

Now, on a showing that the solicitor for the defendant did not know of the statute until August, 1884, and that the defendant did not until the same time know that Mr. Shields was a deputy clerk of the court, an application is made to set aside the reference to Mr. Shields, and all the proceedings under it, and his report, and to declare them void, because of the provisions of the statute. It is shown that the solicitor for the defendant and the plaintiff's solicitor assented in open court to the designation of Mr. Shields as master, at the time the interlocutory decree was presented and settled and signed. Under such circumstances, consent being an adequate special reason in a case of the kind, it must be presumed that, as the judge appointed Mr. Shields, he determined that the consent was an adequate special reason. Nothing, therefore, remains but the irregularity of omitting to state the special reason in the decree.

The disqualification of the deputy clerk was for the benefit of the parties. They could waive objection to him, and the court could act on that waiver. Ignorance of the statute by the solicitor did not detract from the force of the waiver, no abuse or prejudice being now alleged. The solicitor does not aver that he did not know that Mr. Shields was deputy clerk. Knowledge of that fact by him was knowledge of it by the defendant.

The case is not one of consent to jurisdiction, or of a waiver of what public policy forbids to be waived. The appointment of a deputy clerk as master is not forbidden, but is allowed under certain circumstances, and with certain formalities. In a case where only an account is to be taken, and no moneys are to be handled, and the court has full control of the report, there is no reason of public policy which forbids the assent of the parties to the appointment of a deputy clerk, or requires that that should not be an adequate special reason. The irregularity, if it was one, in a case of consent, of not specifying the consent, in the decree, as the special reason for the appointment, is a mere defect or want of form, which may be disregarded or supplied by amendment, under section 954 of the Revised Statutes, or under the general power of a court of equity, under section 913. Moreover, there was a waiver by the defendant, in carrying on the proceedings so long under the reference, and excepting to the report, and waiting till after an adverse decision, before making this application. The oath to a referee is waived by proceeding through a trial without objecting.

It is not entirely clear that the statute is not to be construed as applicable only to the cases where a master *ejusdem generis* with a receiver is appointed,—a master through whose hands money or property is to pass, as a receiver; such as one to sell on foreclosure of a mortgage, or to administer property or funds. But, however this may be, the present case is a proper one in which to direct that an order be entered, providing that the interlocutory decree, dated February 1, 1881, be amended *nunc pro tunc*, as of that date, by inserting therein,

before the words "to ascertain and take," the words, "(the solicitors for the respective parties having in open court consented to the appointment of said Shields as such master, although he is the chief deputy clerk of this court, and the court now determining that such consent is a sufficient special reason for such appointment.)"

The same disposition is made of the application in the case against Neil.

### SPILL v. CELLULOID MANUF'G Co.

(Circuit Court, S. D. New York. November 7, 1884.)

#### 1. PATENT FOR INVENTION—SUPPLEMENTAL BILL AFTER DECREE OF DISMISSAL—NEWLY-DISCOVERED EVIDENCE—DILIGENCE.

After a decree has been rendered dismissing plaintiff's bill, a petition for leave to file a supplemental bill, in the nature of a bill of review, on the ground of the discovery of new matter of consequence, must show that the petitioner could not, with reasonable diligence, have obtained, prior to the former hearing, the testimony which he seeks to introduce, and that such matter is material. Demurrer to petition sustained.

In Equity.

*H. M. Ruggles* and *E. M. Felt*, for plaintiff.

*F. H. Betts* and *E. L. Hamilton*, for defendant.

BLATCHFORD, Justice. Since the announcement of the decision of the court in this case, on the twenty-first of August, 1884, (21 FED. REP. 631,) dismissing the bill of complaint, and before the entering of any formal decree to that effect, the plaintiff has made a motion for leave to file a supplemental bill of complaint in the nature of a bill of review. The motion is founded on a petition which purports to be the petition of the plaintiff by his solicitor, and is not signed or sworn to by the plaintiff, or any agent or attorney in fact of his, but is signed and sworn to by the solicitor, and is supplemented by an affidavit made by the solicitor, stating that the reason why the petition was not signed and verified by the plaintiff was because the plaintiff is in Europe, and has been there for several years last past, and for the further reason that the facts and statements set forth in the petition are within the knowledge of the solicitor.

The petition sets forth that since the decision of August 21, 1884, the petitioner has discovered new matter of consequence in the cause; particularly, that John W. Hyatt, Jr., and David Blake obtained letters patent of the United States, No. 89,582, on the fourth of May, 1869, a printed copy of the specification of which is annexed to the petition; that the defendant, as assignee of I. Smith Hyatt and John W. Hyatt, (who is the same person who is called John W. Hyatt, Jr., in No. 89,582,) obtained letters patent of the United States, No. 156,352, on the twenty-seventh of October, 1874, a printed copy of the