

the act by reason of accident, sickness, or other unavoidable cause. It is contended on behalf of the government that the cost which such Chinaman is required to pay includes the costs of his arrest and trial; but the subsequent clause in the same section, which provides that, where a Chinaman has procured a certificate which has been lost or destroyed, judgment shall be suspended to enable him to procure a duplicate, and in such cases the cost of said arrest and trial shall be in the discretion of the court, shows that the word "cost" as used in the prior sentence does not mean the cost of arrest and trial. Where the act provided for the costs of arrest and trial, it has used the words "arrest and trial," leaving no ambiguity or room for doubt. Nor is there any reason why a Chinaman arrested for failure to register, and whose failure has been due to accident, sickness, or other unavoidable cause, and who is therefore without fault, should be placed in a more unfavorable position than one who may have lost his certificate through his own negligence or fault. The defendant is entitled to a certificate of registration without the payment of the costs of his arrest and trial.

GODELL v. WELLS & FRENCH CO.

(Circuit Court, N. D. Illinois. September 16, 1895.)

1. PATENTS—ASSUMPSIT FOR ROYALTIES—DEFENSES.

In an action of assumpsit, on an agreement to pay royalties under a patent, the question is in reference to the existence of the agreement, and the defendant cannot attack the validity of the patent.

2. SAME—NOTICE OF SPECIAL DEFENSES.

A notice of special defenses, under section 4920, Rev. St., is improper in an action of assumpsit on an agreement to pay royalties.

Assumpsit by Henry C. Godell against the Wells & French Company on an agreement to pay royalties under a patent. Pleas: General issue; special pleas attacking validity of patent (1) for want of invention, and (2) because anticipated in the prior art; and notice of special defenses, under section 4920, Rev. St. Demurrer to special pleas, and motion to strike notice from the files.

Banning & Banning, for plaintiff.

Bond, Adams, Pickard & Jackson, for defendant.

SHOWALTER, Circuit Judge. The declaration is on an agreement whereby the defendant was to pay royalties to the plaintiff. Assuming such an agreement, defendant cannot attack the patent. If there were no such agreement, either express or implied, plaintiff cannot recover. Therefore the pleas are bad. Each of the two pleas in question goes to all the counts,—the special count and the common counts,—and nonassumpsit is also pleaded to the entire declaration. Therefore, no question arises on this demurrer touching the sufficiency of the first count. A demurrer to a special plea cannot be carried back to a defective count, when the general issue or some other good plea is also pleaded to said count; nor, where the special plea goes to all the counts, can a demurrer to such plea be

carried back to one count which is defective, the others being good. In the former case, the good plea waives a demurrer to the count; in the latter, the demurrer, if carried back, would go to the entire declaration, and, since some of the counts are good, would of course be overruled.

A notice of defense, under the statute, is not good here, on my ruling that the declaration is in assumpsit, and not in case; on an agreement to pay royalties, and not for an infringement. The question whether there was a consideration for the promise alleged, or any other question that may be made on the first count of the declaration, is not before the court on this demurrer.

THE ANTONIO ZAMBRANA.

MECKE et al. v. THE ANTONIO ZAMBRANA.

ACTIESELSKABET ANTONIO ZAMBRANA v. MECKE et al.

(District Court, S. D. New York. September 4, 1895.)

CHARTER PARTY—BARRANQUILLA—REFUSAL TO ENTER UNFREQUENTED MAGDALENA RIVER—BILL OF LADING—CUSTOMARY PORT—RETURN DELAYED—DAMAGES—REASONABLE TIME.

The steamship Z., drawing 13 feet, being chartered to run three months "between U. S. and ports of South America," cleared from Philadelphia with a cargo deliverable, according to the bill of lading, "at Barranquilla." For ten years previous to arrival, steamers of her class had not gone up the river, to the city of Barranquilla, 20 miles up the river, but had delivered their cargoes at Puerto Colombo, a mere place of delivery, from which there was transportation by rail to Barranquilla. The consignee insisted that the master should go up the river with the steamer, and that it was safe to do so. In making preliminary soundings, the channel way being wholly unbuoyed, the captain and the only local pilot lost their lives. Thereafter the mate was advised by the captains of other steamers that the attempt would be dangerous, and he was warned by the agent of the insurers that the insurance of the ship would be forfeited by the attempt to go up the river; he thereupon refused to make the attempt. The consignee refused to take the cargo at Puerto Colombo, and after three months of ineffectual endeavors at settlement the ship returned with her cargo, and brought this suit for charter hire; while the consignee, who was the principal in the charter, sued for damages for a breach of the charter in not going up to the river port of Barranquilla, and for the value of the cargo. *Held* (1) that the mate was justified in refusing to go up to the river port, and in returning with the cargo, upon the consignee's refusal to receive it at Puerto Colombo, there being no place for its storage; (2) that the ship could not recover for her delay at Puerto Colombo beyond a reasonable time after the ultimate refusal of the consignee to accept the cargo at the Puerto Colombo was known, and that the period of six weeks after arrival, up to the time of the expiration of the charter, was a reasonable and sufficient time, and recovery of damages beyond that period was disallowed.

This was a libel by Edward Mecke and another against the steamer Antonio Zambrana to recover damages for failure to deliver cargo. The owner of the ship (Actieselskabet Antonio Zambrana) filed a cross libel to recover damages for failure to receive cargo and for the detention of the ship.