

two years' public use, the claim sued on relates back to the first application, and hence that the defense of public use is not made out. *Godfrey v. Eames*, 1 Wall. 317, 325; *Smith v. Vulcanite Co.*, 93 U. S. 486, 500; *Graham v. McCormick*, 5 Ban. & A. 244, 248, 11 Fed. 859.

The claim sued on relates to supporting the lower mud drum of water-tube boilers. The specification describes, and the claim calls for, a combination in which the water tubes are required to sustain "the weight of the mud drum and its contents, whereby provision is made for expansion and contraction of the drums and pipes." Prior to the invention, the mud drum seems to have been supported rigidly on a chair or masonry, and some patents show the elevated steam and water drums resting on the tubes or suspended from columns or girders. In these boilers the expansion or contraction of the metal necessitated a corresponding disturbance or movement of the upper drums and upper ends of the tubes; and, as one witness says, "this lifting and bending caused a great many cracks to occur in the tubes, more especially in the front row," "the tubes loosening in the tube sheets, the bending and breaking of the tubes, and the cracking of the brick settings." In the patented boiler, however, it is the lower mud drum and lower ends of the tubes that are subjected to this disturbance or movement; and, these parts being free to move as required, this disturbance produces no injurious results. On the case as presented, I hold that changing the construction and operation as described amounted to a material and patentable difference over everything shown in the prior art. The boiler shown in the patent sued on has but a single mud drum; but the specification states "that more than one may be used as desired," and that "when more than one is used they may all be supported as above, or some of them supported in this way and others otherwise." The defendant's boiler has three mud drums, at least one of which is suspended or sustained by the tubes connecting it to the elevated steam and water drums. I therefore hold that the defendant's boiler is an infringement of the second claim of the patent sued on.

LETTIELIER v. MANN et al.

(Circuit Court, S. D. California. February 1, 1897.)

No. 697.

PLEADING IN PATENT INFRINGEMENT SUITS—ALLEGATIONS OF OWNERSHIP.

A bill by the patentee for infringement must allege that he owned the patent at the time of filing the bill. It is not sufficient to show merely that the patent was issued to him at a certain prior date, and that, on filing the bill, he had possession, and made profert thereof.

This was a suit in equity by John G. Lettelier against William Mann and George E. Johnson, co-partners, etc., for alleged infringement of letters patent No. 482,484, issued September 13, 1892, to complainant, for an improvement in machines for forming channel strips, etc. The cause was heard on demurrer to the bill.

H. C. Dillon, for plaintiff.

James E. Knight and C. K. Holloway, for defendants.

WELLBORN, District Judge. This is a bill in equity, to enjoin the defendants from using a certain patent, and to recover damages for past infringements. The bill alleges:

"That your orator is the original and first discoverer and inventor of a new and useful improvement in machines for forming channel strips for use in the manufacture of open-topped fruit baskets and boxes. That he filed his application for a patent on said discovery and invention in the United States patent office on the 28th day of March, 1891. That thereupon such proceedings were regularly had and duly taken that a patent was duly issued to your orator from the United States of America for his said discovery and invention on the 13th day of September, A. D. 1892, which said patent was and is numbered 482,484, and which said patented improvement in machines for forming channel strips had not been known, used, or published prior to the said discovery, invention, and application of your orator. That a description and specification of the aforesaid discovery and invention is given in the schedule to the aforesaid letters patent, and the aforesaid patent and the specification thereto annexed (which, or a copy of which, duly exemplified, your orator will produce, as your honors may direct) were duly recorded in the patent office of the United States, duly signed and authenticated, as by the said letters patent and specification in due form of law, ready in court to be produced, will fully appear."

Then follow allegations as to infringement and damages.

A demurrer has been interposed on several grounds, the first of which is:

"That it does not appear by the said bill of complaint that the letters patent therein alleged to have been issued to John G. Lettelier were owned by the said Lettelier at the date of filing the said bill of complaint."

In support of his bill, as against this ground of demurrer, plaintiff alleges that said bill shows that said letters patent, long prior to the commencement of the suit, were duly issued to him by the United States government, and "that a status once established is presumed by law to remain until the contrary appears"; citing *Kidder v. Stevens*, 60 Cal. 414, and *Eltzroth v. Ryan*, 89 Cal. 135, 26 Pac. 647. While these cases support complainant's contention, later California decisions are directly to the contrary.

In *Holly v. Heiskell*, 112 Cal. 174, 44 Pac. 466, the court says:

"Appellant contends that the judgment must be reversed because there is no averment in the complaint that respondent was the owner or entitled to the possession of the property sued for at the time the action was brought; and, under the authorities, the contention must be sustained. In a suit to recover personal property, the complaint must show the ultimate fact that plaintiff was the owner or entitled to possession at the time of the commencement of the action; and it is not sufficient to merely aver that he was the owner or entitled to possession at some period prior to that time. It was so expressly held in *Fredericks v. Tracy*, 98 Cal. 658, 33 Pac. 750, *Affierbach v. McGovern*, 79 Cal. 269, 21 Pac. 837, and *Masterson v. Clark* (Cal.) 41 Pac. 796; and the two first-named cases were referred to approvingly in the still more recent case of *Williams v. Ashe*, 111 Cal. 180, 43 Pac. 595. Counsel for respondent seek to show us a distinction between those cases and the case at bar, but we are not able to see it. In *Affierbach v. McGovern*, *supra*, there was no demurrer to the complaint. In the case at bar the only averment of the respondent's ownership or right of possession is 'that on the 22d day of April, 1895, plaintiff was the owner and entitled to the possession of the following described personal property, to wit.' And the action was not commenced until after the said 22d day of April. Under the authorities above cited, the complaint does not state facts sufficient to constitute a cause of action; and, of course, that objection can be taken at any time."

Substantially to the same effect are *Vance v. Anderson* (Cal.) 45 Pac. 816, and *McCaughy v. Schuette* (Cal.) 46 Pac. 666. In the former the court says:

"It will be observed that while the complaint avers seisin and possession in the plaintiff on the 1st day of May, 1894, it fails to state that she was so seised at the date of the suit brought, which was May 19, 1894, or at any time after May 1st. This was, we think, a failure of an essential allegation in the complaint. It is true that in some of the earlier cases in this court a complaint in ejectment was, in effect, differentiated from those in other actions, and precisely similar complaints with this were held sufficient. * * * *Kidder v. Stevens*, 60 Cal., at page 420."

In harmony with these later California cases is the case relied on by defendants,—*Krick v. Jansen*, 52 Fed. 823.

Complainant, however, further insists that:

"The ownership of the patent and title in complainant is further shown by his allegation, from which it appears that complainant is in possession of the letters patent, and makes profert of them. This allegation alone, Mr. Foster says in his *Federal Practice* (section 77), is sufficient allegation of title."

That part of said section 77 of Foster's *Federal Practice* to which complainant refers, I presume, is the following:

"It has been held to be a sufficient allegation of title and infringement for the plaintiff to allege that he 'was the true, original, and first inventor of a certain new and useful improved application of steam power to the capstan of vessels, not known or used before'; 'that a description or specification of the aforesaid improvement was given in his schedule to the aforesaid letters patent annexed, accompanied by certain drawings referred to in said last-mentioned schedule, and forming part of said letters patent (the said letters patent and the said specification thereto annexed—which, or an exemplified copy of which, your orators will produce, as your honors may direct—were duly recorded in the patent office)'; and 'that the defendant is now constructing, using, and selling steam-power capstans for vessels in some parts thereof substantially the same in construction and operation as in the said letters patent mentioned.'"

The citations of the author in support of said text are *McMillin v. Transportation Co.*, 18 Fed. 260, 261, and *McCoy v. Nelson*, 121 U. S. 484, 7 Sup. Ct. 1000. In neither of these cases, however, was the objection made that the bill did not adequately allege complainant's ownership. Moreover, in the latter case, as appears from the opinion of the court, the allegation of ownership was expressly made. After enumerating some of the allegations of the bill, the opinion proceeds thus: "The bill then alleges that the plaintiff was, and is, the owner of the patent."

Without passing upon the other grounds of the demurrer, I hold that the first is well taken. Demurrer sustained, with leave to the complainant to amend within 10 days, if he should be so advised.

MacLEOD et al. v. GRAVEN.

(Circuit Court of Appeals, Sixth Circuit. March 2, 1897.)

No. 354.

APPEAL—JURISDICTION OF SUPREME COURT.

A writ of error from the supreme court does not lie, by virtue of the last paragraph of section 6 of the circuit court of appeals act, to review a judgment of the circuit court of appeals which is not a final judgment.

In Error to the Circuit Court of the United States for the District of Kentucky.

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

TAFT, Circuit Judge. In this case a writ of error was sued out to a judgment in favor of Mrs. Graven, administratrix, against MacLeod, receiver, rendered by the circuit court below for damages for the wrongful death of plaintiff's intestate. On April 14, 1896, this court reversed the judgment of the circuit court, and remanded the case, with instructions to award a new trial. *MacLeod v. Graven*, 19 C. C. A. 616, 73 Fed. 627. An application was made to Judge LURTON, as a member of this court, to allow a writ of error to the judgment of this court so as to permit a review thereof by the supreme court of the United States. The application has been referred by Judge LURTON for the consideration of the whole court. The right to such a writ of error is asserted upon the ground that MacLeod, the defendant in the court below, was a receiver appointed by that court; that the injury complained of was caused by the operation of an electric railroad by him as such receiver; that the suit against him was therefore one arising under the laws of the United States (*Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905); that on appeals or writs of error in such suits the judgments of this court are not final; and that, as this case involves more than \$1,000, by the express terms of the last paragraph of section 6 of the circuit court of appeals act a review of the case by writ of error from the supreme court is provided.

The application presents the question whether, conceding that a writ of error from the supreme court will lie in this class of cases, it can lie in any case where the judgment of this court is not a final judgment. It is well settled that a judgment of an appellate court reversing the judgment of the trial court, and remanding the cause for further proceedings, is not a "final judgment," as that term is used in federal appellate procedure. *Insurance Co. v. Kirchoff*, 160 U. S. 374, 16 Sup. Ct. 318; *Werner v. Charleston*, 151 U. S. 360, 14 Sup. Ct. 356; *Brown v. Baxter*, 146 U. S. 619, 13 Sup. Ct. 260; *Meagher v. Manufacturing Co.*, 145 U. S. 608, 12 Sup. Ct. 876; *Rice v. Sanger*, 144 U. S. 197, 12 Sup. Ct. 664; *Johnson v. Keith*, 117 U. S. 199, 6 Sup. Ct. 669; *Bostwick v. Brinkerhoff*, 106 U. S. 3, 1 Sup. Ct. 15; *Houston v. Moore*, 3 Wheat, 433.