"The plaintiff complains of the defendant, and says that the defendant is a resident of the city of Indianapolis, in the state of Indiana, and that heretofore, to wit, on the 20th day of July, 1893, the said defendant did assist and encourage the importation and migration of a certain alien and foreigner into the United States, to wit, one James H. Henderson, who was then and there a native of Scotland and a subject of Great Britain, by promise of employment, through advertisements printed and published in the city of Glasgow, Scotland, and under contract and agreement made previous to the importation and migration of said alien and foreigner, and previous to his becoming a resident and citizen of the United States, by the defendant with the said James H. Henderson, by which said contract and agreement the said James H. Henderson was to perform labor and service in the United States for the sum of twelve dollars per week, and the said defendant further agreed to refund the passage money and cost of transportation of the said James H. Henderson from Scotland to the United States; wherefore plaintiff says the defendant has become liable to a penalty of one thousand dollars, for which sum plaintiff demands judgment against defendant, and for all other proper relief."

To this declaration the defendant has interposed a demurrer, for insufficiency of facts to constitute a cause of action.

The statute in question is highly penal, and must be so construed as to bring within its condemnation only those who are shown by the direct and positive averments of the declaration to be embraced within the terms of the law. It will not be so construed as to include cases which, although within the letter, are not within the spirit of the law. It must be construed in the light of the evil which it was intended to remedy, which, as is well known, was the importation of manual laborers under contract previously entered into, at rates of wages with which our own laboring classes could not compete without compelling them to submit to conditions of life to which they were unaccustomed. U. S. v. Laws, 163 U. S. 258, 16 Sup. Ct. 998; Church of Holy Trinity v. U. S., 143 U. S. 457, 12 Sup. Ct. 511; U. S. v. Craig, 28 Fed. 795. It is settled by these and other cases that the statute must be construed as limited to cases where the assisted immigrant was brought into this country under a contract to perform "manual labor or service." The declaration does not state the character of the labor or service which the immigrant was under contract to perform, and hence fails to bring the case within the terms of the statute, as construed by the supreme court. The court cannot indulge the presumption that the labor or service which the immigrant was under contract to perform was manual, in the absence of such averment. The declaration does not set out the advertisements, or otherwise state the terms of the contract or agreement alleged to have been entered into. The pleader has contented himself with a mere statement of conclusions, without stating either the advertisements or contract in hæc verba, or even attempting to set forth the substance of either. At least, the substance of the advertisements and contract should be set out to enable the court to determine whether they bring the defendant within the condemnation of the statute. U. S. v. Edgar, 45 Fed. 44. There is no direct allegation that the immigrant named in the declaration actually came to this country pursuant to the alleged contract for the purpose of performing manual labor or service. Such an averment is essential. U. S. v. Craig, 28 Fed. 795, 799. There is no statement of the acts done by the defendant to assist or procure the immigration into this country of the person

named in the declaration. It is not averred that the defendant prepaid the expenses of his passage. It is averred that the defendant agreed to refund the passage money and cost of transportation from Scotland to the United States, but it fails to allege that the agreement to refund was made before the person alleged to have been assisted came to this country. The court is not at liberty to infer that the agreement to refund was made before the immigrant came here. Indeed, it can only be gathered by inference that the alleged immigrant ever came to this country. The declaration is clearly insufficient, and the demurrer is sustained, with leave to amend in 10 days; otherwise, the case will be dismissed.

MACKAYE v. MALLORY.

(Circuit Court, S. D. New York. April 10, 1897.)

1. EQUITY PRACTICE—DISMISSAL FOR WANT OF PROSECUTION.
A motion by complainant to dismiss for want of prosecution will not be granted where it appears that defendant has taken testimony in support of his defense and of his claim on his cross bill, and that the next step in the orderly disposition of the cause is one to be taken by complainant himself, namely, the taking of testimony in rebuttal of the defense to the original bill and in answer to the testimony in support of the cross bill.

2. SAME.
A delay by complainant of 13 years after joinder of issue without taking any testimony gives defendant a right to a dismissal; and this right is not affected by the fact that complainant then died, and his administratrix obtained an order of revivor, for the latter takes the litigation in the same condition in which the deceased left it.

Lewis Cass Ledgard, for the motion.
E. W. Taylor, opposed.

LACOMBE, Circuit Judge. It appears that in the suit commenced in this court by Mallory upon original bill, and in which Mackaye had filed a cross bill, the latter had taken testimony and rested, both in his defense to the original bill and in his proof of the averments of his cross bill. Thereupon the time for Mallory to take his testimony was by stipulation extended for a period as great as had been allowed Mackaye for the putting in of his testimony, namely, about a year and a half, and during the time thus allowed Mallory for completing his proof Mackaye was to be produced for cross-examination when requested by complainant. Nothing more was done in the ensuing 10 or 12 years down to Mackaye's death, but during that whole period it rested with the complainant to take the next step. He might either have taken and closed his proofs, or have notified the other side that he elected to take none, and thereupon, after a sufficient lapse of time, have made motion to dismiss the cross bill for failure to prosecute; but, so long as the next step to be taken in the action was one to be taken by him, he was in no position to move a dismissal on the ground that no steps were being taken to close the case, and he is in no better position to-day than he was at Mackaye's death, since

the next step to be taken in the orderly disposition of the cause is still, as it was then, the taking of complainant's proofs in rebuttal of the defense to the original bill, and in answer to the testimony taken in support of the cross bill. The present motion in this suit must therefore be denied.

In the suit removed from the state court the situation is different. No evidence whatever has been taken by either party. There is a statement in the affidavit of Mackaye's former counsel that he expected that the testimony in the cross-bill suit would be used in this suit, and that there was some conversation or understanding about it. But his recollection on this point seems to be rather vague, and there is no pretense that there ever was any written stipulation to that effect, or any oral arrangement spread upon the record. We have, then, a case where issue was joined in December, 1881, and no testimony taken by the complainant in support of his bill down to the day of his death, in February, 1894. Under these circumstances defendants were clearly entitled to dismiss the action for failure to prosecute, and there is no reason for holding that they have lost their right to make such motion because his administratrix has subsequently obtained an order of revivor. She takes up the litigation in the condition in which deceased left it, except so far as any laches of her own may have still further embarrassed it. Defendants in this suit are therefore entitled to an order dismissing the complaint for failure to prosecute.

DELLS LUMBER CO. v. ERICKSON.

(Circuit Court of Appeals, Seventh Circuit. May 3, 1897.)

No. 359.

1. MASTER AND SERVANT—QUESTION FOR JURY.
B. had authority and was accustomed to hire and discharge workmen employed in a planing mill, and there were other circumstances tending to show that he exercised and had the authority of a superintendent. E., whom he had hired, continued in the service under his promise to repair machinery of which complaint was made, and was injured. There was another employé who determined what repairs should be made. *Held*, that it was a question for the jury, if the point was controlling, whether B. was exceeding his powers when persuading E. to continue in the service.

2. SAME—PROMISE TO REPAIR.
Where the master is negligent in furnishing defective machinery, and one who continues in the service under a promise by another servant to repair is injured, it is immaterial whether the servant making the promise had authority to do so, provided the injured servant, upon reasonable grounds, supposed him to have.

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

V. W. James and C. Porter Johnson, for plaintiff in error.

T. F. Frawley and A. C. Larson, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. John Erickson, the defendant in error, recovered judgment against the Dells Lumber Company, plaintiff in error, for personal injuries sustained in the employment of that company while operating a matcher in the company's planing mill at Eau Claire, Wis.,—his foot having been caught and crushed between pulleys under that end of the machine near which he was required to be when operating it. The gist of the declaration is that the negligence of the company which caused the injury consisted in omitting to equip the matcher with a spring to hold the boards being matched against the guides, and in omitting to cover or guard the pulleys; that by reason of the absence of the spring the plaintiff was compelled to press with all his strength against the boards to keep them moving in a straight line under the knives; that, while so engaged, a board broke under his hand, causing him to fall and his foot to be caught between the revolving pulleys. When the evidence was all in, the plaintiff in error moved the court to direct a verdict in its favor, but the motion was denied. Whether that ruling was right is the chief question in the case, and its determination depends upon the inquiry whether the defendant in error should be regarded as having assumed the risk of injury from the unguarded pulleys. That the omission to cover the pulleys, or in some mode to guard the operator of the machine against danger from them, was a breach of the company's duty to provide its employé a safe place in which to work is too clear for controversy; but it is contended that Erickson had become aware of the danger, and that by continuing in the service he assumed the risk. The accident occurred on Tuesday, and it appears that, on the Saturday next preceding, Erickson complained to John Bonk, whom he supposed to be the superintendent of the mill, about the condition of the matcher, and declared his purpose to quit work unless a spring was supplied and the pulleys covered, whereupon Bonk requested him not to quit, and promised that the spring should be supplied and the pulleys guarded. The promise, it is insisted, was not binding upon the company, and was unavailing to Erickson as an excuse for continuing to work under conditions of known danger, because Charles Charlesson, the foreman in the mill, was the one who had charge of the machinery, and determined what repairs and alterations should be made, while Bonk, instead of being the superintendent, was only a fellow servant of other employés, and possessed of no authority to promise that repairs or additions to the machinery of the mill should be made. Erickson testified that he believed Bonk to be the superintendent, and other witnesses asserted a like understanding. It is undisputed that Bonk had authority and was accustomed to hire and discharge the workmen employed in the planing mill. He hired Erickson and fixed his wages, as he did the wages of others, and there are other circumstances in evidence which tended to show that he exercised and had the authority of a superintendent. It was therefore a question for the jury, if the point were controlling, whether he was exceeding his powers when persuading Erickson to continue in a service for which, if he quit, another must have been employed. We are of opinion, however, that the important inquiry was not so much what authority did Bonk really possess, as what