

judges of the evidence. I will remind you, however, that the only locations in controversy here are the "P. I.," as claimed by the plaintiff, and the "Golden Eagle" and "Sky Pilot," as claimed by the defendants. I have admitted some testimony concerning the location of the "Alameda" and the old "Bear Mountain" lode claims. This was done for the reason that there is some evidence tending to show that the "Alameda" was located before either the "P. I." or the "Golden Eagle" or the "Sky Pilot," and that it adjoins the "P. I." endwise; and there is also some testimony tending to show that the "Alameda" is a relocation of the ground covered by the old "Bear Mountain" claim. The evidence concerning the two claims last mentioned was admitted to aid you in determining the exact ground covered by the other claims, and you will not consider it for any other purpose.

Verdict for the plaintiff.

KAEMPFER v. TAYLOR.

(Circuit Court, D. Connecticut. February 12, 1897.)

1. COSTS—SOLICITOR'S DOCKET FEE—FINAL HEARING.

To constitute such a "final hearing" as will authorize the taxation of a solicitor's docket fee of \$20, under section 824, Rev. St., there must be a hearing of the cause on the merits. And the mere fact that an order discontinuing a cause without prejudice provides that certain depositions filed by defendant may be used by him in any suit brought by complainant on the same cause of action does not make such a discontinuance a final hearing, within the meaning of the statute. *Manufacturing Co. v. Colvin*, 14 Fed. 269, *Wooster v. Handy*, 23 Fed. 49, and *Ryan v. Gould*, 32 Fed. 754, followed.

2. SAME.

Although the statute allows no solicitor's docket fee upon a discontinuance, yet, following the analogy of the common law, a fee of five dollars is allowed in equity.

3. SAME—SOLICITOR'S FEE FOR DEPOSITIONS.

It is not proper to tax a solicitor's fee under that portion of section 824 which allows to attorneys a fee of \$2.50 "for each deposition taken and admitted in evidence in a cause," unless the depositions are admitted in evidence in that cause. It is not sufficient that the court, by order, provides for their use in any future suit.

4. SAME—COPIES OF PAPERS.

A taxation for copies of papers cannot be allowed where the copies are not actually used on the trial or final hearing. *Wooster v. Handy*, 23 Fed. 49, followed.

Dyer & Driscoll, for complainant.
F. W. Smith, Jr., for defendant.

TOWNSEND, District Judge. This is an appeal from the taxation by the clerk of the following items in defendant's bill of costs: Solicitor's docket fee on final hearing, \$20; solicitor's fee on seven depositions, \$2.50,—\$17.50; disbursements for copies of patents, \$10.50. The bill, answer, and replication were duly filed, issued, and served, and proofs were taken. After defendant had closed his case, the court, upon motion of complainant for a discontinuance, made an order "that this cause be, and the same is hereby, discontinued, without

prejudice, upon the payment of defendant's costs to be taxed; and, further, that certain testimony taken on behalf of defendant, and now on file with the clerk of this court, may be used by this defendant in any suit brought by this complainant against this defendant on the patent here in suit." The conflicting cases bearing upon the question of what constitutes "a final hearing" upon which such docket fee is taxable under the provisions of section 824 of the Revised Statutes, are collected and discussed by Judge Hammond in *Louisville & N. R. Co. v. Merchants' Compress & Storage Co.*, 50 Fed. 449, which seems to have been overlooked by counsel in this case. The decisions of Judge Wheeler in *Manufacturing Co. v. Colvin*, 14 Fed. 269, of Judge Blatchford in *Wooster v. Handy*, 23 Fed. 49, of Judge Lacombe in *Ryan v. Gould*, 32 Fed. 754, and the definition of a final hearing by Judge Wallace in *Andrews v. Cole*, 20 Fed. 410, as one where "the cause has been finally determined, and its determination involved a hearing by the court," are controlling in this circuit.

It is urged on the authority of *The Alert*, 15 Fed. 620, that the order of court as to the use of depositions filed herein made this a final hearing. But the order in *The Alert* discharged the res from custody in a proceeding in rem on payment of the amount claimed by libellant and his costs. As Judge Blatchford says in *Wooster v. Handy*, supra: "Judge Benedict held that, as an order of court was necessary to obtain the release of the vessel and to cancel the libellant's stipulations, the hearing on the motion to that effect was a final hearing." Judge Blatchford, in said opinion, expressly says "that, to constitute a final hearing in equity, there must be a hearing of the cause on the merits." See, also, opinion to same effect of Mr. Justice Gray, cited and followed by Mr. Justice Brown in *Cleaver v. Insurance Co.*, 40 Fed. 863. In these circumstances the docket fee of \$20 must be disallowed. I understand, however, that while the fee bill allows no solicitor's docket fee upon a discontinuance, it has been the practice in this district, following the analogy of the common law, to allow a fee of \$5 in equity, and said sum is therefore allowed. The item for \$17.50, for seven depositions, was allowed under that portion of section 824 which allows to attorneys a fee of \$2.50 "for each deposition taken and admitted in evidence in a cause." These depositions, although taken in this cause, were not admitted in evidence therein. The order of court only provided for their admission in evidence in such suits as might thereafter be brought. The taxation for depositions is disallowed. The taxation for copies of patents must be disallowed, under the rulings of Judge Blatchford in *Wooster v. Handy*, supra. The copies were not "actually used on or in the trial or final hearing."

UNITED STATES v. EINSTEIN et al.

(Circuit Court of Appeals, Second Circuit. February 23, 1897.)

1. CUSTOMS DUTIES—CLASSIFICATION—EMBROIDERIES—"DOTTED SWISSES."
"Dotted Swisses," being white, bleached, woven, cotton fabrics in the piece, embroidered after leaving the loom by an additional process of manufacture, though not known in commerce as "embroideries," are dutiable as articles embroidered, under paragraph 276, Act Aug. 28, 1894, and not under the countable clauses of the cotton schedule.
2. SAME.
The provision in paragraph 257, Act Aug. 28, 1894, that "cotton cloth," as used in the preceding paragraphs, shall include "all woven fabrics of cotton in the piece, whether figured, fancy, or plain," etc., does not apply to embroidered cotton cloth, which was not embroidered in the loom.

Appeal from the Circuit Court of the United States for the Southern District of New York.

James T. Van Rensselaer, Asst. U. S. Atty.

W. Wickham Smith, for the importers.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The firm of Einstein, Wolff & Co. imported, in September, 1894, into the port of New York, embroidered cotton cloth in the piece, known as "dotted Swisses," which were returned by the local appraiser as "cotton embroidery," and duty was assessed thereon by the collector at 50 per cent. ad valorem under the provisions of paragraph 276 of the tariff act of August 28, 1894. So much of the paragraph as relates to the subject is as follows:

"276. Laces, * * * embroideries, * * * and articles embroidered by hand or machinery, * * * composed of flax, jute, cotton or other vegetable fiber, or of which these substances, or either of them, or a mixture of any of them is the component material of chief value, not specially provided for in this act, fifty per centum ad valorem."

The importers protested against the assessment upon the ground that the goods were dutiable under the provisions of paragraph 252-256, inclusive, in the schedule relating to cotton manufactures, of the same act, according to the number of threads to the square inch, the number of square yards to the pound, and the value per square yard. These paragraphs are generally known as the "Countable Clauses." Paragraph 254 is the one applicable to the number of countable threads in the merchandise in question. The decision of the collector was affirmed by the board of general appraisers, but their decision was reversed by the circuit court, which held that the merchandise was dutiable as cotton cloth, under the provisions of paragraph 254. The merchandise consisted of white, bleached, woven cotton fabrics in the piece, and contained between 100 and 150 threads per square inch. They were not known in commerce as "embroideries," but were embroidered by an additional process of manufacture after they left the loom. At and before the date of the act of August 27, 1894, there were known, and dealt in the trade and commerce of this country, figured woven fabrics of cotton in the piece and