

—to whom the parties submitted their case on both law and fact —says that, irrespective of any adjudication on the question of heirship, the situation and conduct of the parties pending these proceedings, as shown by the record offered, convinced him that there was no posthumous child born alive to Marie Louise Rueg, as the fruit of her marriage with Henry Rueg. Plaintiffs offered to prove the birth of such a child by the testimony of Mrs. Felouise De Soto. Objection was made that her testimony was hearsay, and therefore not admissible. This witness had answered:

"I never saw the child. I only speak and testify from what I heard people say. Mrs. Marie Louise Rueg told me nothing about the death of her child. I never heard her say anything about it."

So far as her testimony was hearsay, it is not brought within the conditions that admit hearsay testimony on a question of pedigree, and was not competent evidence. Plaintiffs in error also offered the testimony of Charles Rambin, to the effect that the child was born, was a boy, lived two or three weeks, and died; that he never saw the child; that he testified to what others told him; that he never saw Mrs. Rueg prior to the birth of the child; that shortly thereafter—two, three, or four weeks—he saw her at her father's house; that she then told him about the child having been born, and having died in two or three weeks; that Mrs. Rueg's father, mother, and brothers had told him about the child before he saw Mrs. Rueg. There was proof that Mrs. Marie Louise Rueg, her father, mother, and brothers, were all dead at the time this evidence of the witness Charles Rambin was offered. Defendant in error moved to exclude this proof on the ground that it was hearsay, and not admissible to show the birth and death of the child, and the circuit court sustained this motion. This evidence was competent. 18 Amer. & Eng. Enc. Law, p. 257, and cases there cited. We cannot say that its exclusion worked no injury to the plaintiffs in error.

The judgment of the circuit court is reversed, and the cause remanded for a new trial.

BATE REFRIGERATING CO. v. SULZBERGER et al.

(Circuit Court, S. D. New York. June 7, 1893.)

PATENTS—TERM—EXPIRATION OF FOREIGN PATENT.

Under Rev. St. § 4887, a United States patent expires with a foreign patent granted for the same invention prior to the date of the United States patent, but subsequent to the application therefor. Refrigerating Co. v. Gillett, 13 Fed. Rep. 553, followed.

In Equity. Bill by the Bate Refrigerating Company against Frederick Sulzberger and others for infringement of a patent. Judgment for defendants on their pleas.

Paul H. Bate, for complainant.

Miller, Peckham & Dixon, for defendants.

TOWNSEND, District Judge. This is a bill in equity for the alleged infringement of letters patent No. 197,314, issued to John

J. Bate November 20, 1877, for an improvement in processes for preserving meats. The question raised by the pleas is whether, under section 4887 of the Revised Statutes, a United States patent expires with the date of a foreign patent, granted prior to the date of the United States patent, but subsequent to the application therefor. When this case came up for a hearing in this circuit, the suggestion was made by counsel that, as the precise question herein had been decided in favor of the defendants in other circuits, the case should be submitted on briefs, with the understanding that the court, in conformity with the rule of comity in such cases, would follow said precedents. The following cases involving this question have been decided in favor of the defendants: Refrigerating Co. v. Gillett, 13 Fed. Rep. 553, 31 Fed. Rep. 809; Same v. Hammond, 35 Fed. Rep. 151; Huber v. Manufacturing Co., 38 Fed. Rep. 831; Pohl v. Brewing Co., 39 Fed. Rep. 783. In accordance, therefore, with said practice, I direct that judgment on the pleas be entered for the defendants.

DEDERICK v. FOX.

(Circuit Court, W. D. Pennsylvania. February 7, 1893.)

1. PATENTS FOR INVENTIONS—ABANDONMENT—APPLICATIONS.

Where, after certain claims of an application for a patent have been allowed, the applicant files a second application as a division of the original, and incorporates therein the allowed claims thereof, expressly abandoning the original application, but not the invention, the whole proceeding is a continuous one, from the date of the original application, and the patent allowed on the second application is not void on the ground of abandonment.

2. SAME—HAY-BALING PRESSES.

Letters patent No. 382,144, issued May 1, 1888, to Peter K. Dederick, for an improvement in hay-baling presses, are not void because of any abandonment arising from the proceedings in the patent office.

3. SAME—INTERFERENCE OF PATENTS.

The question of interference between patents is determined by the claims, and not by the general appearance and functions of the machine, shown but not claimed.

4. SAME.

There is no interference, within the meaning of Rev. St. § 4918, between patent No. 382,144, issued May 1, 1888, to Peter K. Dederick, and patent No. 365,211, issued June 21, 1887, to Andrew Wickey, both for improvements in hay-baling presses.

5. SAME—EQUITY JURISDICTION—REMEDY AT LAW—WAIVER.

On a bill in equity for infringement of a patent, an objection that there is an adequate remedy at law comes too late at the final hearing, and after testimony has been taken on the merits.

In Equity. Bill for infringement of a patent. Decree for complainant.

Church & Church, for complainant.

Lysander Hill, for defendant.

Before ACHESON, Circuit Judge, and BUFFINGTON, District Judge.