

CASES

ARGUED AND DETERMINED

IN THE

UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

MICHIGAN CENT. R. CO. v. CONSOLIDATED CAR HEATING CO.

(Circuit Court of Appeals, Sixth Circuit. June 14, 1895.)

No. 250.

APPEAL—ASSIGNMENTS OF ERROR—WAIVER OF DEFECTS—REHEARING.

Where counsel have discussed in their briefs a question as to the effect of amending the specifications of a patent in the patent office, under a general assignment that the court erred in holding the patent valid, without raising any objection in regard to the sufficiency of the assignment of errors, they cannot afterwards insist, on motion for rehearing, that the assignment was not sufficiently specific.

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

This was a suit in equity by the Consolidated Car Heating Company against the Michigan Central Railroad Company for infringement of letters patent No. 329,017, for improvements in steam car heaters granted October 27, 1885, to Elmore D. Cody. The circuit court entered a decree for complainant. Defendant appealed to this court, which, on April 2, 1895, reversed the decree, and ordered the bill dismissed, holding that the second claim of the patent was void for reasons stated in the opinion. 14 C. C. A., 232, 67 Fed. 121. A petition has now been filed for a rehearing.

J. C. Sturgeon and J. B. Foraker, for appellant.

R. A. Parker, for appellee.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge. The grounds upon which a rehearing is prayed in this case are such only as have been already argued by counsel and fully considered by the court in its former opinion, with the exception of one, which is that there was no assignment of error upon which the court could consider the effect of the amendment of the specifications of the Cody patent while his application was pending in the patent office. The first of the errors assigned

was that the court erred "in that it ordered, adjudged, and decreed that the letters patent No. 329,017, granted on the 27th day of October, 1885, to Elmore D. Cody and John W. Hayes, assignee of a one-half interest therein, for a new and useful improvement in steam car heaters, are good and valid letters patent." In the brief of the appellant's counsel the objection to the validity of the patent, founded upon the change of the specifications, was distinctly taken. The brief of counsel for appellee, under a distinct head of the argument, took up and discussed this subject at considerable length without any suggestion that the assignment of error was not sufficiently specific. As the assignment in general terms covered this subject-matter, and it was treated and discussed as falling under the assignment, we think it is too late to complain of the failure to more specifically assign the error, and that the appellee should be deemed to have waived a more definite assignment, if indeed that was necessary.

The petition is overruled.

KILDARE LUMBER CO. v. NATIONAL BANK OF COMMERCE et al.¹

(Circuit Court of Appeals, Fifth Circuit. May 7, 1895.)

No. 350.

1. JURISDICTION OF FEDERAL COURTS—CITIZENSHIP—ARRANGEMENT OF PARTIES.

A Texas corporation gave a trust deed to secure its notes to several parties. By inadvertence in naming the place at which the trustee was authorized to make sale in case of default, he was disabled from legally selling the property under the state statutes. Default having been made upon the notes held by one of the parties, the latter filed a suit to foreclose the trust deed, joining as defendants the trustee and one of the other beneficiaries under the trust, who was also president of the defendant corporation. Both of these persons were citizens of Texas, and it was contended by defendant that their interests in the controversy was adverse to it; that they must therefore be considered as parties plaintiff; and that the jurisdiction was consequently ousted. For complainant it was claimed that the trustee was a merely formal party; that under the Texas decisions, he was not even invested with the legal title, and was not a necessary party; and that the jurisdiction was not affected by his citizenship; further, that the claim of the other defendant was not in fact disputed by the defendant corporation, and that he in truth joined with it in fighting plaintiff's claim. *Held*, that the court had jurisdiction.

2. CONSTRUCTION OF CONTRACT.

Certain creditors of an insolvent corporation purchased its property at judicial sale, agreeing among themselves to form a new corporation, by which their debts were "to be paid" by the issuance to each of them of 60 per cent. of their claims in stock, and by giving the new company's notes for the remainder, secured by a trust deed. The arrangement was carried out, and the new company having defaulted upon the notes given to one party, he sued to foreclose the trust deed. *Held*, that the fact that he had not surrendered his old evidences of indebtedness was not a defense.

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

This was a bill in equity by the National Bank of Commerce of Kansas City, Mo., against the Kildare Lumber Company (a corpora-

¹ Rehearing denied June 4, 1895, without an opinion.