

court acquires jurisdiction without reference to where the cause of action arose. But if neither of them can be so served, the action cannot be maintained in the district unless the cause of action arose therein. For the statute, in giving a plaintiff the right to serve a summons against a corporation upon any inferior agent or clerk thereof, where the superior ones cannot be found in the district, limits the same to cases where the cause of action arose in the district. Now, in each of these cases the cause of action arose without the district, and therefore the service of the summons thereon upon an agent of the corporation who does not appear to be its "managing" one, or its secretary, cashier, or president, is unauthorized and illegal. The illegality arises, not from a defect in form or method, but in substance, and is therefore incurable. In effect, the law does not, under these circumstances, permit the defendant to be brought before this court in civil action without its consent upon a cause of action that arose without the district.

The suggestion of counsel for the plaintiff, in Lung Chung's case, that the cause of action ought to be considered as having arisen within the district because the plaintiff's letters of administration were granted here, is ingenious, but not sound. On the contrary, the cause of action arose in Montana on the death of the deceased,—the law of that territory giving an action to his heirs or personal representatives for damages on that account. The plaintiff's right to sue on this cause of action may be said to have originated here, but the grant of administration to him did not create or originate the cause of action, though it gave him a certain control over it.

The motions are allowed, and the service set aside.

CHILD v. BOSTON & FAIRHAVEN IRON WORKS.

(Circuit Court, D. Massachusetts. January 25, 1884.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—SECOND ACTION FOR DAMAGES FOR SAME ACT.

A party who has elected to take judgment for his profits, which judgment has not been reversed, cannot prosecute a second action for other damages arising out of the same acts of infringement.

2. SAME—DAMAGES FOR A SINGLE WRONG.

For a single wrong, the damages for which are capable of ascertainment, and which is not in the nature of a continuing nuisance or trespass, only one action will lie, and the damages must be assessed once for all

At Law.

E. P. Brown and *C. E. Washburn*, for plaintiff.

Causten Browne, for defendant.

LOWELL, J. The parties have agreed that if, upon the facts submitted, the action can be further maintained, it shall stand for trial;

if not, a verdict shall be entered for the defendant. It is an action at law for infringement of two claims of a patent owned by the plaintiff. After it was begun the plaintiff filed his bill on the equity side of the court for precisely the same infringement, which consisted of making and selling certain printing presses, and Judge SHEPLEY, after a full hearing, entered an interlocutory decree for an injunction, and an account of the profits and damages. *Child v. Boston & Fairhaven Iron Works*, 1 Holmes, 303. The master reported that the plaintiff had not claimed damages as such, and that he was entitled to recover \$5,640.26, as profits. No claim was made before the court or the master under the second claim of the patent, and it was not passed upon, though the bill was broad enough to include it. A final decree was entered for the sum found by the master, but it has not been satisfied. The suit in equity was begun after the statute of 1870 had given the owners of a patent the right to recover damages as well as profits, in equity; and, under the prayer for general relief, the plaintiff might have had his damages assessed, as the interlocutory decree itself provides. Both suits, therefore, were for precisely the same cause of action; and though the remedy in equity was more complete, it was a concurrent remedy with this action, and has now passed into judgment. If the plaintiff had found that his damages exceeded the defendant's profits, he might have had the larger sum assessed. *Birdsall v. Coolidge*, 93 U. S. 64.

The principle of law relied on by the defendant, applies to the damages for the second claim, as well as damages generally. It is that the same defendant shall not be twice vexed by the same plaintiff for a single wrong, any more than for a single contract. "Suppose," said the court, in *Farrington v. Payne*, 15 Johns. 432, 433, "a trespass, or a conversion of a thousand barrels of flour, would it not be outrageous to allow a separate action for each barrel?" So far as I have been informed by the able arguments, or have discovered by my own examination, the authorities agree entirely, to this extent, at least, that for a single wrong, the damages for which are capable of ascertainment, and which is not in the nature of a continuing nuisance or trespass, only one action will lie, and the damages must be assessed once for all. The doctrine has sometimes operated harshly for plaintiffs, whose damages proved to be greater than they were expected to be. Here, however, the infringement consisted in making and selling certain machines, identical in the two cases, and not for their continued use; and there is no possible element of prospective or uncertain damage. See *Bennett v. Hood*, 1 Allen, 47; *Trask v. Hartford & N. H. R. Co.* 2 Allen, 331; *Goodrich v. Yale*, 8 Allen, 454; *Fowle v. New Haven & N. Co.* 107 Mass. 352; *Folsom v. Clemence*, 119 Mass. 473; *McCaffrey v. Carter*, 125 Mass. 330; *Adm'r of Whitney v. Clarendon*, 18 Vt. 252; *Great Laxey Mining Co. v. Clague*, 4 App. Cas. 115.

In giving the opinion of the supreme court, that an unsatisfied

judgment against one wrong-doer does not bar an action against others who are jointly and severally liable, MILLER, J., is careful to distinguish the case from that of a second action against the same defendant. *Lovejoy v. Murray*, 3 Wall. 1, 16.

The plaintiff having elected to take judgment for his profits for the precise infringement which is the subject of this action, which judgment has not been reversed, he cannot now prosecute his action for other damages arising out of the same acts of infringement; and, in accordance with the stipulation, there must be a verdict for the defendant.

NICODEMUS and another *v.* FRAZIER.

(Circuit Court, D. Maryland. January 24, 1884)

PATENTS FOR INVENTIONS—COMBINATION VOID FOR WANT OF PATENTABILITY.

Patent No. 241,405, granted December 27, 1881, to Nicodemus & Weeks, for improvement in apparatus for processing canned goods, held to be a combination of old elements, void for want of patentability.

In Equity.

Sebastian Brown, for complainants.

John H. Barnes, for defendant.

MORRIS, J. Bill of complaint for infringement of patent No. 241,405, granted to complainants December 27, 1881. Complainants' patent is for an improvement in an apparatus for processing canned goods. To enable the goods, after being put in hermetically-sealed cans, to be subjected to a higher degree of heat than 212 degrees Fahrenheit, the complainant provides a vessel, or kettle, with a steam-tight cover in which the cans may be placed, and the steam admitted until the temperature is raised to the required degree. The cans being subjected while in the steam-tight vessel to the pressure of the confined steam are not liable to be burst by the explosive pressure generated within them. The steam-tight processing vessel is substantially the same contrivance described and claimed in patent No. 149,256, granted to Andrew K. Shriver March 31, 1874. Shriver's contrivance is not claimed by him in his patent in combination with any boiler or steam generator, but simply as a steam-tight processing vessel, to be supplied with steam from any convenient steam generator.

The complainant in his patent claims this steam-tight vessel in combination with an ordinary tubular boiler, and it is described and shown as placed upon the boiler with the bottom extending downward a little distance into the boiler itself. The first claim is for the combination of the vessel and the boiler, the vessel mounted upon