

and he was clearly one of the second class to whom a right of action for such a default was given by this statute. The effect of the statute is to give a cause of action against the railroad company to every servant who is himself without fault, for the default or wrongful act of any superior servant, whether or not the latter appointed or exercised any control over the former before or at the time of the infliction of the injury. This was the construction given to this statute by Judge Shiras, of the northern district of Iowa, upon the circuit, and we have no doubt of its correctness. *Ragsdale v. Railroad Co.*, 42 Fed. 383, 386.

That the railroad company would have been liable for any injury resulting to a passenger on the train that ran through the open switch, from the negligence of the conductor who left it open, admits of no discussion. It follows that, under this statute and the stipulation in this case, the railroad company was liable to the defendant in error to the same extent for the injury to the deceased fireman that it would have been to a passenger, and on this ground the judgment must be affirmed. It is so ordered.

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CITIZENS' BANK OF WICHITA v. FARWELL et al.

(Circuit Court of Appeals, Eighth Circuit. July 16, 1894.)

No. 408.

**1. GARNISHMENT—PRIORITY—FRAUDULENT CONVEYANCE.**

Under Gen. St. Kan. § 4296, authorizing the garnishment of property held under a conveyance void as to creditors, the fact that after the garnishment of such property by a creditor, another creditor, on behalf of himself and other creditors, has commenced a suit to set aside the conveyance, and for an accounting by the garnishee, does not affect the right of the former under his prior garnishment.

**2. SAME—SUFFICIENCY OF FINDINGS.**

In garnishment, findings by the court, a jury being waived, that the garnishee took possession of certain property under a mortgage void as to the creditors of the mortgagor, and purchased the same at the sale thereunder, and converted it to his own use, and that its value was a certain amount, are sufficient to sustain a judgment against the garnishee for any amount less than the value so found.

**3. WRIT OF ERROR—REVIEW OF FINDINGS.**

Under Rev. St. § 1011, providing that there shall be no reversal on a writ of error for any error in fact, the sufficiency of the evidence to sustain the findings of the court can only be presented for review by a request for a peremptory holding that on the undisputed facts the finding must be otherwise.

In Error to the Circuit Court of the United States for the District of Kansas.

Action by J. V. Farwell & Co. against the Kansas Furniture Company and garnishee, the Citizens' Bank of Wichita. For former reports, see 6 C. C. A. 24, 30, 56 Fed. 539, 570.

W. E. Stanley, for plaintiff in error.

Edwin W. Moore and Charles H. Brooks, for defendants in error.

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

SANBORN, Circuit Judge. On November 28, 1890, J. V. Farwell & Co., the defendants in error, brought an action in the court below against the Kansas Furniture Company, a corporation, and garnished the Citizens' Bank of Wichita, Kan., the plaintiff in error, under sections 4283 to 4296, inclusive, of the General Statutes of Kansas of 1889. March 5, 1891, they recovered a judgment against the furniture company.

Section 4296 of the statutes of Kansas provides that:

"From the time of the service of the summons upon the garnishee he shall stand liable to the plaintiff to the amount of the property, moneys, credits and effects in his possession or under his control, belonging to the defendant or in which he shall be interested, to the extent of his right or interest therein, and of all debts due or to become due to the defendant, except such as may be by law exempt from execution. Any property, moneys, credits and effects held by a conveyance or title, void as to the creditors of the defendant, shall be embraced in such liability."

Issue was joined between the defendants in error and the bank upon the question whether or not the latter had any property in its possession or under its control belonging to the furniture company, or in which it was interested; but the real issue was whether or not the bank held any property by any conveyances void as to creditors of the furniture company under this section. A jury was waived, and an agreed statement of a part, but of a part only, of the facts was made, and there was other evidence presented to the trial court, which is not contained in the record before us. The court made a special finding of facts, and upon it rendered judgment against the bank. But one exception was taken to any ruling of the court in the trial of the case. That ruling was that the fact that in February, 1893, another creditor of the furniture company had brought a suit in equity against the bank for himself and all other creditors who saw fit to join with him, and had exhibited a bill for an accounting concerning, and a recovery of, the same property the defendant in error sought to reach by its garnishment, was not competent or material to the issue in this case. The garnishment was made November 28, 1890. The suit in equity was commenced February 2, 1893, and the defendants in error were not parties to that suit. The fact that another creditor had subsequently brought a suit against the bank on account of the same property or liability that Farwell & Co. sought to charge in this action certainly could not affect their right to it under their prior garnishment. The statements contained in the bill were, as against Farwell & Co., nothing but hearsay. The ruling was right.

The only other question this record presents is whether, in any view, the facts found in the special finding are sufficient to support the judgment. Nor is this a fairly debatable question. The finding covers 11 pages of the printed record, and carefully sets forth the results of an accounting, and the facts relative to transactions between the bank and the furniture company, which extend over 22 months. It would serve no useful purpose to review these

facts in detail. Among other things, the court distinctly finds that on October 20, 1890, the bank took joint possession, with one Mrs. Martin, of a stock of goods of the furniture company, under two mortgages made by the latter company to them respectively, which were without any consideration, and void as to the creditors of the furniture company; that on November 24, 1890, the bank purchased at public auction under these mortgages that part of the mortgaged stock which then remained unsold, and converted it to its own use; and that the value of that remaining stock was then \$12,000. The judgment against the bank was for \$11,540. This finding alone is sufficient to warrant the judgment. Moreover, we have carefully examined the finding in detail, and it shows that, if no charge is made against the bank or Mrs. Martin for the accounts uncollected August 10, 1890, concerning which counsel for the plaintiff in error chiefly complains, still there could have been nothing due on these mortgages on November 24, 1890, when the bank went through the form of purchasing the mortgaged property of itself and Mrs. Martin under the mortgages. In any view, the finding well sustains the judgment.

The other questions discussed in the briefs we are unable to reach upon the record as it is presented. This court cannot review the weight of the evidence. The agreed statement of facts in this record does not contain the statement of all the material facts on which the case was submitted. The evidence that supplemented it is not before us, so that the case cannot be treated as one submitted upon an agreed statement. The court below made its finding upon the statement and the evidence, and it must stand. Section 1011, Rev. St., which governs this court in this matter, provides that "there shall be no reversal in the supreme court or in a circuit court upon a writ of error \* \* \* for any error in fact." No requests for any declarations of law were made to the court before the trial closed, and that court made no such declarations. No request for any declaration or holding that the evidence was insufficient to sustain a finding or judgment in favor of the defendants in error was made, and none that the court should make any other finding than that it actually did make upon any of the specific questions submitted to it. The result is that none of these questions can be considered. On a writ of error only those questions of law which were presented to and ruled upon in the court below in the trial of the case are subject to review in this court. The finding of the court, whether general or special, performs the office of the verdict of a jury. When it is made and filed, the trial is ended. Even the question whether or not the evidence is sufficient to sustain the finding can only be presented by a request for a peremptory holding that upon the undisputed facts the finding must be otherwise. Rev. St. § 700; *Adkins v. Sloane*, 8 C. C. A. 656, 60 Fed. 344; *Id.*, 61 Fed. 791; *Trust Co. v. Wood*, 8 C. C. A. 658, 60 Fed. 346; *National Bank of Commerce v. First Nat. Bank*, 61 Fed. 809; *Walker v. Miller*, 8 C. C. A. 331, 59 Fed. 869; *Bowden v. Burnham*, 8 C. C. A. 248, 59 Fed. 752; *Clement v. Insurance Co.*, 7 Blatchf. 51, 53, 54, 58, Fed. Cas. No. 2,882; *Norris v. Jackson*, 9 Wall. 125, 127; *Insurance Co.*

v. Folsom, 18 Wall. 237, 249; Cooper v. Omohundro, 19 Wall. 65, 69; Martinton v. Fairbanks, 112 U. S. 670, 5 Sup. Ct. 321; Lehnen v. Dickson, 148 U. S. 71, 13 Sup. Ct. 481.

The judgment below must be affirmed, with costs, and it is so ordered.

THOMSON ELECTRIC WELDING CO. v. TWO RIVERS MANUF'G  
CO. et al.

(Circuit Court, E. D. Wisconsin. September 7, 1894.)

**1. PATENTS — PRELIMINARY INJUNCTION — PUBLIC ACQUIESCENCE — ELECTRIC WELDING.**

Where a new art and apparatus, such as that of electric welding, is widely accepted by the scientific world and the public generally as novel and important, and is speedily put in operation, and the machines and rights under the patent are eagerly sought for by manufacturers, thus supplanting to a large extent the older methods,—all with no question as to the validity of the patent, except in the case of the defendant,—this is sufficient evidence of acquiescence to justify the issuance of a preliminary injunction, unless defendant can clearly show that the patent is invalid.

**2. SAME.**

The Thomson patents, Nos. 347,140 and 347,141, for inventions relating to the art of electric welding, *held* valid and infringed, on motion for preliminary injunction, and injunction granted.

This was a bill in equity by the Thomson Electric Welding Company against the Two Rivers Manufacturing Company and others for infringement of certain patents for electric welding. Complainant moved for a preliminary injunction.

Isham, Lincoln & Beale and Fish, Richardson & Storrow, for complainant.

Miller, Noyes & Miller, for defendants.

SEAMAN, District Judge. This hearing is on an order to show cause why preliminary injunction should not issue to restrain defendants from infringing letters patent granted to Elihu Thomson, and owned by complainant, as follows: No. 347,140, issued August 10, 1886, relating to the art of electric welding, alleged to have been invented by the patentee, and apparatus used therein; No. 347,141, dated August 10, 1886; and No. 385,022, dated June 26, 1888,—each for apparatus employed in carrying out this alleged new art. It is conceded by defendants that they have had ample time to present, and that they have probably shown here, all the defense they can make by affidavits and proof of the prior art. The complainant objects to the reception of two affidavits,—one by George A. Johnson, and one by Leo Daft,—because they were brought in shortly before the hearing, and long after the time stipulated for closing their proofs; but the delay seems to have been excusable, and left opportunity (which was well improved by complainant) for rebutting affidavits. There being no request for further time to meet them, I deem it proper to let in these affidavits under the circumstances, and they are therefore taken into consideration for the purposes of the motion.

Since the argument, in which the points upon each side were well and clearly presented, I have taken such time as I could spare to consideration of the record and briefs, and have read with care all that has been introduced upon the part of the defense, and the impressions which came to me from the argument have not been changed. The invention is employed by the defendants in welding hoops for pails and tubs, and the infringement is unquestioned, and, upon the conceded facts, is deliberate and flagrant, if the patents are valid. All defense rests upon the ground of anticipation or want of invention in the patents. This issue is frankly and squarely presented upon the part of the defendants, and I do not find any denial of complainant's showing that the patents were of great utility; that the alleged new art and apparatus were received and recognized by the world at large, and by electricians and scientists, as novel and important, and the process immediately entered into wide use, and revolutionized the methods of welding metals, especially where different metals were to be welded together; that manufacturers throughout the country have acquiesced in the validity of the patents continuously since their issue; that the great list of those who have operated under them embraces some of the largest in the country, reaches into all the manufacturing states, and there are apparently no contestants other than these defendants; that the defendants entered upon infringement after this general acquiescence and recognition, and after obtaining full information from complainant of the process and apparatus, and after refusal to accept license upon terms accorded to other licensees, which appear reasonable on their face, and are not attacked as unreasonable; that the equities of complainant entitle it to an injunction pendente lite, for protection of its rights and business with licensees, if the patents are valid, or are to be considered valid for the purposes of this motion; that the issuance of an injunction would not close the works of defendants, but would simply turn them back to their former method of welding hoops for their manufactured wares. It is an established rule, for this circuit at least, that the injunctive powers of the court should not be exercised pendente lite against infringement of letters patent without some prior final adjudication of the validity of the patent, or "such continued public acquiescence in the exclusive right asserted as raises a presumption of validity; a presumption not arising from the letters patent, unless accompanied by public acquiescence." *Standard Elevator Co. v. Crane Elevator Co.*, 6 C. C. A. 100, 56 Fed. 718; *Electric Manuf'g Co. v. Edison Electric Light Co.*, 61 Fed. 834. There has been no adjudication of the validity of these patents, and, so far as appears, no opportunity has arisen heretofore for testing their validity. Has there been public acquiescence in the claims here asserted, of sufficient definiteness and duration to afford presumption of validity? This inquiry must depend in each case upon all the circumstances shown. Here was clearly an assertion of a new art and apparatus for welding. Its discovery was widely published and accepted by the scientific world, in Europe and America, and by the public generally, as novel and important. It was speedily put into operation by the complainant, and its machines, and

rights for their use, were at once sought by manufacturers and metal workers; and it is unquestioned that the process had extended to an important share of the welding of metals throughout the country when the defendants entered upon its use. With an asserted invention of this character and utility, and operation under it firmly established since 1888, and to a considerable extent supplanting the older methods, I am satisfied that there is a sufficient showing of public acquiescence, and that "there arises such presumption of the validity of the patent as to entitle them to a preliminary injunction to restrain its infringement, unless the party sought to be restrained can clearly show its invalidity." *Blount v. Société Anonyme*, 3 C. C. A. 455, 53 Fed. 98; *Sargent v. Seagrave*, 2 Curt. 553, Fed. Cas. No. 12,365; *Sessions v. Gould*, 49 Fed. 855; 3 Rob. Pat. §§ 1185-1188.

The remaining question is whether the defense have given a clear and convincing showing (1) that the invention was merely the double use or analogous use in the art of a process previously known; or (2) that it was fully disclosed in previous publications or patents, and actually practiced, as a welding operation, prior to these patents, which should be held to overcome these presumptions, and the re-enforcing affidavits produced by complainants. Great research and ingenuity appear in this defense, but I am constrained to the opinion that neither proposition is maintained, to the degree required for preventing an injunction, and that their determination must be postponed to final hearing. They present the story frequently interposed against valuable patents, of laboratory experiments, of announcements, and of patents which may have come to the verge of this discovery; but the demonstrations are not clear, and the important fact stands in their way that they do not appear to have accomplished the electric weld which is shown by Thomson. The employment of heat and pressure for the operation of welding metals is old, and it was long known that heat could be obtained by the application of an electric current. These were not Thomson's discoveries; but he found a method for employing the electric current, localizing the heat at the joint to be welded, and applying simultaneously the requisite pressure, so that the separate pieces of metal could be properly united. I am not satisfied, for the purposes of this motion, that he was anticipated in this by Despritz, Joule, Plante, Cruto, or any of the patents shown, or by any experiments of Daft or Johnson. In this view the complainant is entitled to an injunction pendente lite against infringement of letters patent Nos. 347,140 and 347,141, and injunction will issue thereupon. With reference to letters patent No. 385,022, all determination will be postponed to final hearing.

PAYNTER et al. v. DEVLIN et al.

(Circuit Court, E. D. Pennsylvania. May 22, 1894.)

1. PATENTS—NOVELTY AND INVENTION—STEAM-PIPE UNIONS.

In the construction of steam-pipe "unions," the substitution, for members having flat, hard-metal, ground surfaces, or unground surfaces