

*Joseph M. Deuel*, for plaintiffs.

*Edward Mitchell*, U. S. Atty., and *Thomas Greenwood*, Asst. U. S. Atty., for defendants.

LACOMBE, Circuit Judge, (*orally*.) The rule is that costs follow recovery, and I see no reason why there should be any exception here. The silence of the supreme court as to costs of this court is not significant, in view of the fact that the subject was not presented to it. Judgment should therefore be entered for the plaintiffs for the amount of the sums and the interest thereon specified in the opinion and the mandate of the supreme court, together with the aforesaid \$690.50, costs and disbursements of this court.

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PIERCE v. UNION PAC. RY. CO.

(*Circuit Court, S. D. Iowa, W. D. October 6, 1891.*)

DISCOVERY IN ACTION AT LAW—REMOVED CAUSE—STATE AND FEDERAL PRACTICE.

Upon removal of an action at law from an Iowa to a United States court, defendant cannot be compelled to file answers to interrogatories attached to the petition, as allowed under the Iowa statute, since Rev. St. U. S. § 861, provides that the mode of proof in such actions shall, except under certain circumstances, be by oral testimony and examination of witnesses in open court. *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. Rep. 724, followed.

At Law.

Action to recover damages for wrongful death. On motion for an order requiring an answer to be filed to written interrogatories attached to petition.

*Charles A. Clark*, for plaintiff.

*Wright & Baldwin*, for defendant.

Before SHIRAS and WOOLSON, JJ.

SHIRAS, J. This action, being at law, to recover damages caused by the death of Ralph H. Pierce, was brought originally in the district court of Pottawattamie county, Iowa, and was thence removed into this court by the defendant corporation. To the petition as filed in the state court there were attached certain interrogatories, to be answered on behalf of the defendant by the proper officers of the company, the answer to which could, under the provisions of the state statute, have been read in evidence upon the trial of the case, had such trial taken place in the state court.

The plaintiff now moves this court for an order directing the time within which such interrogatories shall be answered, and thus the question is presented, whether, in the federal court, the plaintiff is, of right, entitled to insist upon answers being filed to the interrogatories attached to the petition, in order that the same may be read in evidence upon the

trial of the cause. It seems to us that the ruling of the supreme court in *Ex parte Fisk*, 113 U. S. 713, 5 Sup. Ct. Rep. 724, is decisive of the motion now presented. The facts in that proceeding, briefly stated, were as follows: Francis B. Fogg brought suit in the supreme court of the state of New York against C. B. Fisk, to recover damages at law, and, in the progress of the cause, obtained an order that the defendant, Fisk, be examined, and his deposition be taken, as a party before trial, according to the provisions of the New York Code of Civil Procedure. In obedience to this order, Fisk appeared before the court, and his examination had been partly completed, when the cause was removed into the circuit court of the United States, and thereupon in that court a further order was obtained, requiring Fisk to appear, according to the provisions of the state statute, in order that his examination should be completed. The defendant appeared before the court in pursuance of the order, but declined to answer the questions propounded to him, on the ground that the court had no jurisdiction to require him to answer the questions in the manner required by the state statute, and thereupon he was adjudged to be in contempt, and was committed to the custody of the marshals. To secure relief from this imprisonment he sued out a writ of *habeas corpus* from the supreme court of the United States, it being held by that court that the order of commitment made by the circuit court was void, because that court—to-wit, the circuit court of the United States—did not have the power to make the order requiring Fisk to submit to the preliminary examination provided by the state Code of Procedure. This conclusion was mainly based upon the provisions of section 861 of the Revised Statutes, which enacts that “the mode of proof in the trial of actions at common law shall be by oral testimony and examination of witnesses in open court, except as hereinafter provided.” The supreme court held, in substance, that, as congress had, in enacting this section, legislated upon the matter of the mode of proof in law actions, it must be held that thereby congress intended to establish or prescribe the system to govern the practice in this respect in the courts of the United States, and that this action on part of congress precluded having recourse to any system or mode of proof established by state laws. It was further held that the mode of procuring testimony provided for in the state statute was not the equivalent of his oral examination and testimony, as required by the act of congress. In effect, therefore, this case decides that in trials at common law in the courts of the United States the mode by which the testimony of witnesses can be obtained is by an oral examination of such witnesses in open court at the time of, and as part of, the actual trial of the cause, unless a given witness comes within some one or more of the exceptions named in the other sections of the statute. Under the rule given us, then, by the supreme court, we are not justified in granting an order for the procurement of the testimony of a witness by any mode other than his production in open court, unless it is shown that he comes within some of the exceptions provided for in the statutes of the United States,—as, for instance, that the witness lives at a distance greater than 100 miles from

the place of trial, or that he is ancient or infirm, or is about to leave the United States, or to enter upon a sea voyage. In the present cause it is not shown that the party or parties who may be called upon to answer the interrogatories attached to the petition come within any of the exceptions named, and therefore the court is without authority to order the procurement of the desired testimony in any other mode than by the production of the witness in open court, as required by section 861 of the Revised Statutes. The motion made must therefore be refused, and it is so ordered.

WOOLSON, J. I concur in the foregoing opinion and result reached therein.

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*In re SALOMON.*

(Circuit Court, S. D. New York. May 11, 1891.)

CUSTOMS DUTIES—OLD RUBBER BOOTS AND SHOES.

Rubber boots and shoes, worn out by use, and fit only for remanufacture, held to be dutiable at 10 per centum *ad valorem* as "rags" or "waste," under paragraphs 481 and 493 of Schedule N of the tariff act of March 3, 1883, and not dutiable at 25 per centum *ad valorem*, as "articles composed of india rubber," under paragraph 454 of said schedule.

At Law. Appeal from board of United States general appraisers.

F. Salomon, on August 23, 1890, imported by the Glenrath into the port of New York certain old india rubber boots and shoes, which were duly entered at the port of New York, and classified and assessed by the collector of customs at that port, at 25 per centum *ad valorem*, under Schedule N, par. 454, of the tariff act of March 3, 1883, as "articles composed of india rubber, not specially enumerated or provided for in this act." The importer protested, claiming that the said goods (1) were free of duty, under the free list of said act, (paragraph 724,) as "india rubber crude;" or (2) dutiable at only 10 per centum *ad valorem* as "rags, of whatever material composed, and not specially enumerated or provided for in this act," under Schedule N, par. 481; or (3) as dutiable at 10 per centum *ad valorem* as "waste, all not specially enumerated or provided for in this act," under Schedule N, par. 493, of said act. An appeal was taken by the importer from the decision of the collector to the board of United States general appraisers, under the provisions of the act of June 10, 1890. The board affirmed the decision of the collector, holding that the merchandise, consisting of manufactured india rubber, principally boots and shoes, along with scraps thereof, worn out by use, and fit only for remanufacture, were "articles," within the comprehensive meaning of that term as used in the tariff act, and, being composed of india rubber, were properly dutiable at 25 per centum *ad valorem*, under paragraph 454, Schedule N, of the tariff act of March 3,

1883. The importer applied for a review of the decision of said board by the United States circuit court.

*Curie, Smith & Mackie*, for importer.

*Edward Mitchell*, U. S. Atty., and *Henry C. Platt*, Asst. U. S. Atty., for collector.

LACOMBE, Circuit Judge. The decision of the appraisers is reversed, and the article is classified either as "rags," at 10 per cent., or as "waste," at 10 per cent., under paragraphs 481 and 493 of the act of March 3, 1883.

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### CELLULOID MANUF'G CO. v. READ.

(Circuit Court, D. Connecticut. October 7, 1891.)

1. TRADE-MARKS—WHAT WILL BE PROTECTED.

The word "Celluloid," being a new and arbitrary word coined by plaintiff, and applied to goods of its manufacture, is a valid trade-mark, in the use of which plaintiff is entitled to be protected, though the term has become so generally known as to have been adopted by the public as the common appellative of the article to which it is applied.

2. SAME—WHAT CONSTITUTES INFRINGEMENT.

But the use of the term by defendant as applied to an article of his manufacture, "Celluloid Starch," is not such as to induce the public to believe that the starch was connected with plaintiff or a product of its manufacture, and hence it is not an infringement of its trade-mark entitling plaintiff to an injunction.

3. SAME—INJUNCTION.

The fact that a method might be devised by which plaintiff's article, "Celluloid," could be converted into a substitute for starch, and the possibility that it may in the future desire to make such an article, and put it on the market, are too remote to entitle it to an injunction against such use of the term by defendant.

#### In Equity.

*Rowland Cox*, for plaintiff.

*Henry G. Newton* and *Henry F. Hall*, for defendant.

SHIPMAN, J. This is a bill in equity for an injunction against the unlawful use of a trade-mark. The plaintiff was incorporated in 1871, by the name of the "Celluloid Manufacturing Company," for the manufacture and sale of "celluloid, or solid collodion, and its compounds, and articles made therefrom;" and ever since has existed under said name, has been constantly engaged in said manufacture, and has done an extensive business in producing a great variety of articles of use or ornament which contained, in whole or in part, the substance called "Celluloid." About the year 1870 the Messrs. Hyatt invented and patented a process for the conversion and manufacture of pyroxyline into a solid, to which, after the manufacture had developed and been materially improved, they gave the arbitrary or fanciful name "Celluloid," a name which has ever since been applied to the article, as manufactured by the plaintiff, which apparently succeeded to the trade-mark rights