COOP *et al. v.* DR. SAVAGE PHYSICAL DEVELOPMENT INST., Limited.

(*Circuit Court, S. D. New York.* November 17, 1891.)

PATENTS FOR INVENTIONS—INFRINGEMENT—INTERROGATORIES AND ANSWER.

Where a bill for infringing a patent for an improvement in walking tracks for gymnasiums propounds interrogatories as to whether defendant is using a track of a particular construction, and, if not, of what construction, they must be answered by stating the facts, and a general denial of infringement is insufficient.

In Equity. Bill by William L. Coop and others against the Dr. Savage Physical Development Institute, Limited, for infringement of a patent. On exceptions to answer. Exceptions sustained.

Fowler & Fowler and *Charles N. Judson*, for plaintiffs.

A. D. Kiddle, for defendants.

WHEELER, J. This suit is brought upon letters patent No. 358,483 for an improvement in walking tracks for gymnasiums, and interrogatories as to whether the defendant has made, or caused to be made and used, walking tracks of a particular construction, and, if any not of that, of what other, construction, were annexed to the bill, and required to be answered. The defendant has answered, denying the infringement generally, without otherwise answering the interrogatories, and the answer is excepted to for this lack. The exceptions have now been heard. The interrogatories have been approved on demurrer, heard by Judge SHIPMAN. *Coop* v. *Institute*, 47 Fed. Rep. 899. The denial of infringement is a conclusion, and not an answer of facts from which it is drawn. The conclusion may not follow from the facts when given, and whether it does or not may be a question in the case. The plaintiffs seem to be entitled to the facts, and not to be bound by the conclusion, or to overcome it.

Exceptions sustained.

THE PROGRESSO.

STREET *et al. v.* THE PROGRESSO.

(*District Court, E. D. Pennsylvania.* September 21, 1891.)

1. WITNESSES—FEES AND MILEAGE IN ADMIRALTY CASES.

In admiralty causes in the eastern district of Pennsylvania, mileage will not be allowed to witnesses brought from beyond the district, except as to 100 miles of the distance.

2. SAME—FEES AND MILEAGE OF PARTY.

A party is not entitled to either witness fees or mileage when his presence has not been required by the opposite party.

In Admiralty. Libel by Street Bros. against James M. Waterbury, owner of the steam-ship Progresso. Upon exceptions to the clerk's taxation of costs.

Libelants claim witness fees and mileage from Charleston to Philadelphia and return for Thomas Street, one of the libelants; also mileage for another witness, Paul Fatman, from the same place and return. The clerk disallowed Street's witness fees and mileage, and Fatman's mileage, except as to 100 miles.

N. Dubois Miller and *Biddle & Ward*, for libelants.

Coulston & Driver, for claimant.

BUTLER, J. The exceptions must be dismissed. As respects the mileage of witnesses brought from beyond the district, the clerk's ruling corresponds with our practice. Depositions might have been taken abroad and the costs avoided. Inasmuch as the testimony could only be heard by deposition, there was no advantage in bringing the witness here. The rule on this subject is not harmonious throughout the country, but any discussion of the subject in support of our practice, in view of what has been said heretofore respecting it, would be a waste of time. In *The Vernon*, 36 Fed. Rep. 115; *Wooster* v. *Hill*, 44 Fed. Rep. 819; *Haines* v. *McLaughlin*, 29 Fed. Rep. 70; *Buffalo Ins. Co.* v. *Providence & Stonington Steam-Ship Co.*, Id. 237,—the subject was fully discussed.

As relates to the $4.50 claimed by the libelant for his attendance as a witness, the clerk's ruling is sustained. Ordinarily, where a party is present at the taking of testimony, his presence is, presumably, necessary on his own behalf, whether his personal testimony is required or not. The instances must be rare where he can safely absent himself, and where he does not avail himself of the opportunity thus afforded of forwarding his interest in the cause generally. Parties have not been allowed witness fees in this district, and I think should not be, except in case their presence is required by the other side.

RICHMOND *v.* BROOKINGS.

(Circuit Court, D. Rhode Island. November 28, 1891.)

1. REMOVAL OF CAUSES—DIVERSE CITIZENSHIP—FOREIGN ATTACHMENT.
   Although the judgment in an action commenced in a state court against a non-resident by foreign attachment without personal service can bind the property only, and not the person of the defendant, yet the latter is a party to the suit in such sense that the same may be removed to the federal circuit court on the ground of diverse citizenship.
2. SAME—DISMISSAL.
   If the defendant could not in such case be considered a party for the purposes of removal, this would not be a ground for dismissing the cause in the federal court, but only for remanding to the state court.
3. SAME—JURISDICTION OF CIRCUIT COURT—NON-RESIDENT OF DISTRICT.
   Act Cong. 1888, § 1, (25 St. U. S. p. 433,) providing that no suit shall be brought in the circuit court "against any person by any original process * * * in any other district than that whereof he is an inhabitant," applies only to suits commenced in that court; and, in a case removed to it from a state court, its jurisdiction is not affected by the fact that defendant was not a resident of the district, and that the state court had acquired jurisdiction by foreign attachment without personal service. *Bank* v. *Pagenstecher*, 44 Fed. Rep. 705, followed.
4. ATTACHMENT OF LAND—SERVICE ON NON-RESIDENT.
   The Rhode Island statute in regard to attaching real estate requires personal service on the defendant or service by leaving a copy with some person at his residence, or, if he have no residence within the precinct of the officer, then by mailing a copy to him, and serving a like copy on the person, if any, in possession of the real estate. *Held*, that when the return shows service of a non-resident by mailing a copy to him, but makes no allusion to serving any person in possession of the land, the court has no jurisdiction.
5. SAME—AMENDING RETURN.
   The return may, however, be amended so as to show that no person was in possession of the lands, upon affidavits showing such to be the fact.
6. MOTION TO DISMISS—DEMURRER.
   The question whether the declaration states a cause of action cannot be considered upon a motion to dismiss, but must be raised by demurrer.

At Law. Action by William H. Richmond against Wilmot W. Brookings, commenced by process of foreign attachment. On motion to dismiss. Conditional order of dismissal.

E. D. Bassett, for plaintiff.

C. H. Hanson, for defendant.

CARPENTER, J. This action was commenced in the court of common pleas for the county of Providence, in the state of Rhode Island, by attachment of real estate of the defendant. The defendant was not personally served with process. He appeared specially, and filed a plea denying the jurisdiction of the court, and also a petition whereby the action was removed into this court. He now, still appearing specially, files a motion to dismiss the action "on the ground that he is not a resident or citizen of said state of Rhode Island, and was not found, or served upon personally with process, in said state or district of Rhode Island."

In support of this motion the defendant first contends that this court can have no jurisdiction of any action wherein the defendant is not personally served with process, and cites *Perkins* v. *Hendryx*, 40 Fed. Rep. 657. I have already had occasion to consider this question in *Bank* v.