

jury in this instance was based upon proper instructions given by the court. Then, the finding was sanctioned by the court by the refusal to disturb the verdict and the entry of judgment thereon. The patent in suit has but a few years to run, and the plaintiffs should not be lightly deprived of the benefit of the verdict and judgment they have obtained. Moreover, the defendant is a very deliberate infringer.

The defense of want of patentability was not much pressed here. It failed in the former action. The only prior patent exhibited here is the one to A. J. White. That patent, however, was set up in defense in the former suit. I do not think that it anticipates or affects the patent in suit; and I am entirely satisfied, upon the present proofs, that the plaintiffs' patent is for a new and useful invention. A preliminary injunction will be allowed.

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THE GLIDE.

HUDSON v. GRAFFLIN.

(Circuit Court of Appeals, Fourth Circuit. June 11, 1895.)

No. 135.

**ADMIRALTY PRACTICE—TAKING EVIDENCE ON APPEAL.**

Upon the hearing of a cause in admiralty, the claimant, who did not live in the city where the hearing took place, failed to appear. The libelant's evidence was taken, and the case adjourned to a future day. On such adjourned day claimant again failed to appear, and his proctor was unable to give any reason for his absence, whereupon the case proceeded to judgment for the libelant. It appeared that claimant had been ill, had expected to be present on both days, but had been prevented by his disease from attending or advising with his proctor. *Held*, that a proper case was made out for permitting claimant to take evidence pending an appeal.

This was a libel by George W. Grafflin against the barge *Glide* (George P. Hudson, claimant). Judgment was rendered in the district court for the libelant. The claimant appealed, and now moves for leave to take testimony pending his appeal.

Robert H. Smith, for appellant.

Frank Gosnell, for appellee.

Before GOFF and SIMONTON, Circuit Judges, and HUGHES, District Judge.

SIMONTON, Circuit Judge. This is a petition in behalf of the claimant, praying that he be allowed to examine certain witnesses, pending the appeal in this court. The prayer of the petition is resisted by the appellee.

We have no special rule bearing on this case. It is governed by rule 8,<sup>1</sup> conforming our practice to that of the supreme court. The application is not a matter of right. The court in each case

<sup>1</sup> (11 C. C. A. cl., 47 Fed. v.)

determines whether or not the prayer of the petitioner should be granted, and it will never be granted unless some satisfactory reason is shown why witnesses were not produced and examined in the court below. *The Mabey*, 10 Wall. 419. See, also, *The Venezuela*, 1 U. S. App. 315, 3 C. C. A. 319, 52 Fed. 873; *Sorenson v. Keyser*, 2 U. S. App. 177, 2 C. C. A. 92, 51 Fed. 30; *The Beeche Dene*, 13 U. S. App. 212, 5 C. C. A. 208, 55 Fed. 526; *The Lurline*, 14 U. S. App. 153, 5 C. C. A. 166, 55 Fed. 422. In the present case, after some delay, in which both parties acquiesced, the cause was called for trial. The witnesses of the libellant appeared, and were examined. The claimant, who did not live in Baltimore, where the case was heard, did not appear. He was ill at his home at Norfolk. The court adjourned the cause for several days, when it was again called, and the claimant was again absent. It seems that he had hoped to have recovered sufficiently to attend on the day thus fixed for the trial, but his disease prevented him. His proctor, not having been advised of his continued illness, could give no satisfactory reason, beyond surmise, of his repeated absence, and the judge properly ordered the case to proceed. It appears now that the illness of the claimant prevented him from attending at Baltimore, and from instructing his proctor how to meet the case made by the libellant; that he believes bona fide that he has a substantial and meritorious defense, and that but for his illness he could have properly instructed his proctor, have procured the attendance of the witnesses, and, under these circumstances, have developed his defense. Permitting him to do so now would better serve the ends of substantial justice. See *River Line v. Cheat-ham*, 9 C. C. A. 124, 60 Fed. 517.

Let a commission issue from this court, in accordance with the practice prescribed in rule 12 (3 Sup. Ct. ix.) of the supreme court, for the purpose of examining the witnesses named in the petition.

## AMERICAN ASS'N, Limited, v. EASTERN KENTUCKY LAND CO. et al.

(Circuit Court, W. D. Virginia. May 17, 1894.)

## FEDERAL COURTS—EQUITY JURISDICTION—PARTITION.

A federal court of equity cannot entertain a suit for partition of lands where the plaintiff's title is denied, although a state statute permits courts of equity to take cognizance of questions of title in partition suits.

This was a suit by the American Association, Limited, against the Eastern Kentucky Land Company and others for the partition of lands. The Eastern Kentucky Land Company filed its answer denying plaintiff's title, and thereupon demurred to the bill for want of jurisdiction.

White & Buchanan and Jerome Templeton, for complainant.

A. L. Pridemore, for defendants.

PAUL, District Judge. This is a chancery suit brought by the complainant company against the Eastern Kentucky Land Company and others for the partition of a tract of 100 acres of land lying near Cumberland Gap, in Lee county, Va., and also praying for an injunction to prevent waste on said land; but, there being no proof of any waste committed, it is not necessary to consider this question in the proceedings.

The complainant alleges that it is a joint tenant or tenant in common with the defendants in said land. It also claims that it is the owner of a right of way for a railroad tunnel through said land; that it has constructed said tunnel, and is in possession thereof. The principal defendant is the Eastern Kentucky Land Company. In fact, it is the only party defendant claiming any interest in the land. It files its answer, and claims that it is the sole and exclusive owner of the land in question. It denies "that the plaintiff and defendant companies own any lands in the state of Virginia as joint tenants, tenants in common, or in any other form of joint ownership; or that the plaintiff owns any lands in such tenancy with the codefendants of said Eastern Kentucky Land Company; or that the complainant company is in possession of any land owned or claimed by it, except the railroad tunnel, so far as it passes through the defendant company's land, about 1,000 feet, in the state of Virginia, which the plaintiff company entered upon without lawful authority or leave or license, and commenced the construction of its work, and still holds possession thereof." The plaintiff company claims immediate title to the land by deed from the devisees under the will of one Samuel C. Jones. The defendant company claims immediate title by deed from one J. W. Divine and wife, said Divine being the grantee in a deed from the same Samuel C. Jones. The plaintiff and the defendant company each recites many antecedent conveyances from different persons. Surveys have been made, and numerous depositions have been taken, all bearing upon the questions of the title of the plaintiff to the lands in controversy, and the boundaries of the same. The defendant the Eastern Kentucky Land Company demurs to the plaintiff's bill, on the ground that a