

well-settled law that an agreement to submit to arbitration is, in general, revocable by either party at any time before an award has been made; but, where parties to an action have consented to a rule of court submitting the action to arbitrators to be mutually chosen, neither party can rescind the rule. 1 Am. & Eng. Enc. Law, p. 664. When the state, therefore, provided for the submission of issues in court to an arbitrator or referee by consent of parties, it was but fair that it should provide safeguards against the referee holding the case indefinitely,—for years, perhaps, as in this case,—while a party aggrieved thereby was powerless to compel a decision. We are of the opinion, therefore, that when judgment was entered in the circuit court on September 10, 1896, there was on file in that court no report of any referee duly made; and since it appears from the recitals in said judgment that there has been no default of defendants, and no trial of the issues, either by a jury or by the court without the intervention of a jury, the circuit court committed error of law in entering such judgment. The judgment of the circuit court is reversed and the cause remitted.

WESTERN WHEEL-SCRAPER CO. v. DRINNEN et al.

(Circuit Court, N. D. Illinois. April 5, 1897.)

EFFECT OF APPEAL—JURISDICTION OF TRIAL COURT—AMENDMENT OF PLEADINGS—PATENTS.

Pending an appeal from a decree restraining the infringement of a patent, the trial court has no jurisdiction to allow the answer to be amended and the case opened for further proof. *Smith v. Iron Works*, 17 Sup. Ct. 407, followed.

In Equity. On motion. Suit by the Western Wheel-Scraper Company against one Drinnen and others to restrain the infringement of a patent.

Bond, Adams, Pickard & Jackson, for complainants.

R. C. Taylor, for defendants.

GROSSCUP, District Judge (orally). The motion is to amend the answer, and open up the case for further proof. The case is one arising under the patent laws of the United States, and was heard in the circuit court at a previous term (77 Fed. 194), resulting in a decree in favor of the complainants, sustaining the validity of certain claims of their patents, finding the defendants guilty of infringement, and entering the customary injunction order. From this decree an appeal was perfected to the circuit court of appeals, where the case is now pending. The question preliminary to all others, raised by this motion and, in the view I have taken, decisive of the motion, is: Has the circuit court jurisdiction, during the pendency of an appeal in the circuit court of appeals, to open up the original cause upon any question relating to the merit of the decree appealed from? Upon this question I hold that the appeal takes from the circuit court jurisdiction of the cause to the extent that the cause is bound up in the

appeal. The only questions still open in this court, pending appeal, are those that do not relate to the decree appealed from. The purpose of the motion, however, is to open up and change the decree appealed from, and therefore deals with questions in the case that are now within the sole jurisdiction of the circuit court of appeals. This ruling is sustained in *Smith v. Iron Works* (recently handed down by the supreme court) 17 Sup. Ct. 407, and applies to patent cases the same rules that govern chancery cases generally. The motion is overruled.

SCHEEL v. ALHAMBRA MIN. CO.

(Circuit Court, D. Nevada. April 5, 1897.)

No. 596.

MINES AND MINING—CONVEYANCE OF TUNNEL RIGHT—APPURTENANCES.

The grant of a tunnel right through a specific piece of ground, "together with all and singular the appurtenances thereto belonging," carries with it by implication every incident and appurtenant thereto, including the right to dump the waste rock at the mouth of the tunnel on the land owned by the grantors at the time of the conveyance of the tunnel right.

This is a bill in equity to quiet title to the Metropolitan mine and mining claims, owned by the plaintiff. The suit was commenced in the state court, and thereafter removed to this court, on motion of defendant, upon the ground of diversity of citizenship of the parties.

The bill, as reformed in this court, charges that defendant, in running a tunnel through and near plaintiff's mine, wrongfully and unlawfully, without plaintiff's consent, dumped and deposited waste rock and earth from said tunnel upon plaintiff's claim; that defendant claims an estate and interest in the Metropolitan mine adversely to plaintiff, viz. an easement and servitude therein, and the right to dump waste rock thereon; that said claim is false and invalid, and casts a cloud upon plaintiff's title thereto. The defendant, in its answer, "alleges that whatever right, title, or interest plaintiff may have in said Metropolitan claim is subject to the right of defendant to run, maintain, and work said tunnel, and to the right of defendant to dump waste rock on said Metropolitan claim." It bases its right to use the land owned by plaintiff at the mouth of the tunnel, upon the ground that it is, and ever since 1873 has been, the owner of, in possession of, and entitled to the possession of the mining claim and premises known as the "Alhambra Mining Claim," together with the tunnel mentioned in the complaint, "with the right to dump ore and waste rock upon the surface of the Metropolitan mining claim"; that said tunnel, when commenced, at the mouth thereof, was upon vacant and unoccupied public mineral land; that on April 6, 1887, its predecessor in interest and grantor located a tunnel right and location under the provisions of section 2323 of the Revised Statutes, commencing at the mouth of the tunnel, described in the complaint, and running through the Metropolitan claim into, along, and upon the ground of the Alhambra claim; that said location was made with the knowledge of said plaintiff and his grantor; that defendant and its predecessor in interest ran said tunnel upon said tunnel right and location, and fully complied with the mining laws in regard thereto; that long prior to the commencement of this suit the plaintiff and his grantor, for a valuable consideration, sold and conveyed to the defendant the land through which the tunnel runs. The evidence shows that on June 30, 1874, Herman J. T. Scheel (plaintiff's father) obtained a patent to the Metropolitan lode claim; that on February 23, 1887, he conveyed his title to said lode claim to his son, Herman B. J. Scheel, the plaintiff herein; that plaintiff holds the legal title to said lode claim, except as to such portions of the surface ground which, on