

*In re* HERTER BROS.

(Circuit Court, S. D. New York. October 13, 1891.)

**At Law.** Application to review a decision of the board of general appraisers as to the classification of certain marble blocks.

*W. Wickham Smith*, for importers.

*James T. Van Rensselaer*, for the United States.

LACOMBE, Circuit Judge. In disposing of this case there is very little to add to the suggestions and construction of the statute which appear in the charge of Judge COXE in the case of *Baumgarten v. Magone*, 50 Fed. Rep. 69, which of course is the law of this court until reversed, if it ever should be, by the court of appeals. These articles are manifestly small blocks of marble, and I cannot find in the testimony sufficient to warrant a conclusion that the general trade and commerce of this country has given a special trade meaning to the words "marble in blocks" other and different from its ordinary meaning in the speech of everyday life. It may be that it has, but there is not enough in this testimony to show that fact. For that reason, I shall reverse the decision of the appraisers, and direct the assessment of duty upon these articles as marble in blocks, at 65 per cent.

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 WHITNEY *v.* BOSTON & A. R. Co. *et al.*

(Circuit Court, D. Massachusetts. April 8, 1892.)

**PATENTS FOR INVENTIONS—INFRINGEMENT—DISCLAIMER—ORIGINAL INVENTOR.**

One who is in fact the original and first inventor of all the things covered by the several claims of his patent may, without filing the disclaimer required by Rev. St. U. S. § 4922, maintain a suit for infringement of such claims as are valid, notwithstanding that the things covered by the other claims were in public use for more than two years prior to his application.

**In Equity.** Suit by Baxter D. Whitney against the Boston & Albany Railroad Company *et al.* for infringement of a patent. Decree for injunction.

*D. Hall Rice*, for complainant.

*Parkinson & Parkinson*, for defendants.

NELSON, District Judge. Defendants' motion to withhold a decree in favor of the plaintiff until the plaintiff shall have disclaimed the 1st, 4th, 5th, 6th, and 7th claims of his patent is denied, upon the ground that, assuming, as the defendants contend, that the evidence in the case proves that said claims cover what had been in public use and on sale for more than two years prior to the plaintiff's application for his patent, yet, since it appears that the plaintiff was the original and first inventor of the parts of his invention secured by said claims, he is therefore not required by Rev. St. § 4922, in order to entitle himself to a decree for an

infringement of the second and third claims of his patent, to make disclaimer of the other claims. *Manufacturing Co. v. Sprague*, 123 U. S. 249, 8 Sup. Ct. Rep. 122; *Telephone Co. v. Spencer*, 8 Fed. Rep. 512; Walk. Pat. § 197. The plaintiff, having waived his right to an account, is entitled to a decree for an injunction against the infringement of the second and third claims of the patent, with costs, and it is so ordered.

DICKERSON v. MATHESON *et al.*

(Circuit Court, S. D. New York. April 18, 1892.)

**1. SALE—PATENTED ARTICLE—NOTICE OF RESTRICTION—TRADE CUSTOMS.**

A firm in Germany having the right, under European and American patents, to sell a patented coloring matter in Europe and the United States, was in the habit of selling with restrictions against exportation to the United States. A London firm, which knew, in a general way, of this restriction, sent an order to the London agents of the German firm for a quantity of the goods "strong for export." *Held*, that it could not be presumed that these words conveyed notice of an intention to export to the United States, in the absence of proof that such was their trade meaning in London.

**2. PRINCIPAL AND AGENT—NOTICE TO AGENT.**

On receiving notice of the arrival of the goods in London, the purchasers made out a check for the price, and gave it to their clerk, who, in the usual course of business, exchanged it for the invoice sent by a messenger of the seller's London agent. This invoice contained a notice of the prohibition against exporting to the United States, but the attention of the firm was not called thereto until a day or two later. *Held*, that notice to the clerk was notice to the firm, and, having accepted the goods with notice, the firm was bound by the restriction.

**3. PATENTS FOR INVENTIONS—SALE WITH RESTRICTIONS—INFRINGEMENT.**

The owner of patents granted in Europe and the United States, who sells the patented article in Europe with a prohibition against importation into the United States, may treat as an infringer one who sells that article in this country. *Dickerson v. Matheson*, 47 Fed. Rep. 319, affirmed.

**4. PRACTICE—STIPULATED EVIDENCE—SUBSEQUENT TESTIMONY.**

The parties to a cause stipulated that, in order to save the delay and expense of a commission to England, the cause should be tried as if certain evidence therein set out had been given. Afterwards, however, it became necessary to send a commission, and certain testimony was taken thereunder, but nothing was done to have the stipulation expunged. *Held* that, even if the commission was inconsistent with the stipulation, the stipulated evidence would not be disregarded on the motion of one party first made at the final hearing without notice to his adversary.

**5. FOREIGN LAWS—HOW PROVED.**

Foreign laws must be proved as facts in the courts of this country, and mere citations to English statutes and authorities cannot be accepted as showing the English law.

In Equity. Suit by Edward N. Dickerson against William J. Matheson and James N. Steele for infringement of a patent. Decree for complainant.

Statement by COXE, District Judge:

On the 3d of November, 1885, Carl Duisberg, a German, obtained United States letters patent No. 329,632 for an improvement in coloring matter, known as "Benzo-Purpurine." On the 21st of December, 1885, Duisberg assigned the patent to the Bayer Company, of Ger-