

to the decision of the court in *Norton v. Jensen*, it shows that respondent took the chances of having that matter determined by the court. In other words, the affidavits offered in this case clearly showed that the respondent, in erecting its machinery, acted with its eyes wide open as to the exact condition of affairs concerning those patents, and took the chances of having it determined by the court in its favor that the Kendall patent was not an infringement of the Norton machine.

I believe that I have noticed all the points relied upon by counsel except the one where it is claimed that, this suit having been brought by complainants, and it appearing that they themselves had not used the monopoly of their patent, they were not entitled to an injunction. I do not think that point is well taken. The action is necessarily for the benefit of their licensees, and it is their duty to protect their licensees by suits against parties who were infringing the same; otherwise, the value of the patent would be absolutely destroyed.

It was contended that this was a case of special hardship, and that for this reason a preliminary injunction ought not to issue. There are cases where the courts have held, on account of the peculiar facts of the case, that the court ought not to issue a preliminary injunction on account of the hardship that might result by such action to innocent parties. It is enough to say that I do not consider that this case comes within the rule that has been announced in decisions of that character.

My conclusion, therefore, is that the complainants are entitled to the preliminary injunction, and that order will be entered.

SMITH et al. v. VULCAN IRON WORKS OF SAN FRANCISCO.

(Circuit Court, N. D. California. December 5, 1892.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—BAND-SAW MILLS.

Letters patent No. 442,645, granted to Samuel R. Smith on December 16, 1890, for improvements in band-saw mills are valid; and claims 1, 2, 3, 4, 5, 6, and 10 held to be infringed by mills made under and according to the specification of letters patent No. 468,303, granted to the Vulcan Iron Works, as assignee of Charles J. Koefoed, on February 2, 1892.

2. SAME—CONSTRUCTION OF CLAIM—FORMAL CHANGES.

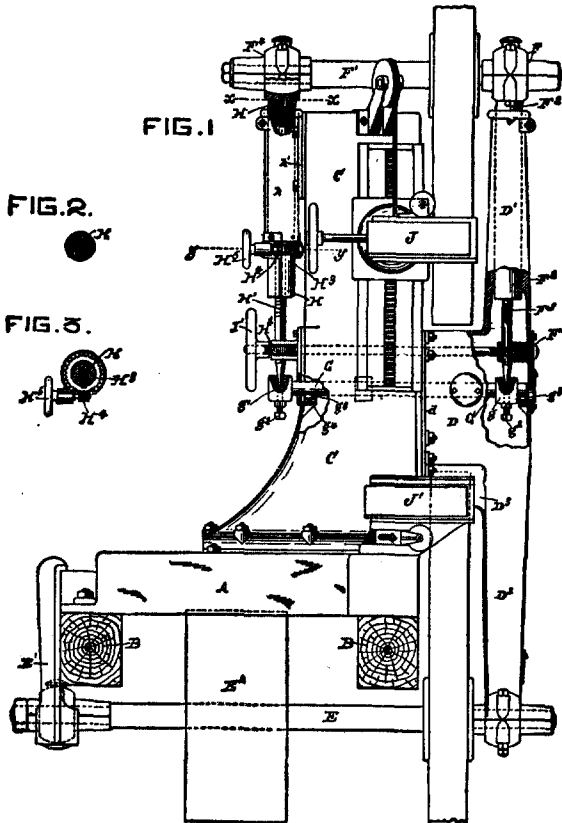
Where a patentee, in his specification, describes his device as being cast in one piece, and claims it in that form, but does not by express words disclaim other forms, it will be deemed that the specification specifies the single casting merely as the best form in which the patentee has contemplated embodying his invention, and accordingly the claim will be construed to cover a device performing the same function and similar in construction to that of the patentee, except that it is cast in two pieces, and bolted together.

3. SAME—INVENTION.

Where there is doubt as to the presence of invention, the presumption arising from the grant of the patent will control, and the defense of non-invention will fail.

In Equity.

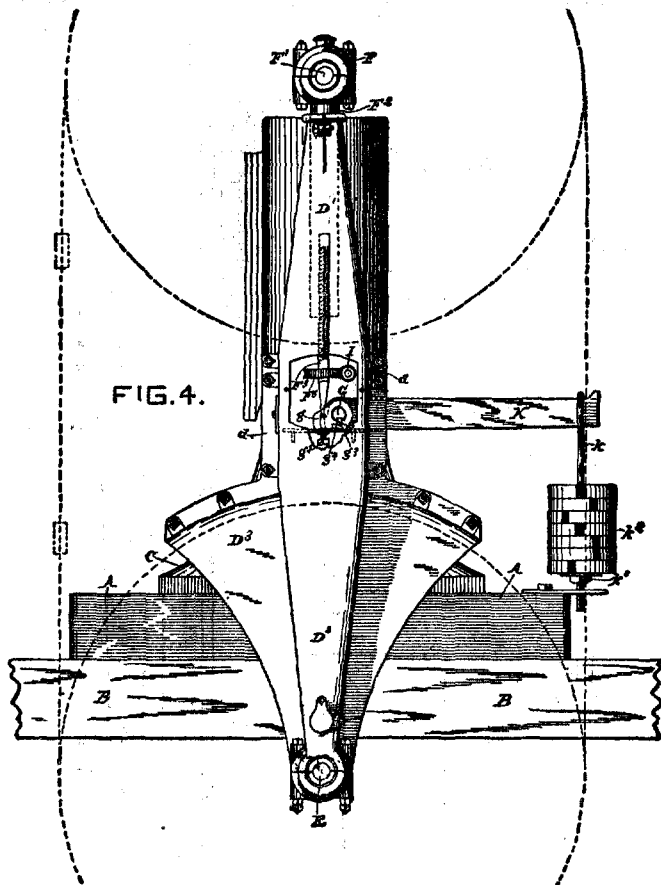
Suit by Smith, Myers, and Schnier, of Cincinnati, assignees of Samuel R. Smith, for infringement by the Vulcan Iron Works of San Francisco, upon patent No. 442,645, granted to Samuel R. Smith on December 16, 1890, for "improvement in band-saw mills." The invention consisted in an outside support for the front bearings of the band-wheel shafts, and also in a sensitive automatic straining device, whereby any slack of the saw is taken up, and the saw kept at the proper tension. The outside support consisted of a single hollow casting, described in the specification as follows: "The front support of the band-wheel shafts is a single hollow casting, consisting of the horizontal portion, D, which has outwardly projecting flanges, d, which are



planed off to joint against the planed seat upon the column, C, to which it is securely held by bolts, and the vertical arms, D¹, D², which receive and support the boxes or front bearings of the band-wheel shafts."

The claims charged to have been infringed read as follows: "(1) In a band-saw mill, the combination, with the band wheels and main supporting frame or column, of an integral standard carrying the front bearings of the upper and lower band-wheel shafts, said standard being attached to the front side of said main frame or column, between said band wheels, substantially as hereinbefore set forth. (2) The combination, substantially as specified, of the hollow supporting column, C, and the hollow casting, D, D¹, D², centrally secured to said column, to furnish rigid supports for the front

bearings of the upper and lower band-wheel shafts. (3) A support for the front bearings of the band-wheel shafts, having the flanged horizontal portion, D, to be secured to the supporting frame, and the vertical arms, D¹, D², cast in one piece with said central portion, the said part, D, being bored to receive the adjustable bearing of the upper band-wheel shaft. (4) The combination of the base plate, A, cast in a single piece, the column, C, having a flanged base to be secured to said base, A, the front support for the band-wheel shafts consisting of the casting, D, D¹, D², and shield, D³, together forming a supporting frame for band-saw mills, substantially as hereinbefore



set forth. (5) In a band-saw mill, the combination of the supporting frame, the vertically adjustable bearings for the upper band-wheel shaft, mounted in said frame, the transverse shaft, G, mounted on knife-edge bearings in said frame, and having arms, g, g', secured upon said shaft to support the bearings of said upper band-wheel shaft, and the weighted lever, K, secured upon said shaft between the knife-edge bearings to counterpoise the bearings of the upper band-wheel shaft, and provide a sensitive automatic adjustment for the same, whereby the saw is kept at the proper tension, substantially as hereinbefore set forth. (6) The combination, substantially as hereinbefore set forth, of the supporting frame, the transverse shaft,

G, having knife-edge bearings, g', secured in it, the supporting plates, g', resting on brackets in said frame, the arms, g, g', having steps at their outer ends, the hardened steel adjustment screws, g', passing through said steps, the vertically adjustable bearings for the upper band-wheel shaft resting upon said screws, the lever, K, secured upon said shaft, and projecting through the frame, the rod, k, upon the outer end of said lever, K, the cap nut, k', upon said rod, and the removable weights, k', for the purpose specified."

"(10) In a band-saw mill, the combination of the column, C, brackets projecting from said column, a rock shaft having knife-edge bearings resting upon said brackets, a weighted lever, and two arms, g, g', secured upon said rock shaft, with the band-wheel shaft and its boxes, and rods supporting the boxes, said rods resting upon the arms, g, g', substantially as shown and described." The defendant made and sold band mills constructed under the patent No. 468,303, granted to it as assignee of the inventor, Charles J. Koefoed, on February 2, 1892, in which was shown an outside support for the front bearings of the band-wheel shafts, differing from that of Smith only in being cast in two pieces, and then bolted together. In the straining device of complainants' patent, the rock shaft was mounted on knife-edge bearings by inserting the knife edges into the under side of the shaft at each end, and allowing them to vibrate in a small grooved plate resting on a bracket attached to the frame. In the defendant's straining device, this arrangement was reversed, the knife edges being inserted into the brackets and the grooved plates in the rock shaft.

J. H. Miller, M. M. Estee, and Geo. J. Murray, for complainants.
John A. Wright, for respondent.

McKENNA, Circuit Judge, (orally.) This is an action for the infringement of a patent for a band-saw mill. The defense is want of invention and of novelty, and that respondent has not infringed. A great deal of testimony was taken, and the case ably and elaborately argued, but the demands of the court prevent a review of the evidence. I do not know that it would be useful any way. While the machine is not a complicated one, yet it cannot be understood except by reference to drawings and models and explanations of them. A verbal description would only confuse; hence I will not attempt it. It may be said generally, quoting counsel for complainants, that—

"The patent shows a main supporting frame securely attached to a base plate, consisting of an upright hollow metallic column, preferably of circular form. Attached to the front of this column is a hollow casting, consisting of three parts, the first a horizontal part bolted to the main column, and the second and third parts vertical hollow arms to receive the bearings of the upper and lower band-wheel shaft. The entire casting is of T shape, horizontally disposed, with the stem bolted to the main column, midway between the band wheels. Through the center of this outside column and the main column is a horizontally disposed transverse rock shaft, resting on knife-edge bearings attached to brackets, and having a straining weighted lever attached to the center of the rock shaft at right angles. The weight on this lever, which can be increased or diminished at will, operates to vibrate the rock shaft on its knife-edge bearings. The front bearing of the upper band-wheel shaft is axially secured upon the top of a depending trunnion, which fits snugly into the bore of the upper hollow arm of the outside supporting column, and is tapped at its lower end to receive a screw shaft, which rests in a step in the outer end of a short arm secured to the rock shaft. The rear bearing of the upper band-wheel shaft has a similar arrangement for its support. It will thus be seen that the weighted lever secured to the rock shaft between the knife-edge bearings counterpoises the two bearings of the

upper band-wheel shaft, and provides an exceedingly sensitive automatic adjustment for the same, whereby the saw is kept properly strained. The front bearing of the lower band-wheel shaft is secured to a permanent fixed shaft, which has its front end secured to the lower member of the outside supporting column, and its rear end to a hanger depending from the base of the main frame. This bearing is not adjustable. A hood or shield overhangs the lower band wheel, and has an upper segmental flange through which it is bolted to the main frame."

The patentee's specification and drawing show the front supporting column to be cast in one piece, and a portion of his language, considered by itself, justifies the contention that this was his invention; that is, the casting in one piece. He says, after describing the defects of other machines, what he claims as his own:

"In machines of this kind heretofore constructed, the supports for the bearings of the upper and lower band wheels were made separate and independently attached to the supporting frame. The strain of the saw, of course, tended to draw the upper and lower band wheels at an angle to each other, thereby causing the saw to run unevenly, or require separate adjustment of the upper band wheel vertically, as well as what is known as 'cross-line adjustment,' to make the saw run true after each straining or slackening of the saw tension. To overcome these defects, I have provided a single casting, which is firmly secured to the supporting frame in such manner as to receive the front bearings of both band wheels. I have also provided a back bearing for the shaft of the upper band wheel," etc.

But on page 3 he further says:

"I have shown and described what I believe to be the simplest and best means of embodying my invention; but it is obvious that many mechanical changes may be made without departing from its spirit and scope, and I would hence have it understood that I consider all such mechanical changes as mere modifications of my invention."

But manifestly, if casting in one piece is the best, its advantages are secured by casting in two pieces, and bolting them together, as in the machine of the respondent. It is certainly an equivalent, and could not be excluded except by express words of the patentee, confining his invention to the other form. However, it is a close question if there is invention in it, and I have yielded somewhat to the presumptions of the patent.

The view is clear as to the straining devices. There are undoubtedly invention and novelty in them, and those used by the respondent are substantially similar. It imitated as clearly as it dared, and not make exact resemblance. A decree will be entered for the complainant.

PRINCE'S METALLIC PAINT CO. v. PRINCE MANUF'G CO. et al.

(Circuit Court of Appeals, Third Circuit. September 18, 1893.)

No. 9.

1. TRADE-MARK—SUIT FOR INFRINGEMENT—ESTOPPEL.

Where the purchaser, on foreclosure, of a property and business which had long been conducted in connection with a trade-mark, uses the trade-mark under claim and color of title, with the full knowledge of the

former owner, for eight years without objection, this amounts to an acquiescence which will estop the latter, and a subsequent purchaser of the trade-mark from him at sheriff's sale, from afterwards maintaining a suit to restrain such user.

2. SAME—EQUITY—ESTOPPEL.

In a suit in the courts of a state for infringement of the trade-mark "Prince's Metallic Paint," title to the trade-mark being claimed by both parties, relief was refused, on the ground that, even if plaintiff had title, it had forfeited its equity by using the trade-mark in connection with paints made from ores dug from other than the original Prince mine. *Held*, that the defendant in that litigation, who had always used the trade-mark in connection with paints not coming from the Prince mine, had no equity to sustain a suit for infringement against the former plaintiff.

3. SAME—SALE OF BUSINESS—WHEN TRADE-MARK PASSES.

A trade-mark for metallic paint, which has been used for many years by the first producer and his successors solely in connection with paint made at a fixed place, and from ore dug from a certain mine, becomes localized and identified with the mine and place of manufacture so as to pass to the purchaser of the factory, mine, and business, as incident thereto.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

In Equity. Suit for infringement of a trade-mark. The bill was dismissed by the circuit court, (53 Fed. Rep. 493,) and complainant appeals. Affirmed.

John G. Johnson and Charles Barclay, for appellant.

Richard C. Dale, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and WALES, District Judge.

ACHESON, Circuit Judge. This is an appeal by Prince's Metallic Paint Company, a corporation of the state of Pennsylvania, from the decree of the circuit court, at final hearing upon full proofs, dismissing its bill of complaint, filed June 1, 1888, to restrain the defendant, the Prince Manufacturing Company, also a corporation of the state of Pennsylvania, from using the trade-mark "Prince's Metallic Paint." The court, expressing no positive opinion upon the question of right, based its decree mainly upon want of jurisdiction. Now, undoubtedly, as originally framed, the bill lacked the necessary averments to bring the case within the act of congress for the registration and protection of trade-marks used in commerce with foreign nations; but this defect was cured by appropriate amendments, which, it would seem, were not brought to the attention of the learned judge who heard the case. It is therefore incumbent upon us to consider the merits of the controversy.

The material facts are these: In the year 1858, Robert Prince, as the agent of his wife, Antoinette Prince, commenced the manufacture of metallic paint at Big Creek, in Carbon county, Pa., from iron ore—which he had discovered could be so used—mined from the property of his wife, a tract of about 44 acres of land in that county. The mill, which was also the property of his wife,

at which he manufactured the paint, was in the neighborhood of the ore bed. It was designated "Prince's Metallic Paint Mill." The product was called "Prince's Metallic Paint." He adopted as a trade-mark a label containing the words "Prince's Metallic Paint" in circular form, which he attached to the packages of paint so manufactured and sold by him. Mrs. Prince having died in 1859, thereafter, and until his own death, in November, 1870, Robert Prince, as executor of his wife's will, continued the business, but, from about 1866, in connection with Albert R. Bass, his son-in-law, who had become the owner of the equal undivided one-half of the mill, ore property, and business. Upon the death of Robert Prince, David Prince, as surviving executor of Antoinette Prince and individually, and Albert R. Bass and wife, formed a copartnership under the name of Prince & Bass to manufacture Prince's Metallic Paint, and they continued the business as before until the fall of 1871, when Bass purchased the interest of the estate and of David Prince, and became the sole owner and proprietor of the mill, ore property, and business. Bass continued the business until 1873, when a company was formed by him and others under the name of Prince's Metallic Paint Company, which, as an unincorporated association, carried on the business until 1875, when the company became incorporated under the same name, and to the corporation the mill, ore property, and business were transferred. In the year 1875 the corporation abandoned the old mill at Big Creek, and erected a new mill at Bowman's, several miles distant from the old mill, but nearer the ore bank, on a site then purchased by the company for the purpose. There it manufactured Prince's Metallic Paint until 1878, when it became insolvent and ceased to do business.

During this whole period of time the trade-mark "Prince's Metallic Paint," which Robert Prince had adopted, was used successively by all the above-named proprietors of said business and owners of the said properties which originally belonged to Antoinette Prince. Bass had given a purchase-money mortgage to David Prince, executor, covering the undivided one-half of the original mill and the ore property, and the other undivided one-half thereof was incumbered by a mortgage by Bass to one Heather. The new mill property was also incumbered by a mortgage. In the year 1878 all these mortgages were foreclosed, and the entire properties sold. About the same time the personal effects of Prince's Metallic Paint Company seem to have been sold upon execution, so that that company was deprived by judicial sale of all its tangible property. The sheriff's vendees of the new mill were Balliett and Meendsen. Shortly after he thus acquired title to the mill, Meendsen, who was a judgment creditor of Prince's Metallic Paint Company, caused an execution (plur. fi. fa.) to be levied by the sheriff of Carbon county upon the said trade-mark, which was particularly described in the sheriff's levy, and the same was publicly sold by the sheriff by virtue of said writ to Meendsen in November, 1878.

Early in the year 1879 the Prince Manufacturing Company, the defendant in this bill, was incorporated under the laws of Pennsylvania, A. C. and Robert Prince, sons of Robert and Antoinette Prince, and their wives, being corporators and principal stockholders. In May, 1879, this company acquired the title to the new mill property at Bowman's together with a transfer to the company of such title to the trade-mark in question as Meendsen took under the sheriff's sale thereof. This company also acquired the title to the undivided one-half of the old mill and the ore property which had been sold under the Prince purchase-money mortgage, and the right of possession and use of the other undivided one-half thereof from the sheriff's vendee of that interest. Very soon thereafter the Prince Manufacturing Company began the manufacture of Prince's Metallic Paint at the mill at Bowman's, using the said trade-mark, and it has ever since continued so to do without interruption. From the beginning of its business it has openly claimed the exclusive right to use the trade-mark, and in the year 1879 obtained an injunction against Bass to restrain him from using it upon a paint which he individually was then making. With the exception of this brief use by Bass, the Prince Manufacturing Company was in the exclusive, and, so far as appears, the unquestioned, use of the trade-mark, until the year 1888, a term exceeding the statutory period of limitations. Its product was labeled and sold in the market as Prince's Metallic Paint. The company extensively advertised its paint by that designation. David Prince, the secretary of the company, testifies, without contradiction:

"We advertised it in every possible way we could through the company. We made the name prominent before consumers, large and small; so much so that the name of the paint was a great deal better known than the name of our company. * * * Our name was known comparatively only to the wholesale buyers, while the name of the article was known throughout the country to all consumers, wherever we could make it known."

It is shown that the company's business constantly increased from year to year, insomuch that whereas, prior to 1879 no one year's sales of Prince's Metallic Paint had exceeded 800 tons, the yearly sales by the Prince Manufacturing Company had run up to about 5,000 tons when this suit was brought. The officers of Prince's Metallic Paint Company undoubtedly knew from the first, and all along, that the Prince Manufacturing Company claimed and used the trade-mark as its own.

In the month of November, 1887, certain judgment creditors of the old corporation, Prince's Metallic Paint Company, caused to be issued writs of *fi. fa.*, and, upon returns of *nulla bona*, alias writs, by virtue of which the sheriff of Philadelphia county, under the act of April 7, 1870, levied upon "the franchises and rights of the 'Prince's Metallic Paint Company' heretofore granted by the commonwealth of Pennsylvania," and in the succeeding January the sheriff sold and conveyed the same, together with "all trade-marks belonging to the said company," to one Richardson, who, with his

associates, in March, 1888, organized a new corporation, adopting as its name the old title, "Prince's Metallic Paint Company." This new corporation was the plaintiff below, and is here the appellant.

Shortly before this present suit was commenced, the Prince Manufacturing Company brought suit in the supreme court of the state of New York for the city and county of New York against Prince's Metallic Paint Company, (the appellant here,) to restrain it from the use of the trade-mark in question. The court at special term decided that the plaintiff had not established its title to the trade-mark and its right to the exclusive use thereof, and therefore dismissed the complaint. Upon appeal, however, the general term of the supreme court reversed the judgment, holding that the plaintiff had an exclusive title to the trade-mark. *Prince Manuf'g Co. v. Prince's Metallic Paint Co.*, 15 N. Y. Supp. 249. But upon further appeal the order of the general term was reversed, and the judgment of the special term affirmed by the court of appeals, upon the ground, however, that the plaintiff (the Prince Manufacturing Company) had made a misuse of the trade-mark, in that it had applied the same to paints manufactured by it from ore taken from mines other than the original Prince mine. *Prince Manuf'g Co. v. Prince's Metallic Paint Co.*, 135 N. Y. 24, 32, 38, 39, 31 N. E. Rep. 990. After stating that "this defense was set up in the defendant's answer," the court of appeals said:

"Whatever contradiction may be found in the record as to other facts, there is one which admits of no dispute, and that is that from 1858, the year in which the manufacture of metallic paint was established by Robert and Antoinette Prince, until the incorporation of the plaintiff in 1879, the label 'Prince's Metallic Paint' had been exclusively applied, first, by the originators of the article, and subsequently, after their death, by their successors in the business, to paint made from ore taken from the so-called original Prince tract of forty-four acres. * * * The label or trade-mark came to have a broader meaning than it originally possessed, and, when attached to packages of paint, indicated not only that the paint was made by Prince or his successors in business, but also that it was made from ore taken from the original Prince mine, and this latter indication constituted an important element of the good will of the business. * * * The plaintiff and its predecessors in the use of the label have by their conduct warranted the public in believing that the words 'Prince's Metallic Paint' meant metallic paint made by Prince or his successors from the ore of the Prince mine."

And at the conclusion of its opinion the court of appeals said:

"It is probable that the plaintiff has acted without any actual intent to defraud; but what it did upon the evidence and findings operated as a deceit upon the public, and this is sufficient to bar relief. The attitude of the defendant does not commend itself to a court of equity. Even if its right to use the label was established, it is aiding outside manufacturers to sell their goods under the label of the corporation. But we place our judgment on the inequitable use of the label by the plaintiff."

It is not pretended that in the manufacture of its paint the plaintiff in this bill (the appellant) uses ore taken from the old Prince tract. In fact, the plaintiff uses ore mined from other lands in that vicinity, through which the same vein of ore as that in the Prince tract extends. It manufactures its paint at Ruther-

ford & Barclay's mill, of which it has had a lease since December 1, 1890. At that mill, and out of the same ore, it makes paint, some of which is called and labeled "Prince's Metallic Paint," and is sold as such, and some of which is called and labeled "Rutherford's Metallic Paint," and is sold as such.

The plaintiff, it is contended, is precluded by the decision of the court of appeals of New York from asking an injunction here. The argument has great force. These two companies were the parties to the New York suit. The court had jurisdiction. The subject-matter of controversy there was this trade-mark. The court held that its use was limited to paint made from ore taken from the original Prince mine, and upon that ground, coupled with the fact that the Prince Manufacturing Company did not confine its brand to paint made from that ore, there was judgment in favor of the defendant, the present plaintiff. Enjoying the benefit of that judgment, it is not easy to comprehend what equity the plaintiff has, seeing its paint is wholly made from other ore.

Waiving, however, the question of estoppel, the plaintiff's title, for which it seeks the protection of a court of equity, is very far from clear. As between the two sheriff's sales of the trade-mark, (if, indeed, either had any efficacy,) much is to be said in favor of the earlier one. Appeal of Lusk, 108 Pa. St. 152, 157. But we strongly incline to the opinion that in 1878-79 the trade-mark "Prince's Metallic Paint" had become so localized—so identified with the Prince mine and the place of manufacture—that it was inseparable therefrom. There is sanction for this conclusion in the adjudged cases. Congress Spring Company v. High Rock Spring Co., 45 N. Y. 291, 302; Manufacturing Co. v. Hall, 61 N. Y. 226; Pepper v. Labrot, 8 Fed. Rep. 29; Kidd v. Johnson, 100 U. S. 617; Milling Co. v. Robinson, 20 Fed. Rep. 217. It was the judgment of the general term of the supreme court of New York, in view of everything, that the trade-mark passed as an incident of the property to the Prince Manufacturing Company with the possession of the works; and that conclusion is the logical deduction from the above-quoted declarations of the court of appeals.

But if the Prince Manufacturing Company was not clothed with a perfect title originally, the long acquiescence by Prince's Metallic Paint Company in the open and exclusive use of the trade-mark by the Prince Manufacturing Company, under a known assertion of right, and, at least, a color of legal title, is a bar to the equitable relief here sought. Assuredly, the new company (the plaintiff) has no greater rights than had the old company when its corporate franchises were levied on in November, 1887. But there had then been such acquiescence for more than eight years in the prosecution by the Prince Manufacturing Company of the business of making and selling Prince's Metallic paint. Its conduct of the business being marked by constant and successful efforts, by advertisement and otherwise, to extend the market for the article, and enhance its reputation, to take from the Prince Manufactur-

ing Company the trade advantages thence ensuing and give them to the plaintiff—the certain effect of an injunction—would be unconscionable.

Now, it is true that, where the plaintiff's title to a trade-mark is clear, mere delay, unaccompanied by anything else, will not ordinarily bar a suit for injunction against a naked infringer. *Fullwood v. Fullwood*, 9 Ch. Div. 176; *McLean v. Fleming*, 96 U. S. 245; *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. Rep. 143. But we are dealing with no such case. In courts of equity the rule is to withhold relief where there has been unreasonable delay in prosecuting a claim, or long acquiescence in the assertion of adverse rights. *Creath's Adm'r v. Sims*, 5 How. 192; *Godden v. Kimmell*, 99 U. S. 201; *Lansdale v. Smith*, 106 U. S. 391, 1 Sup. Ct. Rep. 350. Again and again has it been judicially declared that nothing can call into activity a court of equity but "conscience, good faith, and reasonable diligence." *McKnight v. Taylor*, 1 How. 161; *Sullivan v. Railroad Co.*, 94 U. S. 806, 812. In *McLaughlin v. Railway Co.*, 21 Fed. Rep. 574, Judge Brewer held a bill for the infringement of a patent, alleging the unauthorized use and construction of a patented invention for 13 years, without stating an excuse for the plaintiff's delay in suing, to be demurrable. Laches for even less than the statutory period of limitations, aided by other circumstances, will bar a right. *Ashhurst's Appeal*, 60 Pa. St. 290, per Strong, J. In *Lewis v. Chapman*, 3 Beav. 133, the master of the rolls refused an injunction to restrain the infringement of a copyright solely on the ground of six and a half years' delay, where there was knowledge of the commencement and prosecution of the defendant's publication. Long acquiescence before filing a bill for an injunction, with full knowledge of the infringement, is deemed laches equivalent to a breach of good faith. *Browne, Trade-Marks*, § 497. Hence, in *Manufacturing Co. v. Garner*, 55 Barb. 151, a delay of nine years in applying for an injunction to restrain infringement of a trade-mark was held to be good cause for refusing it.

Having regard to the whole case, viewed from every standpoint, our conclusion is that the plaintiff has not shown itself to be entitled to the interposition of a court of equity, and accordingly the decree of dismissal is affirmed.

**LAKE ERIE & W. R. CO. v. BOARD OF COM'RS OF SENECA COUNTY
et al.**

(Circuit Court, N. D. Ohio, W. D. October 24, 1893.)

1. EMINENT DOMAIN—SECOND APPROPRIATION.

In Ohio the rule is well established that a second appropriation of lands formerly appropriated to a public use cannot be made when the second appropriation is inconsistent with the first, and tends to deprive the corporation first acquiring such public use from the full and free enjoyment thereof.

2. SAME—DITCHES AND DRAINS—RAILROAD RIGHT OF WAY—POWER OF COUNTY COMMISSIONERS.

County commissioners in Ohio have no power, under the statutes authorizing them, under certain conditions, to appropriate lands for public ditches or drains, to construct a large ditch for a long distance upon a railroad right of way in such manner as would prevent the railroad company from constructing a side or double track, or from using the ground for other purposes essential to the full enjoyment of its corporate powers.

In Equity. Bill by the Lake Erie & Western Railroad Company against the board of commissioners of Seneca county, Ohio, William H. Schlosser, auditor, and William Collins, to enjoin them from constructing a ditch on complainant's right of way. On motion to dissolve a temporary injunction. Denied.

J. M. Lemmon, N. E. Hackedorn, and J. B. Cockran, for complainant.

George E. Schroth, for defendants.

RICKS, District Judge. This case is now before the court upon a motion to dissolve the temporary restraining order heretofore allowed upon the filing of the complainant's bill, restraining the commissioners of Seneca county from constructing a ditch upon the right of way of the complainant near the city of Fostoria. The complainant alleges in its bill that it is a corporation created by the laws of the state of Illinois; that it operates a railroad between the states of Ohio, Indiana, and Illinois, and is engaged in interstate traffic, and the transportation of the mails of the United States, and passengers and merchandise. It alleges that the city of Fostoria is a flourishing city, for which and from which it transports a large amount of freight and merchandise. It further alleges that near said place, upon its roadway, and within 12 feet of its main track, the defendants propose to deepen and widen a ditch which has already been in existence along said right of way for some time; that the defendants propose to make said ditch 1,150 feet long, chiefly on the southerly side of their right of way, and to be from 15 to 17 feet wide at the top, and from 5 to 7 feet deep; that the construction of said ditch so near the main track would endanger the permanency of its roadbed, increase the dangers of accident, and, in cases of the derailment of a train, make the loss of life and injury to property much greater than it otherwise would be. It avers further that the enlargement of said ditch