

the line of the Chicago & Erie. The application of a similar rule of interpretation to that already employed disposes of this question. Assuming that either by reason of the Erie Railroad's ownership of the stock of the Chicago & Erie, or because of its having running arrangements with the latter road, the line of the Chicago & Erie would come within the general enumeration at the close of paragraph 1 of the contract of March 16, 1888, the mutual rights and obligations of the parties are still to be determined by the specific and exclusive contract of 1887, which makes special provision for the express business to be carried on upon the line of the Chicago & Erie. That contract was never abrogated by the original parties to it. It was continued in force by express assumption of its obligations upon the assignment to Wells-Fargo Company, which was executed on the same day as the contract of March 16, 1888, with the Erie Railroad. Its burdens have been assumed and discharged by the Chicago & Erie, and it has not been terminated by the circumstance that subsequent arrangements between the Chicago & Erie and the Erie Railroad are such that, upon the expiration of the special contract for the former line, the Wells-Fargo Company might be entitled to demand service from it under the general contract for lines not enumerated in the schedule. The terms of the contract of guaranty seem to indicate that such was the intention of the parties, for the \$500,000 as minimum of receipts guaranteed is restricted to the lines enumerated in the schedule attached to the contract of March 16, 1888, which does not include the line now operated by the Chicago & Erie. Evidently there was no intention to abrogate the special contract which already provided for a minimum from that line in advance of its expiration under its own terms. All questions, therefore, as to liability for losses by reason of strikes sustained on the line of the Chicago & Erie, should be left to be determined between that road and the Wells-Fargo Company. The receivers, therefore, are instructed that, so far as appears, neither the failure to expedite the trains 13 and 14 so long as Wells-Fargo Company declines to pay the extra costs, nor the losses sustained by the strike, are an answer or offset to their claim for the guaranteed minimum. No opinion, however, is expressed as to the disputed questions of fact, which deal with service other than that by "special express trains."

SAVAGE v. WORSHAM.

(Circuit Court, S. D. California. February 24, 1896.)

No. 580.

PUBLIC LANDS—CANCELLATION OF PATENT—INTEREST IN LAND.

Complainant filed a bill against the patentee of a tract of public land, seeking to have the patent declared void on the ground of frauds alleged to have been practiced by defendant on the land department in obtaining it, and to be himself declared entitled to the land by virtue of an alleged preference right under the act of congress of May 14, 1880 (1 Supp. Rev. St. 282), giving such right to one who has contested, paid the fees, and

procured the cancellation of a pre-emption, homestead, or timber-culture entry. Complainant's bill failed to show that he had ever contested defendant's entry. It showed affirmatively that defendant's entry had not been canceled, and it did not aver that any evidence of the frauds which were claimed to vitiate defendant's patent had ever been presented to the register or receiver of the land office. *Held*, that complainant had not shown any right to or interest in the land.

William E. Savage, in pro. per.
Chapman & Hendrick, for defendant.

WELLBORN, District Judge. The property in controversy in this suit is the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 22, township 2 S., range 11 W., San Bernardino meridian, and situated in Los Angeles county, Cal. The defendant holds the legal title to said land, under a patent from the United States issued August 14, 1893; and the object of the suit is to charge him as a trustee of complainant, or, as indicated in the prayer of the bill, to declare said patent void on account of alleged mistakes of law and fact committed by the land department, and fraud and imposition alleged to have been practiced upon said department by the defendant. Complainant derives his warrant for thus attacking defendant's title from a preference right of entry claimed by him under section 2 of the act of May 14, 1880 (section 2, Act 1880; 1 Supp. Rev. St. U. S. 282). This section reads as follows:

"In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead or timber-culture entry, he shall be notified, by the register of the land office of the district in which such land is situated, of such cancellation, and shall be allowed thirty days from the date of such notice to enter said lands, provided, that said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant, and not to be reported."

The rule is well settled that the court will not interfere with the title of a patentee of the United States unless the adverse claimant shows that, but for the error or fraud or imposition of which he complains, he would be entitled to the patent. It is not enough to show that the patent should not have been issued to the patentee. *Lee v. Johnson*, 116 U. S. 48-53, 6 Sup. Ct. 249; *Bohall v. Dilla*, 114 U. S. 47-51, 5 Sup. Ct. 782; *Savage v. Worsham*, 66 Fed. 852. Assuming, without deciding, however, that a preference right of entry under the aforesaid act of 1880 is such an interest as will authorize an attack upon a patent obtained adversely thereto through fraud or mistake, the question arises, does the bill show that complainant has, or ever had, the preference right of entry which he claims? To the acquisition by him of this right, three things are necessary: First, he must have been a contestant of the defendant's homestead entry; second, he must have paid the land-office fees; and, third, he must have procured the cancellation of said entry (section 2, Act 1880, *supra*). The bill fails to show either the first or third of these prerequisites. With reference to the first, it is to be observed that the secretary of the interior on September 17, 1889, expressly held that the complainant was not a contestant, while, so far as concerns the third, the whole bill is framed on the theory, and directly avers, that the defendant's homestead entry was never canceled, but, on the contrary, ripened into a

patent. The complainant insists, however, that, but for mistakes of law and fact in the land department, and fraud practiced thereon by defendant, said homestead entry would have been canceled, and that complainant would thereby have become a successful contestant. Placing upon the allegations of the bill the most favorable construction for the complainant, all that can be claimed is that the defendant's final proof for the commutation of his homestead entry to cash entry was insufficient, in the matter of residence and cultivation, to entitle him to the commutation applied for. But there is not anywhere in the bill even a pretense that any such facts were ever shown to the register or receiver as would have justified the cancellation of the defendant's homestead entry. There is a wide distinction between the cancellation by the land department of a homestead entry, and a refusal by the same authority of an application by the settler for patent before the expiration of the homestead limit of five years. To justify the former action,—that is, cancellation of a homestead entry,—affirmative testimony must be adduced that the settler has changed his residence or abandoned the land for more than six months. Rev. St. § 2301. There is not the slightest allegation in the bill that such testimony was ever submitted to the land department. The most and all that the bill charges in this respect is that the defendant's final proof was not sufficient to authorize the commutation of his entry. It is true, the bill alleges that this final proof was willfully false, and that in point of fact the defendant did not reside on said land, or cultivate the same; but there is no averment, or even the semblance of an averment, that proof of either of these facts was ever made, or attempted to be made, by the complainant or any one else. So far as the disclosures of the bill go, they sustain, rather than antagonize, the ruling of the land department that the complainant was not a contestant, within the meaning of the second section of the act of 1880.

I am of opinion that the bill does not show that the complainant has, or ever had, any right to or interest in said land. This view of the case renders it unnecessary for me to pass upon the other grounds of demurrer urged in defendant's brief. Demurrer sustained, and 20 days allowed the complainant to amend, if he shall be so advised.

INVESTOR PUB. CO. OF MASSACHUSETTS v. DOBINSON et al.

(Circuit Court, S. D. California. February 24, 1896.)

No. 632.

1. EQUITY PLEADING—FORM OF ALLEGATION—GENERAL DEMURRER.

An allegation of an essential fact in a bill in equity, by way of recital, but in such form that the existence of the fact appears by necessary implication, is good as against a general demurrer.

2. UNFAIR COMPETITION—SIMILAR CORPORATE NAMES.

Complainant, the Investor Publishing Company, alleged in its bill that it had for many years published a trade journal, called "The United States Investor," which had acquired a high reputation and large circulation in the United States and other countries; that defendant the Investor Pub-