

assigned for error. We think it obvious that the testimony was improperly admitted. It is a fundamental rule that statements made by an agent are not admissible against his principal, unless they are made in the course of some business transaction in which the agent is authorized to represent his principal, or unless the statements made are so coincident with the act or event out of which the suit originates as to form a part of the *res gestae*. The statement said to have been made by the section foreman to the plaintiff was not admissible against the defendant company, within either branch of the rule last stated. So far as the record shows, he had not been deputed to conduct any negotiation with the plaintiff which rendered any statement by him, with reference to the manner in which the colt had been injured, either relevant or pertinent. The statement in question was also made at a period of time so remote from the occurrence of the injury that it was not a part of the *res gestae*, but was merely a narrative of a past transaction. There are very many cases in which testimony of the same character has been held inadmissible, but we will only refer to a few which bear a very strong analogy to the case at bar. *Smith v. Railway Co.*, 91 Mo. 58, 61, 3 S. W. 836; *Packet Co. v. Clough*, 20 Wall. 528, and citations; *Railroad Co. v. O'Brien*, 119 U. S. 99, 7 Sup. Ct. 118; *Worden v. Railroad Co. (Iowa)* 33 N. W. 629; *Railway Co. v. Reeves (Ky.)* 11 S. W. 464.

An exception was also taken to the action of the trial court in refusing to direct a verdict for the defendant, but, as the case must be reversed for the reason above indicated, it is unnecessary to consider the last mentioned exception. The evidence on a second hearing of the case may be altogether different from that reported in the present record.

The judgment is reversed, and the cause remanded, with directions to award a new trial.

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ST. LOUIS & S. F. RY. CO. v. McLELLAND.

(Circuit Court of Appeals, Eighth Circuit. May 21, 1894.)

No. 292.

SECOND WRIT OF ERROR UNNECESSARILY SUED OUT—DISMISSAL.

After reversal of a judgment on writ of error, for errors committed at the trial, a second writ, sued out to correct alleged errors in taxation of costs after rendition of judgment, which might have been incorporated in the same record, will be dismissed at the cost of plaintiff in error.

In Error to the United States Court in the Indian Territory.

This was an action by John McLelland against the St. Louis & San Francisco Railway Company, in which plaintiff recovered judgment, and defendant brought error. 62 Fed. 116. Defendant also sued out a second writ of error to review alleged errors after rendition of judgment.

L. F. Parker (Edward D. Kenna and H. S. Abbott, on the brief), for plaintiff in error.

T. P. Winchester and W. T. Hutchings filed a brief for defendant in error.

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

THAYER, District Judge. This is a second writ of error which was sued out in this case, after a first writ of error had been granted to obtain a reversal of the judgment for errors committed at the trial. The present writ was sued out to correct alleged errors of the trial court in the taxation of costs after the rendition of judgment. As we have already reversed the judgment in this case, on which the liability to pay the disputed costs depends (62 Fed. 116), and as there was no apparent necessity for suing out the second writ, inasmuch as all of the assigned errors might have been incorporated in one and the same record, the second writ of error should be dismissed at the cost of the plaintiff in error, and it is so ordered.

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KILMER MANUF'G CO. v. GRISWOLD et al.

(Circuit Court, N. D. New York. June 16, 1894.)

**1. PATENTS—LIMITATION OF CLAIM—BALE TIES.**

In the Kilmer patent, No. 282,991, for improvement in bale ties, claim 2, for a clasp of wire larger than the band wire, and having a pinching angle to hold tightly the band when forced into it by expansion of the bale, must be confined to the precise mechanism described, in view of the prior state of the art, as shown by the Smith patent, which has the same features except that the clasp is "of wrought iron, malleable iron, or other suitable material," and other patents using a clasp of round wire larger than the band.

**2. SAME—INVENTION.**

The Kilmer patent, No. 372,375, for an improvement upon No. 282,991, relating to bale ties, in adding to the wedging action of the clasp of that patent a gripping action giving additional power, involves invention, the fundamental idea being new as applied to bale ties, notwithstanding devices performing similar functions were known in analogous arts, as shown in the Foote patent, No. 139,899, and other patents.

**3. SAME—INFRINGEMENT.**

The Kilmer patent, No. 372,375, for an improvement in bale ties, having first introduced the jamming or wedging action of the sides of the clasp upon the band wire, is entitled to a construction liberal enough to protect that invention, and hence is infringed by ties made under the Griswold patent, No. 466,563, having a clasp differing in form from the Kilmer clasp, but like it in principle, possessing all its features, and operating in substantially the same manner.

This was a suit by the Kilmer Manufacturing Company against J. Wool Griswold and others for infringement of patents.

S. A. Duncan and W. H. Van Steenbergh, for complainant,  
E. H. Brown, for defendants.