practiced before the courts and the competency of those courts.

3a. The patentee, in each country, can only have his patent forfeited, on account of its not having been worked, after a minimum delay of three years, lasting from the application in the country in question, and in case the patentee does not justify the cause of his inaction.

4. The first paragraph of Article 6 is to be understood in the sense that no trade mark can be excluded from protection in any of the states of the Union by the fact alone that it does not comply from the point of view of the signs of which it is composed, with the conditions of the legislation of that state, provided it complies on that point with the legislation of the country of its origin and it has been duly registered in the latter country. Saving this exception, which only concerns the form of the mark and under reserve of the stipulations of the other articles of the Convention, the interior legislation of each of the states will be applied in each case.

In order to avoid all false interpretation, it is understood that the use of public armorial bearings and insignia may be considered as contrary to public order, in the sense of the final paragraph of Article 6.

5. The organization of the special service of industrial property, mentioned in Article 12, will comprise as far as possible the publication in each state of an official periodical paper.

6. The expense of the International Office, instituted as per Article 13, will be borne mutually by the contracting states. They are not, in any case, to exceed the sum of sixty thousand francs per year.

In order to determine the contributive portion of each of the states towards the total sum of the expenses, the contracting states and those that will ultimately become members of the Union, will be divided into six classes,

each contributing in the proportion of a certain number of units, viz.:

1st class	.....	25 units.	4th class	.....	10 units.
2nd class	.....	20 units.	5th class	.....	5 units.
3d class	.....	15 units.	6th class	.....	3 units.

These coefficients will be multiplied by the number of the states of each class and the sum of the products thus obtained will supply the number of units by which the total expense is to be divided. The quotient will give the amount of the outlay unit.

The contracting states are classed as follows, in view of the division of the expenses:

1st class	.....	France, Italy
2d class	.....	Spain
3d class	....	Belgium, Brazil, Portugal, Switzerland
4th class	.....	The Netherlands
5th class	.....	Servia
6th class	.....	Guatemala, Salvador

The Swiss administration supervises the expenses of the International Office, advances the needful funds and makes up the yearly account, which will be forwarded to all the other administrations.

The International Office will centralize the information of whatever nature with reference to the protection of international property and will combine same into general statistics to be distributed to all the administrations. It will study the common usefulness which interests the Union and will draw up, with the aid of the documents which are placed at its disposal by the different administrations, a periodical in the French language on the questions concerning the object of the Union.

The number of the periodical, the same as all documents published by the International Office, will be dis-

tributed amongst the administration of the states of the Union in proportion to the number of the above-mentioned contributive units. Any supplementary copies and documents which may be asked for, either by the said administrations or by societies or individuals, will be paid for apart. The International Office must hold itself always at the disposal of the members of the Union, in order to supply them on the questions relating to the international service of industrial property, the special information which they may require.

The administration of the country where the next conference is to be held will prepare, with the assistance of the International Office, the work of that conference.

The manager of the International Office will assist at the sittings of the conferences and will take part in the discussions, however, without deliberative vote. He will make a yearly report about his management, which will be communicated to all the members of the Union.

The official language of the International Office will be the French language.

7. The present closing protocol, which will be ratified at the same time as the convention concluded on this day's date, will be considered as forming an integral part of this Convention and will have the same force, value and duration.

In witness whereof the undersigned plenipotentiaries have drawn up this present protocol.

FOURTH INTERNATIONAL CONGRESS OF
AMERICAN STATES.

Conventions Relating to Patents, Trade Marks, Designs,
Etc.

DEPARTMENT OF THE INTERIOR,
UNITED STATES PATENT OFFICE,

Washington, D. C., February 23, 1911.

The following conventions relating to patents, designs, and industrial models, trademarks, and literary and artistic copyrights, which were prepared at the request of the Secretary of State by the Commissioner of Patents, who was designated by the President of the United States as the Expert Attache to the delegation of the United States of America to the Fourth International Congress of American States, were adopted by said Congress, which met at Buenos Ayres, June 9 to August 30, 1910, and have been approved by the United States Senate.

EDWARD B. MOORE,
Commissioner of Patents.

CONVENTION.

Inventions, Patents, Designs, and Industrial Models.

The Excellencies the Presidents of the United States of America, the Argentine Republic, Brazil, Chili, Colombia, Costa Rica, Cuba, Dominican Republic, Ecuador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Salvador, Uruguay and Venezuela:

Being desirous that their respective countries may be represented at the Fourth International American Con-

ference, have sent thereto the following delegates, duly authorized to approve the recommendations, resolutions, conventions, and treaties which they might deem advantageous to the interests of America.

United States of America: Henry White, Enoch H. Crowder, Lewis Nixon, John Bassett Moore, Bernard Moses, Lamar C. Quintero, Paul Samuel Reinsch, David Kinley.

Argentine Republic: Antonio Bermejo, Eduardo L. Bidau, Manuel A. Montes de Oca, Epifanio Portela, Carlos Rodríguez Larreta, Carlos Salas, José A. Terry, Estanislao S. Zeballos.

United States of Brazil: Joaquim Murтинho, Domicio da Gama, José L. Almeida Nogueira, Olavo Bilac, Gastão da Cunha, Herculano de Freitas.

Republic of Chili: Miguel Cruchago Tocornal, Emilio Bello Codecido, Aníbal Cruz Díaz, Beltrán Mathieu.

Republic of Colombia: Roberto Ancízar.

Republic of Costa Rica: Alfredo Volio.

Republic of Cuba: Carlos García Velez, Rafael Montoro y Valdés, Gonzalo de Quesada y Aróstegui, Antonio Gonzalo Pérez, José M. Carbonell.

Dominican Republic: Américo Lugo.

Republic of Ecuador: Alejandro Cárdenas.

Republic of Guatemala: Luis Toledo Herrarte, Manuel Arroyo, Mario Estrada.

Republic of Haiti: Constantin Fouchard.

Republic of Honduras: Luis Lazo Arriaga.

Mexican United States: Victoriano Salado Alvarez Luis Pérez Verdía, Antonio Ramos Pedrueza, Roberto A. Esteva Ruiz.

Republic of Nicaragua: Manuel Pérez Alonso.

Republic of Panama: Belisario Porras.

Republic of Paraguay: Teodosio González, José P. Montero.

Republic of Peru: Eugenio Larrabure y Unánue, Carlos Alvarez Calderón, José Antonio de Lavelle y Pardo.

Republic of Salvador: Federico Mejia, Francisco Martínez, Suárez.

Republic of Uruguay: Gonzalo Ramírez, Carlos M. de Pena, Antonio M. Rodríguez, Juan José Amézaga.

United States of Venezuela: Manuel Díaz Rodríguez, César Zumeta.

Who, after having presented their credentials, and the same having been found in due and proper form, have agreed upon the following convention on inventions, patents, designs, and industrial models.

ARTICLE I. The subscribing nations enter into this convention for the protection of patents of inventions, designs, and industrial models.

ART. II. Any persons who shall obtain a patent of invention in any of the signatory States shall enjoy in each of the other States all the advantages which the laws relative to patents of invention designs, and industrial models concede. Consequently, they shall have the right to the same protection and identical legal remedies against any attack upon their rights, provided they comply with the laws of each State.

ART. III. Any person who shall have regularly deposited an application for a patent of invention or design or industrial model in one of the contracting States shall enjoy, for the purpose of making the deposit in the other States and under the reserve of the rights of third parties, a right of priority during a period of twelve months for patents of invention, and of four months for designs or industrial models.

In consequence the deposits subsequently made in any other of the signatory States before the expiration of these periods cannot be invalidated by acts performed in the interval, especially by other deposits, by the publica-

tion of the invention or its working, or by the sale of copies of the design or of the model.

ART. IV. When, within the terms fixed, a person shall have filed applications in several States for the patent of the same invention, the rights resulting from patents thus applied for shall be independent of each other.

They shall also be independent of the rights arising under patents obtained for the same invention in countries not parties to this convention.

ART. V. Questions which may arise regarding the priority of patents of invention shall be decided with regard to the date of the application for the respective patents in the countries in which they are granted.

ART. VI. The following shall be considered as inventions: A new manner of manufacturing industrial products, a new machine or mechanical or manual apparatus which serves for the manufacture of said products, the discovery of a new industrial product, the application of known methods for the purpose of securing better results, and every new, original, and ornamental design or model for an article of manufacture.

The foregoing shall be understood without prejudice to the laws of each State.

ART. VII. Any of the signatory States may refuse to recognize patents for any of the following causes:

(a) Because the inventions or discoveries may have been published in any country prior to the date of the invention by the applicant.

(b) Because the inventions have been registered, published, or described in any country more than one year prior to the date of the application in the country in which the patent is sought.

(c) Because the inventions have been in public use, or have been on sale in the country in which the patent has been applied for, one year prior to the date of said application.

(d) Because the inventions or discoveries are in some manner contrary to morals or laws.

ART. VIII. The ownership of a patent of invention comprises the right to enjoy the benefits thereof, and the right to assign or transfer it in accordance with the laws of the country.

ART. IX. Persons who incur civil or criminal liabilities, because of injuries or damage to the rights of inventors, shall be prosecuted and punished in accordance with the laws of the countries wherein the offense has been committed or the damage occasioned.

ART. X. Copies of patents certified in the country of origin, according to the national law thereof, shall be given full faith and credit as evidence of the right of priority, except as stated in Article VII.

ART. XI. The treaties relating to patents of invention, designs, or industrial models, previously entered into between the countries subscribing to the present convention, shall be superseded by the same from the time of its ratification in so far as the relations between the signatory States are concerned.

ART. XII. The adherence of the American Nations to the present convention shall be communicated to the Government of the Argentine Republic in order that it may communicate them to the other States. These communications shall have the effect of an exchange of ratifications.

ART. XIII. A signatory nation that sees fit to retire from the present convention, shall notify the Government of the Argentine Republic, and one year after the receipt of the communication the force of this convention shall cease, in so far as the nation which shall have withdrawn its adherence is concerned.

In witness whereof, the plenipotentiaries have signed the present treaty and affixed thereto the seal of the Fourth International American Conference.

Made and signed in the city of Buenos Ayres on the 20th day of August in the year 1910, in Spanish, English, Portuguese, and French, and deposited in the ministry of foreign affairs of the Argentine Republic, in order that certified copies be made for transmission to each of the signatory nations through the appropriate diplomatic channels.

For the United States of America:

Henry White.	Bernard Moses.
Enoch H. Crowder.	Lamar C. Quintero.
Lewis Nixon.	Paul S. Reinsch.
John Bassett Moore.	David Kinley.

For the Argentine Republic:

Antonio Bermejo.	Carlos Salas.
Eduardo L. Bidau.	José A. Terry.
Manuel A. Montes de Oca.	Estanislao S. Zeballos.
Epifanio Portela.	

For the United States of Brazil:

Joaquim Murtinho.	Olavo Bilac.
Domicio de Gama.	Gastão da Cunha.
José L Almeida Nogueira.	Herculano de Freitas.

For the Republic of Chili:

Miguel Cruchaga Tocornal.	Aníbal Cruz Díaz.
Emilio Bello Codecido.	Beltran Mathieu.

For the Republic of Colombia:

Roberto Ancízar.

For the Republic of Costa Rica:

Alfredo Volio.

For the Republic of Cuba:

Carlos García Velez.	Antonio Gonzalo Pérez.
Rafael Montero y Valdés.	José M. Carbonell.
Gonzalo de Quesada y Aróstegui	

For the Dominican Republic:

Américo Lugo.

For the Republic of Ecuador:

Alejandro Cárdenas.

For the Republic of Guatemala:

Luis Toledo Herrarte. Mario Estrada.

Manuel Arroyo.

For the Republic of Haiti:

Constantin Fouchard.

For the Republic of Honduras:

Louis Lazo Arriaga.

For the Mexican United States:

Victoriana Salado Alvarez, Antonio Ramos Pedrueza.

Luis Pérez Verdía. Roberto A. Estevá Ruiz.

For the Republic of Nicaragua:

Mauel Pérez Alonso.

For the Republic of Panama:

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