

tion of jurisdiction, filed an answer to the bill in July, 1878. It seems clear that with the present parties to the case the court is without jurisdiction. In arranging the parties according to their interests, and as to their respective sides in the controversy, it will be necessary to place Mrs. Phillips with the complainants; and the fact of her residence and citizenship in this district will be fatal to the jurisdiction. *Bland v. Fleeman*, 29 Fed. Rep. 669; *Covert v. Waldron*, 33 Fed. Rep. 311; *Rich v. Bray*, 37 Fed. Rep. 273. Where there is great delay, as in this case, in raising the question of jurisdiction, the court will consider the delay in passing upon the question. See *Deputron v. Young*, 134 U. S. 241, 10 Sup. Ct. Rep. 539. The counsel for complainants suggested to the court his right to dismiss as to Mrs. Phillips, which would obviate all difficulty as to the jurisdiction of the court on the ground of citizenship; and the question would then remain as to whether or not it is necessary to retain Mrs. Phillips as an indispensable party, under the equity practice of the court. In *Horn v. Lockhart*, 17 Wall. 570, a case very much like this, being a suit to recover assets of an estate in the hands of an executor, the suit was brought in Alabama, where the executor resided, and two of the parties made defendants resided in the state of Texas, which was the residence of the complainants. The objection to the jurisdiction was met by the dismissal of the suit as to the two defendants resident in Texas. The dismissal as to these parties, thereby obviating the question of jurisdiction, was sustained by the supreme court, and I am unable to see the difference in principle between that dismissal and the dismissal here of the case as to Mrs. Phillips. The two defendants as to whom that case was dismissed had interests identical with the interest of Mrs. Phillips in this case; and, if a decree could be rendered in that case without their presence as indispensable parties, I see no reason why it may not be rendered in this case. Upon the authority of the case just cited, I am of the opinion that, if counsel for complainants desire, an order may be taken, dismissing this case as to Mrs. Phillips; otherwise, the case must be dismissed for want of jurisdiction.

HOHNER v. GRATZ.

(Circuit Court, S. D. New York. May 7, 1892.)

FOREIGN JUDGMENTS—RES ADJUDICATA—INFRINGEMENT OF TRADE-MARK.

In an action in equity to restrain the defendant from selling in this country harmonicas made in Germany, and protected by the complainant's trade-mark, a motion will not be granted, after the cause is in readiness for hearing, giving leave to interpose a supplemental answer setting up a judgment rendered against the same complainant in a suit in Germany to restrain an alleged violation of the same trade-mark there, in which the defendant there was the principal of the defendant here; because foreign adjudications, as respects torts, are not binding, and because the granting of an injunction depends in part upon circumstances which vary in different jurisdictions; and also because neither the parties nor the subject-matter of the two suits are the same, and neither comity nor public policy require or

admit that the protection of the citizens of this country against imposition or fraud committed here should in any degree be held subject to the decisions of a foreign tribunal.

In Equity. Bill by Mathias Hohner against William R. Gratz to restrain the violation of a trade-mark. Motion for leave to file a supplemental answer setting up a foreign judgment, denied.

Louis C. Raeger, for complainant.

Benno Loewy, for defendant.

BROWN, District Judge. The recent adjudication in Germany which is sought to be set up as a supplemental answer in bar of the complainant's demand, is not, in my judgment, entitled to the force of an adjudication in an action like the present. The relief prayed for is to restrain the violation of the complainant's trade-mark in harmonicas, through any sales of the infringing harmonicas by the defendant in this country. The granting of such relief has reference not merely to the complainant's rights, but to the protection of the American public against imposition. *Medicine Co. v. Wood*, 108 U. S. 218-223, 2 Sup. Ct. Rep. 436. The question whether the alleged infringement is likely to impose upon the public, or whether it involves an unfair and inequitable business competition, depends upon the circumstances of the place. An injunction might be properly refused in Germany, and yet properly granted here, from the different circumstances which would necessarily enter into the decision.

Comity, moreover, does not require, nor does public policy permit, that the protection of the citizens of this country against imposition in transactions within its own territory, should in any degree be held subject to the decisions of any foreign tribunal. See *Brimont v. Penniman*, 10 Blatchf. 436. Cases like the present have no analogy to suits upon foreign judgments rendered on contracts, or other subjects of ordinary common-law right, and are not within such adjudications as that of *Hilton v. Guyott*, 42 Fed. Rep. 249, and the cases there cited. Here the subject-matter is a tort, and an imposition upon the public alleged to be committed or about to be committed here. Such subjects are not concluded by foreign adjudications, even when the acts referred to are the same identical acts. Whart. Conf. Laws, §§ 793, 827.

But here the particular subject-matter of the two actions is not identically the same. Though similar torts or imposition in Germany may have been the subject of the suit in the German tribunal, those acts are not the same as similar torts committed here; nor is the defendant the same, though he may be the agent of the German defendant. What is sought here is to restrain this defendant's torts within this country, and his imposition upon the American public; and that is a different subject from a restraint upon the principal in Germany against similar torts committed there. The motion is, therefore, on both grounds denied.

JOYCE v. CHARLESTON ICE MANUF'G CO.

*(Circuit Court, D. South Carolina. April 30, 1892.)***1. TRIAL—CONFLICT OF EVIDENCE—PROVINCE OF COURT AND JURY.**

When there is a conflict of evidence as to material facts, which conflict can only be solved by determining the credibility of the witnesses, the court has no authority to direct a verdict.

2. NEW TRIAL—MISCONDUCT OF WITNESS.

The fact that a witness, on an objection to his testimony, intentionally deceived the court as to the statements he was about to make, is not sufficient ground for a new trial when the statements thus introduced were not in fact irrelevant, and had already been given in evidence.

3. SAME—WEIGHT OF EVIDENCE—OPINION OF COURT—THIRD TRIAL.

Although a federal judge may give his opinion as to the weight of the evidence, yet, after two concurring verdicts opposed to that opinion, he cannot grant a third trial, except for substantial errors of law.

At Law. Action by E. F. Joyce against the Charleston Ice Manufacturing Company to recover damages for an unlawful detention of personal property. Heard on motion for a new trial. Overruled.

Bryan & Bryan, for plaintiff.

Samuel Lord and *J. N. Nathans*, for defendant.

SIMONTON, District Judge. This case has been before two juries. At the first trial, which was had in Greenville, the verdict was for the plaintiff. After hearing argument on motion for a new trial, the verdict was set aside, the court being satisfied that the jury were influenced by prejudice. The second trial was had at the present term in Charleston. The plaintiff again obtained a verdict. A motion for a new trial.

The action is for damages for the unlawful detention of personal property. The plaintiff was under contract with the defendant to dig an artesian well on its premises in the city of Charleston. The location of the proposed well was within the inclosure of the defendant. While the digging of the well was in progress, disputes arose between the plaintiff and the defendant respecting the performance of the contract. This dispute pending, plaintiff desired to remove from the inclosure of the defendant certain 10-inch tools and 10-inch pipe, rope, and some other materials needed by him for a well in Florence, S. C., and, as he alleges, not needed at the well in Charleston. Prior to this he had, at his own pleasure, brought to and removed from the premises of the defendant plant and materials used about the well without seeking the permission or consent of the defendant. On this occasion—13th February, 1890—such consent was asked for the removal of the articles specified. It was not given. The 10-inch plant and other material were not removed. One or more efforts were made by plaintiff with the same result. On 18th March following, a formal demand was addressed to the president of the ice company for the entire plant of the plaintiff of every description on the premises of defendant. This demand was mailed to the president, who was absent from the city. On the 24th March he replied in writing, acceding to the demand. This letter was received by