that he was not on the White river expedition, but left the regiment before that expedition, and knew nothing that transpired in relation to the defendant, after he left the regiment. He was then asked the following questions, and made the following answers, against the objection of defendant's counsel:

"*Question.* Is the following language in the affidavit [meaning the affidavit of the witness mentioned in the third count of the indictment] true, as applicable to any disease contracted by the defendant on the White river expedition, or afterwards, to-wit, 'That subsequently, and during the month of January, 1863, said Daubner was attacked with a disease, and as he had been theretofore exposed to a severe snow-storm, his sickness was supposed to be the result of the same.' *Answer.* It is not true, as so applicable, so far as I know. *Q.* Was the declaration for a pension shown to you, or known to you, at the time of making the affidavits? *A.* No, sir."

Clearly, the questions thus put to this witness were proper. The declaration for a pension alleged that at St. Charles, Arkansas, in January, 1863, the defendant took a severe cold, from exposure to a snow-storm, and was suddenly attacked with a sickness, which prostrated him, and rendered him senseless, etc., and that he, on that attack, remained in an insensible condition for about eight hours; that he was treated on the hospital boat Imperial, in the White river, and immediately afterwards at the hospital in convalescent camp at Helena. As we have seen, the affidavit of Holbrook stated that he was attacked with a disease in January, 1863, and refers to his exposure to a snow-storm, and to sickness as the result of the same. And it further states that Dr. McMiller was second surgeon of the regiment, and was surgeon in the hospital in which the defendant was placed after his attack of sickness. Now, confessedly, the affidavit of Holbrook was procured in support of the defendant's claim and declaration for a pension, and the indictment charges that the affidavit was false, in that it was calculated and intended by Daubner to support his declaration for a pension touching his exposure at St. Charles, Arkansas, on the occasion of the White river expedition, in January, 1863, whereas, in fact, Holbrook had no knowledge whatever of the White river expedition, and was not with the regiment at the time mentioned in Daubner's declaration for a pension; the contents of said declaration not having been communicated to him, and not being known by him when he made his affidavit. It was not claimed by the attorney for the government that Holbrook intended to make a false affidavit; indeed, it was shown, so far as Holbrook was concerned, that when he made his affidavit he understood that he was referring to a condition of things existing while the regiment was in Kentucky, and before he, Holbrook, had left the regiment. But it was claimed in behalf of the prosecution that the defendant procured Holbrook's affidavit in support of his declaration for a pension, which located the place of his alleged sickness and condition of insensibility at St. Charles, and when the regiment was on the White

river expedition, for the purpose of satisfying the department of the truth of the allegations of his declaration. So it became a material question, under the allegations in the indictment, as the court in its charge subsequently said to the jury, whether the affidavit of Holbrook was to the defendant's knowledge false, as an affidavit intended to support his declaration for a pension; that is, whether the defendant intended to mislead and deceive by the use of an affidavit true on its face, but false when applied to such a state of facts as was alleged in the declaration for a pension. Did the defendant intend to deceive the commissioner of pensions by presenting an affidavit appearing on its face to relate to the same state of facts as that set forth in the declaration, but, in fact, and in the mind of the person who made the affidavit, having reference to another and different state of facts? These being pertinent and substantial points of inquiry, bearing upon the defendant's understanding and intent in the transaction, the questions put to the witness Holbrook, which were objected to, were undoubtedly competent.

9. It was in proof that in 1875, and subsequently, the defendant was treated for catalepsy by Dr. N. A. Gray, and that he continued his treatment until the defendant applied for a pension. The defendant testified that Dr. Gray told him finally that his disorder was incurable. The following questions were then put to the defendant, which were objected to by the district attorney, and the objections were sustained, namely:

"*Question.* What, if anything, did Dr. Gray at that time advise you with reference to your right to have a pension for that disability? *Question.* When were you advised, and when did you first know, that you were entitled to a pension from the government on account of this disease of catalepsy?"

The last question was then repeated, and the defendant offered to show that he first knew his disease was a subject for an application for a pension within a few days of the date of the application, and then first learned the same from his physician, Dr. Gray. The court refused to permit the defendant so to testify. It will be observed that the court allowed the defendant to state everything which the physician said to him in relation to his disorder, and as to its alleged incurableness. Concerning the disorder the physician was of course competent to speak, and any information he gave to the defendant which pertained to the disease itself, it was proper to show, and the court permitted it to be shown. But it will be noticed that, in the additional questions put to the defendant, counsel sought to go further, and to show statements which it was claimed the physician made to the defendant in relation to the latter's right to claim and to obtain a pension. This was outside such statements or communications as could be properly called professional. The law fixed the rights of the defendant with reference to a pension, and the statements of the physician to him on that subject were no more admissible than would be the statements of any other person on that subject,

made under the same circumstances. The fact that the defendant may then have been suffering from catalepsy, did not of itself make him a subject for a pension. His right to a pension depended, among other things, upon whether he contracted the disease while in the military service. The questions objected to did not call for any opinion given by the physician to the defendant, which it was competent for him to give as an opinion within the line of his profession; and I can have no doubt that the questions were objectionable.

* * * * * * *

10. The court has been very strongly urged to grant a new trial on the ground that the verdict is not warranted by the evidence. Appreciating fully the force of the argument made by counsel to the court, on the merits of the case, I have endeavored with the utmost care, and not without anxiety,—*First*, to ascertain within what limits the court may act in exercising the power of granting or refusing a new trial in a case of this character; and, *secondly*, by weighing and considering the testimony adduced on both sides, to determine whether the verdict is just and ought to stand. The authorities are not in entire harmony in their statements of the rule which should control the court in exercising the power of granting new trials in criminal cases. In Hil. New Trials, at page 114, it is said:

"A new trial may be granted in case of conviction upon insufficient evidence; but in criminal as well as civil cases a verdict will always have great weight with the court, and a new trial will not, of course, be granted, because the court is not satisfied beyond a reasonable doubt, from the evidence in the record, of the guilt of the defendants."

And authorities in support of this proposition are cited in the author's notes. In the same work, at page 480, cases are referred to in which it has been held that a new trial will be granted in criminal cases where circumstances of guilt are slight, or where the testimony preponderates against the verdict. So, where the court was satisfied that the facts were involved in too much doubt and uncertainty to warrant the conviction, or where the jury in a trial for murder had not, in the consideration of the evidence, given the prisoner the benefit of every doubt. Again, on page 448, it is said:

"Courts should rarely take it upon themselves to decide upon the effect of evidence. Were they so to act they might with truth be charged with usurping the privileges of the jury. If the verdict is clearly wrong, we must do so. If we only doubt its correctness, we must let it alone. * * * A mere difference of opinion between the court and jury does not warrant the former in setting aside the finding of the latter. That would be, in effect, to abolish the institution of juries, and substituting the court to try questions of fact."

In *Waller* v. *State*, 4 Ark. 88, it was held that, in a criminal case, the presumption of law is in favor of the verdict; unless the record affirmatively overthrows this presumption, it will not be disturbed; and it must do this in such manner as to show that manifest injustice and wrong have been done in the premises.

In *Kirby* v. *State*, 3 Humph. 304, it was said:

"It is not to be understoood * * * that the verdict of the jury in a criminal case weighs nothing with this court, and that a new trial will be granted if, upon the evidence certified in the bill of exceptions, we are not convinced, beyond a reasonable doubt, of the guilt of the party. On the contrary, the jury are the exclusive judges of the credit of the witnesses, and in all cases much must occur before the court and jury, properly calculated to act upon their minds, which cannot be transferred to paper. A verdict, therefore, in all cases, must have great weight with this court."

In *People* v. *Goodrich*, 3 Parker, Crim. Cas. 518, it was held that the power to grant new trials ought not to be exercised, except in cases where it was the duty of the court to advise the jury to acquit the defendant, or to inform them that it was unsafe to convict upon the evidence before them; and that in cases of doubt, where the evidence is conflicting, and the credibility of the witnesses is in question, and no error has been committed by the court, a new trial will generally be denied. In this case a new trial was refused, although the court said that it would have been better satisfied with the action of the jury if they had acquitted the defendant.

Perhaps the correct rule on this subject is as well stated in the case of *State* v. *Elliott*, 15 Iowa, 72, as in any other. It was there held that while the court should set aside a verdict which is clearly against the evidence, and while greater latitude is allowed in the examination of motions for a new trial on this ground in criminal than in civil cases, it should be well satisfied of the insufficiency of the evidence to convince the judgment, reason, and conscience of the jurors of the correctness of the verdict. In the opinion of the court in this case it was said, as may be well said here, that in the consideration of the testimony much depended—

"Upon the character of the witnesses, their means of knowledge, their relation to the parties, their demeanor upon the stand, the agreement or non-agreement of their statements with the facts otherwise established, and many other matters not necessary to refer to in detail; and while a jury is not justified in arbitrarily disregarding the testimony of a witness, the circumstances which properly influence them are so various, and so often impossible to be known by this court, that, in case of conflict, there should be great hesitation before their conclusion should be disturbed. * * * It was the duty of the jury to be satisfied of the guilt of the accused, beyond all reasonable doubt, and this doubt is removed when they have arrived at that certainty 'which convinces and directs the understanding, and satisfies the reason and judgment of those who are bound to act conscientiously upon it,' (*Com.* v. *Webster*, 5 Cush. 320;) and while we recognize the duty of the court to interfere with an unjust verdict, it should, nevertheless, be well satisfied, when the testimony is conflicting, of its insufficiency to convince the judgment, reason, and conscience of the triers before setting aside the conclusion arrived at, as it must be presumed, after the requisite patient thought and attention."

The inquiry would seem to be, therefore, not alone whether the court, upon a consideration of all the evidence, might come to a different conclusion from that arrived at by the jury, but whether it is

clear, from the insufficiency of the evidence itself, that the jury have not rendered such a verdict as in reason and justice ought to have been rendered. In other words, the court should be able to say, this is such a verdict as cannot stand. Its injustice is manifest, because of the insufficiency of the evidence to sustain it. And where the credibility of witnesses is involved, so that it becomes necessary for the jury, in arriving at a conclusion, to determine who of the witnesses they will believe and who they will not believe,—who are corroborated and who are not,—and thus ascertain where lies the weight of credible evidence upon a given point, it is the duty of the court to exercise exceeding care lest it usurp the necessary functions of the jury, while at the same time it sees to it that an unjust conviction is not brought about with its sanction or concurrence.

Now, as the court stated to the jury, the oral proofs on the part of the prosecution consisted—*First*, of the testimony of persons who were members of the twenty-eighth regiment, the object of which was to establish the government's claim that the defendant was not, while in the line of his duty at St. Charles, in consequence of exposure to a snow-storm, attacked with a sickness which rendered him senseless, or which resulted in catalepsy, or any kindred disease; that he did not contract catalepsy while in the service, and was not treated in hospital, on the boat Imperial, or elsewhere, for any such disease. *Second*, of testimony relating to the performance of manual labor by the defendant, and his ability to perform such labor since he returned from the service. *Third*, of medical testimony concerning the disease known as catalepsy. *Fourth*, of testimony in support of the claim that certain relatives of the defendant, in the ancestral line, had what had been spoken of as fits and sinking spells, and that the defendant's alleged disorder was inherited. And, *fifth*, of testimony tending to show the circumstances under which certain of the affidavits set forth in the indictment were prepared and executed.

The evidence on the part of the defendant was addressed to, and was intended to meet the evidence of the prosecution upon these subjects of inquiry; the testimony on both sides embracing within its scope, numerous incidental points.

The testimony which the court and jury were required to consider was voluminous. Upon various points it was conflicting, as might well be expected in a case of this character. Listening to it attentively, as the court did when it was delivered; observing the witnesses as they testified, and the various points in their examination indicative of strength or weakness of recollection concerning the facts about which they testified,—when finally a conclusion was reached, and a survey could be taken of the whole case in its general features and in all its details, the mind of the court was impressed with the conviction that the stain of fraud rested upon the claim which the defendant had made and successfully prosecuted for the allowance of a pension. Subsequent reflection has not removed this belief. With-

out going into an analytical examination of the evidence, it must suffice to say that the case was peculiarly one involving questions of the credibility of witnesses, and the accuracy of their recollection of facts and events; and it is impossible for the court to say that the jury exercised a perverted or mistaken judgment upon those questions. Of course, it cannot be said of the case made against the defendant that it is devoid of all doubt. Rarely can this be said of any case. At the same time it cannot be successfully maintained, I think, that the evidence is insufficient to sustain the verdict, or that the conclusions of the jury are not consistent with an honest, reasonable, and fair consideration of the evidence; and, applying to the case the rules of law which adjudications of undoubted authority declare should govern the court in determining the question here in judgment, I am of the opinion that the verdict should stand.

DUNHAM *v.* KIMBALL and others.

(*Circuit Court, D. Massachusetts.* September 5, 1883.)

PATENTS FOR INVENTIONS—INFRINGEMENT.

Claims 1, 2, and 3 of patent No. 154,281, granted to Henry Dunham, August 18, 1874, for an improvement in machines for driving nails in boots and shoes, are infringed by the nailing machine made by J. E. Kimball, but the fourth claim in said patent is not infringed by said machine.

In Equity.

Charles H. Drew, for complainant.

James E. Maynadier, for defendants.

Before LOWELL and NELSON, JJ.

LOWELL, J. The plaintiff is the owner of three patents for improvements in machines for driving nails in boots and shoes, invented by her husband, Henry Dunham, two of which are relied upon in this suit. Dunham conceived the idea of a machine to drive nails with heads by combining parts of two old machines. There were old and well-known machines for driving nails into separate pieces of leather, called tack-leathering machines; and other machines for feeding and pegging soles automatically with nails or pegs which had no heads. Dunham united the feeding and nail-driving devices of one class of machines with the devices for delivering and centering nails with heads which were found in the other class. He made no substantial change in the several devices. This is the patent, No. 154,129, dated August 18, 1874. He soon after made improvements in the machine, and obtained the second patent, No. 184,281, dated November 14, 1876, but applied for August 10, 1874. The chief value of the improvement described in the first patent seems to be in

the idea of combining the two old machines. As a working nail-driving apparatus, the machine described in the second patent is much better; and we are of opinion that a reasonably liberal construction should be given in favor of the person who both originated the idea and made, for the first time, a good machine; but that it is better to apply this construction to the second patent, which describes the commercially successful result. The specification of No. 184,281 declares that the improvement consists of—

"A rotary shaft, with a cam, for the raising of the driver, and a spring for the purpose of forcing of the driver downward onto the nail; in combination with an automatically operating nail reservoir, and automatically moved ways on which the nails are conducted to a side opening in the lower part of a stationary tube, through which the driver descends as soon as the nail has entered the tube. The side opening in the aforesaid stationary tube is closed by an automatically moved picker as soon as the nail has entered the stationary tube, and a pair of elastic springs on each side of the stationary tube serve for the purpose of centering the nail previous to its being driven."

The description of the machine and its operation, so far as we are concerned with it, may be thus given:

A reservoir supplies nails to an inclined nailway, or track, of a form already well known, consisting of two parallel rails upon which the nails slide by their heads, called nailways (plural) in the patent. These ways have an adjustable cover, said to be new, which has two functions, to assist in holding and guiding the nails in their course down the ways, and to close the end of the nailway during a part of the operation. The ways reciprocate in and out of the throat of the nail tube. The operation of driving a nail is this. The ways move forward into the nail tube; at this time, the lower or springing end of the cover is lifted, and a thin blade of iron is thrust between the lowest nail and the others; the ways are drawn back, and the lowest nail is left in the tube and is driven by the driver. As the ways recede, the lower part or end of the cover is released and snaps over the nails.

The defendant J. E. Kimball was formerly in partnership with Dunham, and had an interest in the patents. Since their separation, he has made a nailing machine, which, in his opinion, does not infringe the plaintiff's patents. The other defendant, Merritt, is not now interested in the case, and is a witness for the plaintiff.

The opening general description of Dunham's specification would nearly describe the defendant's machine. There are certain differences upon which the question of infringement turns. The defendant has a mechanism for feeding the leather which differs from that of the plaintiff; but both are old. He has stationary inclined ways, which extend to an opening in the side of the nail tube. These ways are met by what he calls a fork, which is a piece of iron, divided in the middle, like a section of the nailways. This fork reciprocates in and out of the nail tube in the opposite direction from the reciprocating nailways of the plaintiff. When a nail has slid down upon this fork, a thin blade moves forward and separates it from the body of nails; the fork then recedes, and leaves the nail in the tube to be driven.

The plaintiff contends that the part which the defendant calls a fork is really a portion of the nailways; and that it reciprocates for the same purpose, and with the same effect as the whole track or way reciprocates in the patent; and that, in truth, the mode of operation of the two machines is substantially similar.

The defendant insists upon the differences between the two organizations, which all depend upon the fact that the defendant's machine has no spring to stop or protect the end of his nailway. In all other respects the machines are alike. The piece called a fork is one with the nailway, and a part of it when the nail is delivered into the throat of the nail tube; the separator acts in the same way to divide the lowest nail from the others; the fork, which, when at rest, was a part of the nailway, recedes, and the nail is driven in the same way as in the plaintiff's machine. The difference is that the nailway is cut in two and the lower end moves in the opposite direction from that in which the plaintiff's nailway moves. The part of the cover which acts as a stop is not needed, and is not present in the defendant's machine. We doubt its being an essential part of the plaintiff's machine. At any rate it is distinctly and separately described and claimed. We agree with the plaintiff that the fair construction of his patent will cover the defendant's machine.

The fourth claim, which contains, as an element, the stop, or springing end of the cover, is not infringed. Claims 1, 2, and 3—which are for combinations, (1) of the nailway and nail tube, (2) of the nail tube with an opening in its side, and the picker (or separator) and nailways, and (3) the ways and the adjustable cover—are infringed.

Decree for the complainant.

NAT. PUMP CYLINDER CO. *v.* GUNNISON.

(*Circuit Court, W. D. Pennsylvania.* September 4, 1883.)

PATENTS FOR INVENTIONS—CLAIM IN REISSUE REPEATING CLAIM IN ORIGINAL PATENT.

Where the claim in a reissue, while differing verbally from the claim in the original patent, is substantially and in legal effect a mere repetition of that claim, the claim in the reissue may be sustained.

Gage v. *Herring* 2 Sup. Ct. Rep. 819; *Schillinger* v. *Greenway Brewing Co.* 17 FED. REP. 244, followed.

In Equity. *Sur* demurrer to bill.

John K. Hallock, for demurrer.

Mr. Taylor, contra.

ACHESON, J. The *first*, *second*, and *third* grounds of demurrer go to the entire bill of complaint, and, if sustained, would require the court to hold that the reissued letters patent are void *in toto* by reason