

performance, to point out wherein there was failure to perform, or defective performance, that the plaintiff might have opportunity to complete performance according to the terms of the contract. Here the plaintiff claims to have specifically performed. The plant was delivered by the plaintiff to the person in custody and control of the building. The plant was taken possession of by the owner, has been appropriated and enjoyed by him, and has been operated by him in connection with the use of the building; and, although the defendant was merely a contractor with the owner, such a delivery was all the delivery that could have been made to the defendant, who had no right to retain it from the owner, and such delivery, accepted by the owner, absolved the defendant, and is, in effect, a delivery to him. Under such circumstances, there was here a proper question for the jury, whether the refusal of the architect to determine the question submitted to his judgment and to issue his certificate, if there was such refusal, was not arbitrary. He had no right to content himself with objections raised by the owner without investigation and determination by him of the correctness of those objections. He had no right to remain passive. His duty was that of active judgment, not of passive acquiescence in the objections of the owner. His duty was that of impartial judgment between the parties, which was not fulfilled by an arbitrary refusal to judge, or by inaction, because of the owner's objections. It should not be permitted that one may prevent the payment of a debt for a plant which had been constructed in substantial accord with the provisions of the contract, if it had so been, and which had passed into the possession of the owner of the building, and been operated by him, because of an arbitrary refusal of the architect to adjudge performance, or to declare wherein performance was defective. In what has been said, we disclaim any expression of opinion upon the weight of the evidence, or of the conclusion to which the testimony should lead. We have sought only to state to what conclusion the jury might arrive upon the testimony produced, upon a consideration of it most favorable to the plaintiff in error. Viewed in that light, the plaintiff was entitled to the opinion of the jury upon the question involved, and it was error to withdraw the consideration of the question, if the issues were so framed as to permit its presentation.

The declaration embraces a special count upon the contract, alleging performance and the acceptance of the plant by the architect. It also embraces the common counts. The question arises whether it was permissible, under the common counts, to prove that there was either waiver of the condition precedent, or a refusal by the architect to proceed to judgment, or to impeach his determination or refusal to accept for fraud, collusion, or such gross mistake as would necessarily imply bad faith. It is undoubtedly the rule that the plaintiff must declare specially, the contract continuing executory, but when it has been executed, and payment only remains, the plaintiff may, at his election, declare specially or upon the common counts; and so, also, when the work contracted to be done was not performed within the stipulated time or in the stipulated manner, and yet was beneficial to the defendant, and has been accepted and enjoyed by

him, the plaintiff cannot recover upon the contract, because he has departed from it, but may recover upon the common counts. *Dermott v. Jones*, 2 Wall. 1; *Taylor v. Renn*, 79 Ill. 186. In *Catholic Bishop of Chicago v. Bauer*, 62 Ill. 188, it was ruled that when full performance had been waived or been prevented, and the work to be performed had been accepted, recovery may be had for the contract price of the service performed, under *indebitatus assumpsit*. So, also, *O'Brien v. Sexton*, 140 Ill. 517, 30 N. E. 461. In *Fowler v. Deakman*, 84 Ill. 130, the architect certified to the correctness of certain items, disallowing others, and by reason of claims for damages by the owners for delays, imperfect work, and loss of rent, declined to adjust the differences. This was held to absolve the contractor from further effort to procure the certificate; that, under a special count charging bad faith and collusion, the fact of the refusal of the architect could not be proven, because there was no allegation of bad faith or of collusion, but that such evidence could be received under the common counts; the court observing:

"It has always been held in our practice that when a party has fully performed his part of a written contract, and nothing remains to be done but for the other party to pay the money due under the contract, a recovery may be had under the common counts."

We think the question ruled by the decision in that case. If there it was permissible to prove under the common counts that the contractor was absolved from performance of the condition precedent of his contract, it must be equally allowable to prove any fact which would establish such absolution, whether it arises from waiver, acceptance, appropriation and user, or from the wrongful action of the architect. In *Hennessy v. Metzger*, 152 Ill. 505, 38 N. E. 1058, the declaration would seem to have embraced only the common counts, and the question whether the architect acted fraudulently and arbitrarily was deemed a question proper to be submitted under the issue, although the question of pleading would not seem to have been especially considered. The ruling in *Railroad Co. v. March*, *supra*, is not opposed. There a general demurrer was interposed to the whole, and to each count, of the declaration, which embraced a special count upon the contract and a count of *indebitatus assumpsit*. The special count disclosing the condition precedent of the contract failed to set out any certification by the engineer with respect to performance of the contract. The demurrer was overruled, and a trial was had, which resulted in a verdict and a judgment for the plaintiff. The supreme court reversed the judgment because of the defective special count. There is no suggestion that a recovery could not have been had under the general *indebitatus* count, if performance of the contract, and a valid excuse for not obtaining the engineer's certificate, had been shown. It is also to be observed that in the state of Illinois the common-law rule that a general verdict and judgment upon special counts must be reversed if one of the counts be bad, has been changed by Rev. St. Ill. c. 110, § 58, which provides that:

"Whenever an entire verdict shall be given on several counts the same shall not be set aside or reversed on the ground of any defective count, if one or more of the counts in the declaration be sufficient to sustain the verdict." Bond

v. Dustin, 112 U. S. 604-609, 5 Sup. Ct. 296; Santa Anna v. Frank, 113 U. S. 339, 5 Sup. Ct. 536.

If, therefore, the March Case had arisen in the state of Illinois, a different ruling would doubtless have been made. We hold, therefore, that the evidence was receivable under the common counts of the declaration.

It is further to be observed that this contract did not require any certificate from the architect. It was sufficient that the plant should run to his satisfaction, and that it be accepted by him. The special plea alleges such acceptance. Mr. Clark was the representative of the architect in the construction of this building. In the conduct of his business, Mr. Cobb called in the assistance of others competent to act for him. Mr. Clark was his representative and assistant in the construction of this building. He was sent by Mr. Cobb to be present at this test. It does not appear that he was an expert with respect to elevators, but Mr. Cobb declares that he himself was not. The evidence of the plaintiff tended to show that the elevators fulfilled all the tests applied or proper to be applied, and that Mr. Clark declared his full satisfaction with the work. In the absence of evidence showing that Mr. Clark made a written report of his inspection, and because of the nonproduction of such report, and the failure to call Mr. Clark as a witness, we think the plaintiff was entitled to have the case submitted to the jury upon the question whether Mr. Cobb did not in fact, through his representative, accept the work. It is true, he declares, when called for the defense, that he did not authorize Mr. Clark to accept it for him; but he fails to state with what authority Mr. Clark was clothed, or for what purpose he represented Mr. Cobb at the test. It is also true that the defendant was entitled to the personal judgment of Mr. Cobb upon this work, but it was a question for the jury whether that right was not waived by the defendant, who, being present, made no objection to the delegation of authority by Mr. Cobb to Mr. Clark, or to the latter's assumption of authority and judgment. We are therefore of opinion that the question should have been submitted to the jury for its determination, under the special plea, whether, notwithstanding his denial, there was not in fact an actual acceptance of this work by Mr. Cobb, or by one authorized by him to act in the premises. The judgment is reversed and the cause remanded, with directions to the court below to award a new trial.

---

THOMSON-HOUSTON ELECTRIC CO. v. OHIO BRASS CO. et al.

(Circuit Court of Appeals, Sixth Circuit. May 17, 1897.)

Nos. 479, 480.

1. PATENTS—CONTRIBUTORY INFRINGEMENT.

One who makes and sells one element of a patented combination, with the intention and for the purpose of bringing about its use in such a combination, is guilty of contributory infringement, and is equally liable with him who in fact organizes the complete combination.

2. SAME—INFERENCE OF INTENT.

One who makes articles which are only adapted to be used in a patented combination, and offers them for sale to the general public, will be pre-

sumed to intend the natural consequences of his acts, and will therefore be *held* to intend that they shall be used in the combination of the patent, and an injunction will be granted.

3. SAME—VALIDITY—EARLIER PATENT FOR MINOR IMPROVEMENTS.

The granting of a patent for mere improvements pending an earlier application for the broad invention does not invalidate a patent afterwards granted for the latter, though the elements covered by its claims were described and illustrated, but not claimed, in the earlier patent; nor does this result in prolonging the monopoly in the broad invention. 78 Fed. 139, affirmed.

4. SAME—ELECTRIC RAILWAY TROLLEY SWITCHES.

The Van Depoele patent, No. 424,695, which covers the patentee's broad invention of improvements in suspended switches and traveling contacts for electric railways, is not invalid because of the prior issuance of patent No. 397,451 to the same inventor, for certain improvements on the broad invention.

5. SAME—APPEALS FROM ORDERS GRANTING PRELIMINARY INJUNCTIONS.

On appeals from orders granting preliminary injunctions, the case is ordinarily to be treated from the standpoint from which they were viewed by the circuit court; and a decision on the merits by a circuit court of another circuit, sustaining the patent, is therefore usually of controlling weight on appeal, as in the court below.

6. SAME.

The Van Depoele patent, No. 495,443, for improvements in suspended switches and traveling contacts for electric railways, *held*, on appeal from an order granting a preliminary injunction, not to be invalid because of the prior issuance to the same inventors of patent No. 424,695, covering inventions of a similar character.

### Appeals from the Circuit Court of the United States for the Northern District of Ohio.

These are appeals in two patent cases between the same parties, that present questions of such a similar character that they were argued together, and may be properly disposed of in one opinion. The appeals are from orders of preliminary injunction made before a hearing upon the merits. The first case was a suit by the Thomson-Houston Electric Company to enjoin the alleged infringement by the Ohio Brass Company of United States letters patent No. 424,695, for certain new and useful improvements in suspended switches for electric railways, issued to Charles J. Van Depoele, April 1, 1890, and assigned by mesne assignment to the complainant below. A preliminary injunction was issued against the making and selling by the defendant below of overhead conductor switches for electric railways for use in the combinations covered by the third, fourth, and eleventh claims of the patent. The second case was a suit by the same complainant against the same defendant for an alleged infringement of United States letters patent No. 495,443, issued to Charles J. Van Depoele, for new and useful improvements in suspended switches and traveling contacts for electric railways, and assigned by mesne assignments to the complainant below. A preliminary injunction before the hearing on the merits was granted, enjoining the defendant from the manufacture or sale of trolleys or trolley bases intended to be used in the sixth, seventh, eighth, twelfth, or sixteenth claims of said patent. It appeared in the first case that in a suit before Judge Coxe, in the Northern district of New York, the validity of patent No. 424,695 was in issue, and the validity of the claims here involved was sustained. 69 Fed. 257. The cause was carried to the circuit court of appeals for the Second circuit, and the order of injunction, so far as the claims here involved were concerned, was affirmed, though the complainant was required to enter a disclaimer as to certain other claims in the patent, to wit, the second, ninth, and tenth, which disclaimer was duly made and filed in the patent office. 18 C. C. A. 145, 71 Fed. 396. In the second case it appeared that the validity of patent No. 495,443 had been at issue in a cause heard upon its merits, and passed to final decree before

Judge Townsend, in the district of Connecticut, and that the claims of the patent here involved were sustained.

There were two principal objections made in this court to the injunctions below. The first was that there was not any proof of actual infringement or of an intention to infringe the combinations covered by the claims set forth in the orders of injunction appealed from. The second objection was that the patents Nos. 424,695 and 495,443 were both void, the latter because the former, a patent of earlier issue, was for the same invention, and the former because patent No. 397,451, a still earlier patent issued to the same patentee, covered and was also for the same invention. Upon the first objection in the two cases, the evidence was substantially the same. The claims in both patents covered combinations of parts used in an electric street railway in which the track, the car, the overhead conductor, and switches, and the trolley or contact device formed elements. The charge of infringement in the first case, involving patent No. 424,695, was based on an admitted sale by defendant of an overhead switch; and the charge as to infringement of No. 495,443 was based on an admitted sale of a trolley, pole, and contact wheel. The sales were made at the same time to an agent of the complainant. The agent of defendant who sold says that he suspected that the purchaser was an agent of complainant. The memorandum of sale of these articles, and receipt for the price, signed by defendant, were as follows:

"Mansfield, Ohio, Feb. 4, 1896.

"The Ohio Brass Co., sold to Edwin W. Hammer, Newark, N. J.

1 Str. Under-Running Adj. Switch, No. 1145..... \$ 2 25

1-12 inch Pole Ohio Trolley Buck Harp T. H. Wheel..... 15 50

"Paid.

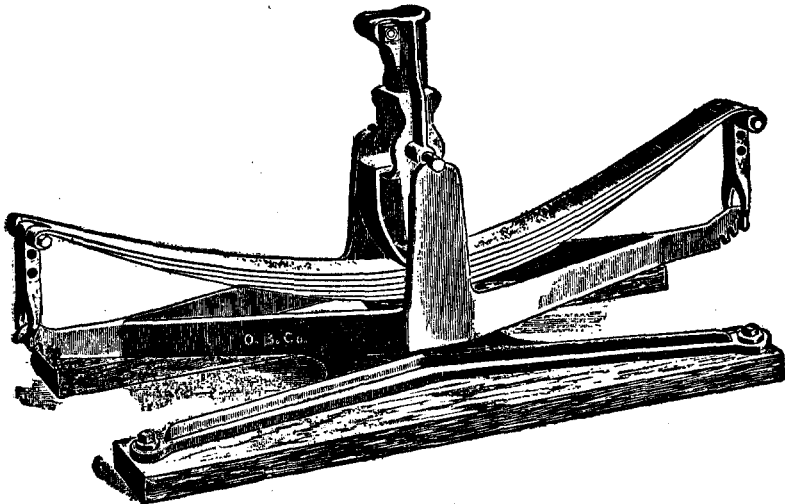
The Ohio Brass Co.,

"Feb. 4, 1896.

"Per L. P. Bennett, Cashier."

A book admitted to be a catalogue printed by defendant, and circulated by it in the trade, was offered in evidence. This purported on its face to be a catalogue of electric railway material and supplies made by defendant, and offered by it for sale generally to the trade. Below are excerpts from the catalogue containing illustrations of the articles exactly like those bought from the defendant by Hammer:

"Ohio Trolley.



"This trolley is one of the simplest and most effective on the market. It is made up of eight pieces, the working parts of which are made of steel, and malleable and wrought iron. The base and stand is 3 feet long, 8 inches wide,

and, when the trolley pole is in a horizontal position, but 13 inches high. The trolley pole can be swung either forward or backward, or in a complete circle. It can be assembled or dismantled in a few minutes' time without the aid of tools. The tension on the pole is least when drawn down, and can be adjusted to suit, making it especially desirable for running under low structures.

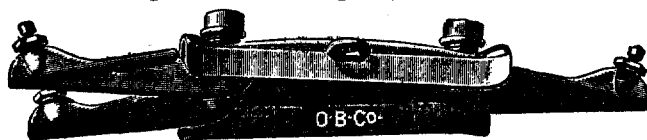
"Buckeye Trolley Harp.



"This style of harp is made for use with steel trolley poles. It is light and strong in construction, and designed to avoid any danger from being caught by the overhead wires.

No. 1347—Harp Complete, Bronze.....	Each	\$1 80
No. 1348— " " Malleable Iron.....	"	1 30
No. 1349—Contact Springs.....	"	09

"Straight Under-Running Adjustable Switch.



"These are similar in design to the Wood's adjustable switch, as shown on the preceding page, except that the tongues are so modified as to make a perfectly straight under-running approach to the switch pan for the trolley wheel.

No. 1145—Two-Way.....	Each	\$5 50"
-----------------------	------	---------

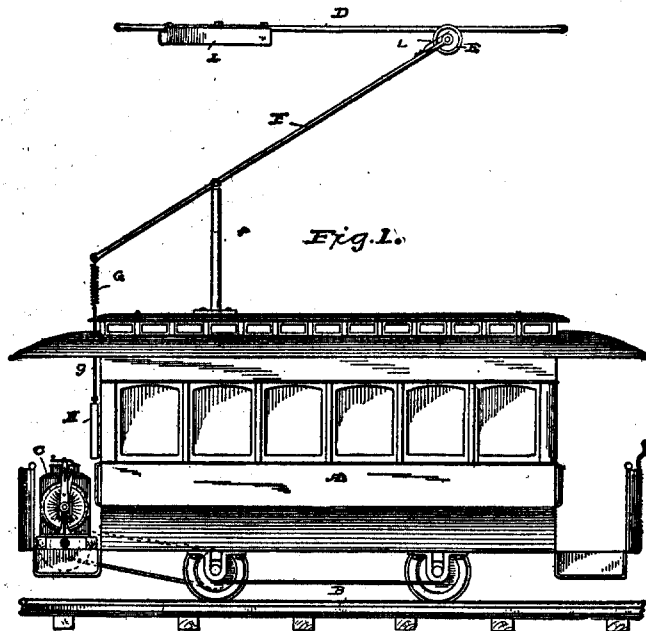
There were also affidavits on information and belief introduced on behalf of complainant that two street-railway companies were using trolleys and switches bought from the defendant. Defendant filed counter affidavits, in which the defendant's agent selling the switch and trolley to the agent of complainant stated that he did not know that they were to be put to an unlawful use, and denied that the defendant had sold switches or trolleys to the street-railway companies named in the complainant's affidavit, but there was no denial that the defendant had sold to others, and no statement that such sales had been made only for use by licensees of complainant.

Patent 424,695 was applied for March 12, 1887, and was issued April 1, 1890. The inventor, in the specifications, refers to his invention as follows:

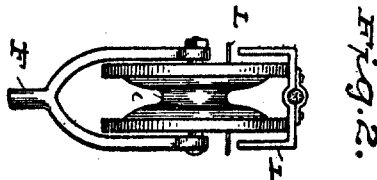
"My invention consists in certain devices and their relative arrangement, by means of which a contact device carried by a rod or pole extending from the car, and pressed upwardly, into contact with the conductor, is switched from one line to another, correspondingly with the vehicle. \* \* \* I also make claims in this application to a switch plate particularly designed for the arrangement which forms the principal subject-matter of this application. More particularly my invention consists in a track switch for the vehicle, a conductor switch for the contact device or 'trolley,' as it is termed, and the trolley itself attached to the vehicle; these elements being so arranged relatively to one another that in operation the vehicle reaches the track switch, and is diverted laterally before the trolley reaches the conductor switch, whereby the trolley, which partakes of the lateral movement of the vehicle, has im-

parted to it a laterally moving tendency before its switch is reached, and it therefore passes through the switch in the proper direction, corresponding to the movement of the vehicle.

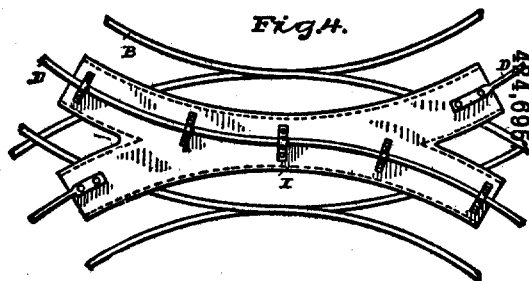
"Fig. 1 is a side elevation of a car provided with my improved contact devices, and otherwise embodying my invention.



"Fig. 2 is an enlarged detail showing the contact wheel in position in the switch box.

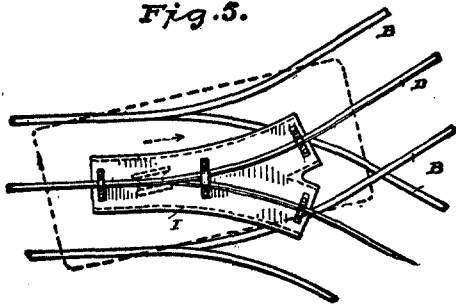


"Fig. 4 is a top plan view of a portion of track, showing the conductor, the switch box, and the rails.



"Fig. 5 is also a plan view, and is similar to the preceding, with the addition of a car shown in dotted lines.

*Fig. 5.*



The patentee continues in the specification: "In order that the contact wheel, E, shall be compelled to pass from one conductor to a branch, or one attached thereto leading in a different direction, I provide the inverted open-bottom metallic boxes, I, which are formed with branching compartments, and constructed in the form of switches, conforming to the curves and angles of the track switches by which the direction of the car is controlled. These boxes are in the form of open, smooth, curved passages, and are free from obstructions within, so that the contact wheel, E, which is slightly depressed on meeting the end of the switch box, may roll freely therethrough, and move laterally therein, in the desired direction, without hindrance. Fig. 2 shows how the tips of the wheel flange are received on the undersurface of the switch plate, and how that the depending edges or ribs on the side of the plate are separated a distance greater than the thickness of the contact wheel, so that the latter is movable freely therein. The switch box, I, may take almost any shape, and may be made of thin sheet metal or of cast metal, as is most convenient; but I prefer the castings. The electric switches, I, are to be placed directly over—that is to say, above—their counterparts. The track switches and the contact wheel, as before stated, are to be located so that as the front portion of the car swings in the desired direction, as the front wheels pass the track switch, the contact arm will be deflected, and the direction of the wheel, E, correspondingly changed while still on the straight wire; so that on reaching the switch box the wheel will be depressed and pass therethrough, and naturally pass through and out of the proper compartment thereof. The switch boxes, I, being connected directly to the conductors, D, are similarly charged; and when the wheel, E, is passing therethrough, the current passes through the box, I, and thence into the contact wheel, through its flanges, e, passing thence through the arm, F, or a separate conductor to the motor, C. Since there are no moving tongues or springs or points to catch or impede the progress of the wheel when three or four grooves, as the case may be, exist in one switch box, the wheel will intersect the grooves, and pass along in the desired direction, and go through without any difficulty whatever, its direction being previously indicated by the movement of the front portion of the car."

The claims here involved of the patent are: "(3) The combination with an overhead wire for receiving an underneath contact, of a switch plate attached to the wire in about the same horizontal plane as the wire." "(4) The combination of a track having switches, an overhead conductor above the track, and having switches, and a car on the track provided with a contact-carrying arm, arranged to engage the conductor at a point in rear of the front wheels of the car." "(11) The combination, with an overhead line wire, of a grooved contact device pressed against the wire, and receiving the wire between the flanges of the groove, and a guiding switch plate connected to the wire against which the said flanges bear in passing from one line to another."

The earlier patent claimed to avoid this one is No. 397,451, and was issued February 5, 1889. The application was filed November 12, 1888, more than a year after the filing of the application for patent No. 424,695. The inventor





ticularly in an improved traveling contact, and in improved arrangement and construction of the switches by which the said traveling contact is directed onto the proper conductor. These devices for switching the traveling contact from one conductor to another have been already claimed in my patent No. 424,695, which was issued as a division of this application on April 1, 1890. I therefore do not lay claim to them herein, but the description and illustration of them is retained to show how my traveling contact is adapted to meet one of the essential requirements of railway service, without special arrangements or other complications." He then describes in the same language the same devices and combinations of parts with the same drawings which appear in the specifications of patent No. 424,695, except that he adds three drawings not substantially different from those in the prior patent, but which show the construction in a little more detail. He omits from the specifications in the later patent the following words, which were in the prior patent, and which refer to the use of the spring and weight used to hold the contact device against the conductor: "And while the arm, F, is movable laterally with respect to the vehicle, the spring and weight will constantly tend to restore the arm to its normal contact position, and assist in causing the contact arm to partake of the lateral movement of the vehicle;" and also the statement that, by reason of the weight, "the [contact] wheel has a much greater range of action."

The claims relied on by the complainant below, and upon which the injunction was granted, were as follows: "(6) In an electric railway, the combination with a suitable track, and a supply conductor suspended above the track, of a car provided with a swinging arm carrying a contact device in its outer extremity, and means for imparting upward pressure to the outer portion of the arm and contact, to hold the latter in continuous working relation with the underside of the supply conductor, substantially as described. (7) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, a swinging arm supported on top of the car, a contact device carried by one extremity of the arm, and held thereby in contact with the underside of the electric conductor, and a tension device at or near the other end of the swinging arm for maintaining said upward contact, substantially as described. (8) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, an arm pivotally supported on top of the car, and provided at its outer end with a contact engaging the underside of the suspended conductor, and a tension spring at or near the inner end of the arm for maintaining said upward pressure contact, substantially as described." "(12) In an electric railway, the combination with a car of a post extending upward therefrom, and carrying a suitable bearing, an arm or lever carrying at its outer end a suitable contact roller, and pivotally supported in said bearing, and provided at its inner end with a tension spring for pressing the outer end of the lever carrying the contact wheel upward against a suitably suspended conductor, substantially as described." "(16) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, an arm pivotally supported on top of the car, and provided at its outer end with a grooved contact wheel, engaging the underside of the suspended conductor, and a tension spring for maintaining an upward pressure contact with the conductor, substantially as described."

The claims of patent No. 424,695, which are relied on by the defendant to show that it covers the same invention as patent No. 495,443, are as follows: "(15) In an electric railway, the combination of a car, a conductor suspended above the line of travel of the car, a contact-carrying arm pivotally supported on top of the car and provided at its outer end with a contact roller engaging the underside of the suspended conductor, and a weighted spring at or near the inner end of the arm for maintaining said upward contact, substantially as described. (16) In an electric railway, the combination of a car provided with a pivoted arm, as F, having a contact at its outer extremity, a tension spring, as G, attached at its inner extremity, and a vertically-moving weight connected to said spring for holding the same in operative relation to the arm throughout its entire range of movement, substantially as described. (17) In an electric railway, the combination of the car having suitably-pivoted arm, F, carrying a contact wheel at its outer extremity, a spring, G, secured to its lower extremity, and a connection extending from said spring and provided with a weight at

its lower end, substantially as described." "(31) In an electric railway, the combination, with an overhead conductor and a vehicle, of an intermediate contact device, consisting of a trailing arm having a grooved contact wheel at its outer end, and moving laterally relatively to the vehicle, but provided with a spring tending to retain it in its normal central position. (32) In an electric railway, the combination, with an overhead conductor and a vehicle, of a trailing contact arm, guided at its outer end by the overhead conductor, and movable laterally relatively to the vehicle, but having a normal centralizing tendency by means of a spring or weight. (33) In an electric railway, the combination, with an overhead conductor and a vehicle, of an intermediate contact device consisting of an upwardly pressed trailing arm, having a grooved contact wheel at its outer end, by which it is guided by the conductor, the said arm being free to swing laterally relatively to the vehicle, but tending to remain in its normal central position by means of a spring or weight. (34) The combination, with a vehicle and an overhead conductor, of a trailing contact arm guided normally by the conductor, but having a spring connection with the vehicle, tending constantly to maintain it in a definite position, while at the same time it is free to swing laterally with respect to the vehicle against the pressure of the said spring. (35) In an electric railway, the combination, with an overhead conductor and a vehicle, of an intermediate contact device, consisting of a rearwardly extending arm, guided at its outer extremity by engagement with the conductor, and movable laterally relatively to the vehicle, but having a spring or weight tending to restore it to its normal central position."

Frank T. Brown, for appellants.

Frederick H. Betts and F. P. Fish, for appellee.

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

TAFT, Circuit Judge (after stating the facts as above). The catalogue of the defendant shows that it is offering for sale to the public without restriction the switch and trolley to be used as part of the equipment of an electric street railway. Defendant has not shown, and we infer from the evidence that it cannot be shown, that either the switch or trolley and harp can be used in an electric railway except in the combinations described and claimed in the two patents here in suit. The third claim of patent No. 424,695 is for a combination of an overhead wire for receiving an underneath contact and a switch plate attached to the wire in about the same horizontal plane as the wire. The description of the article sold by the defendant in its catalogue is that of an "under-running adjustable switch," and it is said to make a perfectly straight under-running approach for the trolley wheel. It is apparent that the switch plate has no practical utility except in such an arrangement of parts as that stated in the third claim. The same thing is true of the fourth and eleventh claims of that patent. The sixth claim of patent No. 495,443 is a combination in an electric railway of (1) a suitable track, (2) a supply conductor suspended above the track, (3) a car provided with (4) a swinging arm carrying (5) a contact device in its outer extremity, and (6) means for imparting upward pressure to the outer portion of the arm and contact, to hold the latter in continuous working relation with the underside of the supply conductor. The evidence sufficiently shows that neither the trolley nor the harp is adapted to be used on electric street railways except in the above combination. Purchasers buy articles for practical use, and would only buy the switch

and trolley, therefore, for use in complainant's patented combinations. One is legally presumed to intend the natural consequences of his act. Hence the defendant, in offering the switch and trolley for sale to the general public, may be reasonably held to intend that they should be used in combinations in an electric railway covered by the claims of complainant's patents.

It is well settled that where one makes and sells one element of a combination covered by a patent with the intention and for the purpose of bringing about its use in such a combination he is guilty of contributory infringement and is equally liable to the patentee with him who in fact organizes the complete combination. The leading case on the subject is *Wallace v. Holmes*, 9 Blatchf. 65, 29 Fed. Cas. 79. It was cited with approval in *Tie Co. v. Simmons*, 106 U. S. 89, 1 Sup. Ct. 52, and the same doctrine was applied and extended by this court in *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288, to a case where the article sold was not even an element of the patented combination, but was an article the use of which in connection with patented combination was a violation of the conditions of a license, and destroyed the protection the license would otherwise have afforded. The cases in the circuit courts where the same general principle has been applied are legion. We cite a few of them: *Bowker v. Dows*, 3 Fed. Cas. 1070; *Richardson v. Noyes*, 20 Fed. Cas. 723; *Travers v. Beyer*, 26 Fed. 450; *Willis v. McCullen*, 29 Fed. 641; *Alabastine Co. v. Payne*, 27 Fed. 559; *Celluloid Manuf'g Co. v. American Zylonite Co.*, 30 Fed. 437. The contention of the counsel for the defendant, if we understand it, is that the effect of the decision of the supreme court in the case of *Morgan Envelope Co. v. Albany Perforated Wrapping Paper Co.*, 152 U. S. 425, 14 Sup. Ct. 627, is to do away altogether with the doctrine of contributory infringement. If this is a proper reading of the judgment of the supreme court in that case it was a somewhat startling departure from previously understood principles in the law of torts. An infringement of a patent is a tort analogous to trespass or trespass on the case. From the earliest times, all who take part in a trespass, either by actual participation therein or by aiding and abetting it, have been held to be jointly and severally liable for the injury inflicted. There must be some concert of action between him who does the injury and him who is charged with aiding and abetting, before the latter can be held liable. When that is present, however, the joint liability of both the principal and the accomplice has been invariably enforced. If this healthful rule is not to apply to trespass upon patent property, then, indeed, the protection which is promised by the constitution and laws of the United States to inventors is a poor sham. Many of the most valuable patents are combinations of nonpatentable elements, and the only effective mode of preventing infringement is by suits against those who, by furnishing the parts which distinguish the combination, make it possible for others to assemble and use the combination, and who, by advertisement of the sale of such parts and otherwise, intentionally solicit and promote such invasions of the patentee's rights. The *Morgan Envelope Company Case*, so far from departing from the doctrine of contributory

infringement, expressly recognizes it and the authorities in which it is announced and enforced. The court held, however, that the doctrine of contributory infringement could not apply in a case in which the claim of the patent embraces a machine and something to be treated thereby which is perishable in its nature, and the alleged infringer furnishes the latter element to be used with the machine and consumed. Whether this holding is really a limitation upon the doctrine of contributory infringement, or is to be regarded only as in effect deciding that such combinations are impossible in a patent, may admit of question.

In *Heaton-Peninsular Button-Fastener Co. v. Eureka Specialty Co.*, 77 Fed. 288, this court was obliged to consider with much care the *Morgan Envelope Case*. After quoting at length from Mr. Justice Brown's opinion, Judge Lurton, speaking for this court, said:

"It is true that Mr. Justice Brown, in discussing the question involved in that case, assumes that a combination of the machine for delivering the paper with the paper to be delivered was valid. But, before he finishes the argument, he shows that the assumption leads to an absurdity; and the decision, in effect, is that form of argument known as the '*reductio ad absurdum*,' establishing that his original assumption was not founded in reason. The illustration of the result of such a combination shows that what the court was deciding was that a combination of the machine with an unpatentable paper or material to be operated upon by the machine was an impossibility, and the sale of the machine involved and implied the right of use of the material with which it was to be combined; and this is shown by the case of *Wilson v. Simpson*, 9 How. 109, which is cited by Mr. Justice Brown as a case sustaining his conclusion. \* \* \* Thus, with respect to the paper holder, the supreme court in effect held that the sale of the paper fastener with the paper in it contained the implication of a right to renew the paper when that paper sold should be exhausted, and did not require the purchase of the paper from the original patentee, the paper itself not being patented."

We are very clearly of opinion that the *Morgan Envelope Company Case* does not affect the question of contributory infringement before us.

It is said that no concert of action by defendant with any one for the purpose of accomplishing an infringement of complainant's patent rights is shown. As already stated, it does appear that defendant is offering for sale articles that can only be used in combinations covered by complainant's claims. This is an effort to secure a concert of action by which the combinations of complainant's patents may be assembled. If successful, infringement will follow; hence the preliminary steps which are intentionally taken to bring about the injury may be enjoined.

In considering the same point in *Wallace v. Holmes*, 29 Fed. Cas. 79, Judge Woodruff said:

"Here the actual concert with the other is a certain inference from the nature of the case, and the distinct efforts of the defendants to bring the burner in question into use, which can only be by adding the chimney. The defendants have not, perhaps, made an actual prearrangement with any particular person to supply the chimney to be added to the burner; but every sale they make is a proposal to the purchaser to do this, and his purchase is a consent with the defendants that he will do it, or cause it to be done."

Now, it is suggested that defendant had the right to sell parts to be used in complainant's combinations to the licensees of complainant, and to those who, having once bought the articles of the com-

bination from the complainant, it is said, have the implied right to repair and renew parts worn out with use. It being established that defendant is offering for sale articles, intending them to be used in combinations which, if unlicensed by complainant, would be infringements of complainant's patents, we think that it is the duty of the defendant to see to it that such combinations which it is intentionally inducing and promoting shall be confined to those which may be lawfully organized. We are unable to see why any different rule should be applied in such a case from that applicable to a case in which a defendant makes a patented machine to order. He may make such a machine upon the order of the patentee or a licensee, but not otherwise. Upon him is the peril of a mistake as to the lawful authority of him who gives the order. So, he may knowingly assist in assembling, repairing, and renewing a patented combination by furnishing some of the needed parts; but, when he does so, he must ascertain, if he would escape liability for infringement, that the one buying and using them for this purpose has a license, express or implied, to do so. What we have said has application only to cases in which it affirmatively appears that the alleged infringer is offering the parts with the purpose that they shall be used in the patented combination. We have found that it does so appear here, and is a matter of certain inference from the circumstance that the parts sold can only be used in the combinations patented. Of course, such an inference could not be drawn had the articles, the sale or offering of which was the subject of complaint, been adapted to other uses than in the patented combination. In the latter case the intention to assist in infringement must be otherwise shown affirmatively, and cannot be inferred from the mere fact that the articles are in fact used in the patented combinations or may be so used. If defendant avers that he is selling to express or implied licensees of the patentee, the injunction should be granted in such form as shall permit the continuance of these lawful sales. In the case at bar the circuit court offered thus to modify the order, but the defendant declined to apply for the modification. It is hardly in a position now to assign for error the failure of the court to insert such a modification.

The conclusion we have reached as to contributory infringement is supported by the decision of the circuit court of appeals of the Second circuit on similar facts in *Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co.*, 22 C. C. A. 1, 75 Fed. 1005, affirming an order of injunction by Judge Townsend in the circuit court. Judge Wallace dissented, but we think the reasoning of the majority more satisfactory. The learned dissenting judge likened the case to one in which the seller of wire or rails should be enjoined from selling them, because the articles might be used in any unlawful combination on an electric railway. Such articles could, of course, be used in so many lawful ways other than in the combinations of the patent that it would be quite unlikely that the sellers could have an intention to promote infringement of particular patents in their sale, and it would be most difficult to prove such intention. But, where the article can only be used in a patented combination, the inference of the intention of the maker and seller

is certain, and the right of the patentee to injunction ought, we think, to be equally certain.

We come now to the second assignment of error in these cases, namely, that the patents relied on are void because the inventions covered by them were patented in prior patents to the same patentee. The circumstances make this question different as it arises on the two patents, and we shall first consider whether patent No. 424,695 is void by reason of the prior issue of patent No. 397,451. We are clearly of opinion that it is not. The application for No. 424,695 was filed more than a year before that for the patent No. 397,451. The inventor expressly states in his specifications in No. 397,451 that his invention is an improvement on the switch and trolley devices and combinations shown in the application which subsequently resulted in patent No. 424,695. An examination of the drawings and specifications leaves no doubt that this statement is true. With respect to the switch or switch plate, in the patent of later application and earlier issue the inventor added to the simple switch box center ribs and side contractions of the extremities of the passageways for the purpose of more certainly directing the trolley wheel in entering and leaving the switch in the way in which it should go. With respect to the trolley arm, the improvement consisted in making it of adjustable length. The claims, all of them, include and refer to one or the other of these improvements. Now, it is not material to this discussion whether these improvements are patentable or not. They are expressly claimed as improvements, and no attempt is made by the patentee to cover anything but them. If inventions at all, then they are separable from the old switch and trolley combinations, and, if they are not inventions, the patents are void, and cover nothing. Since the case of *O'Reilly v. Morse*, 15 How. 61, 121, 133, it has been well settled that a patent may issue for an improvement on an earlier invention either to the original inventor or to a stranger. Of course, no one can use the improvement without right or license to use the fundamental invention; but, on the other hand, the right to use the original invention does not confer the right to use the improvement without license from the tributary inventor. We do not understand this general doctrine to be denied, but it is said that if, by some chance, the application for the fundamental patent is delayed in its course through the patent office until a patent on the avowed improvement has issued, then the patent on the fundamental invention is void. In cases where the delay in the issuing of the patent for the main invention cannot be charged to the laches or fraud of the patentee, such a rule would be a hard one; and unless it is required by the express words of the statute, or by the express holding of the supreme court, we should be inclined, if possible, to avoid declaring it to exist. The contention of counsel for the defendant in this behalf, instead of having the support of the authority of the supreme court, is in the teeth of two decisions of that tribunal.

In *Suffolk Co. v. Hayden*, 3 Wall. 315, an inventor applied for a patent on improvements in the interior arrangements of an elongated trunk previously in use for cleaning cotton. While this application

was pending, he applied for an improvement on the form of the trunk, i. e. its external form; and in his second application he described the improvement in the interior arrangements of the trunk, without making any claim as to it. A patent issued on the second application before one was issued on the first, and the point at issue before the court was whether the prior patent on the later application describing but not claiming the improvement for which a patent had first been applied for, avoided the later patent on the earlier application for this improvement, and it was held that it did not. In disposing of the contention that the second patent was void, the supreme court said:

"The first point of the plaintiff in error is that the description in the patent of March, of the improvement patented the December following, and on which the present suit is brought, and omission to claim it in such earlier patent, operated as an abandonment or dedication of it to the public, and that for this reason the subsequent patent of 1st December was void. But the answer to this ground of defense is that it appeared that Hayden, the patentee, had pending before the commissioner of patents an application for this same improvement at the time he described it in the specification of the 17th of March, which was doubtless the reason for not claiming it in this patent. The description in no sense affected this application thus pending before the commissioner, and, while it remained before him, repelled any inference of abandonment or dedication from the omission to again claim it."

The same question arose again in the Barbed-Wire Patent Case, 143 U. S. 280, 12 Sup. Ct. 443, 450, and is stated and disposed of in Mr. Justice Brown's opinion in that case as follows:

"The application for the patent in suit was filed October 27, 1873, though the patent was not issued until November 24, 1874. Subsequent to the application for this patent, and on March 14, 1874, Glidden filed an application for an improvement in wire stretchers for fences, upon which a patent was issued May 12, 1874. It is not perceived how this patent could affect in any way the pending application for the later patent. The patentee abandoned nothing he had claimed before, but sought, as an improvement upon the former, to claim a slotted tube midway between the posts, in which was put a coil spring to spread the wires, and automatically tighten them, and keep them at the proper tension, as against expansion by heat and contraction by cold. If the later application had covered the same invention as the prior application for the November patent, the later patent might have been void, under our ruling in *Suffolk Co. v. Hayden*, 3 Wall. 315; but this claim was for a combination of wires with the slotted tube, containing a coiled spring, and perched upon a post. In this application he makes no mention whatever of barbs as a feature of his claim, although in describing his invention he mentions the use of two wires, provided at suitable intervals with spurs coiled around them, and which are spread apart between the coils to keep the latter from moving longitudinally upon the wires. But he says of these spurs: 'I do not claim to have originated the devices known as "spurs" or "prongs" on the wires, they having been used before, but confine myself to the means for holding the spurs at proper intervals on the wires, and to the means for attaining a uniform tension of the wires, as claimed.' This disclaimer, it will be observed, is of spurs or prongs generally (not of the coiled barb either alone or in combination with the twisted wires), and is made with reference to that application only. It is true that this patent was subsequently reissued with a broadly expanded claim for a combination with a fence wire of a barb formed of a short piece of pointed wire, secured in place upon the fence wire, by coiling between its ends, forming two projecting points; but this reissue was held to be unwarranted and void in *Manufacturing Co. v. Fuchs*, 16 Fed. 661, 667. This attempted reissue, however, did not in any way affect his original application, which stood upon its own merits, and, after being rejected and amended three times, was finally passed with a claim substantially identical with the first claim of the original



application, and the patent granted. In legal effect, this was a prior patent, since the date of the application, and not the date of the patent, controls in determining the legal effect to be given to two patents issued at different dates to the same inventor, and the order in which they are to be considered. In any event, the reissue in 1876 of one patent would not affect another patent granted in 1874."

It will be observed that the case at bar is stronger than either of the cases cited, because in the application for the patent on the improvement not only is no claim made for the main invention, but the applicant expressly states that he has an application pending for the main invention necessarily described in describing the improvement, but not claimed, and thus shows beyond peradventure that he has no intention of abandoning or dedicating to the public his main invention. The authority and effect of these two cases counsel for defendant seeks to meet by the claim that the ground upon which he contends that the second patents in the cases before the court must be void was not presented to the court, and was not considered by it. He says that the second patent for the main invention is void, not because it was dedicated to the public in the first patent, but because the effect of the second patent is to extend the monopoly of the first patent beyond the statutory period. The argument runs thus: The monopoly of the first patent, the one for the improvement, can legally be of no longer duration than 17 years. But the improvement cannot be used except as applied to the main invention, and, as the later patent (the one for the main invention) does not expire until some time after the expiration of the patent for the improvement, the monopoly of the improvement patent is in fact extended until the expiration of the later patent (the one for the main invention), and so exceeds the statutory 17 years. It may be conceded that it is doubtful whether the case of *Suffolk Co. v. Hayden* on its facts presented the question thus raised by counsel, because the two patents there under consideration were improvements on different parts of the same machine, and it did not appear that the earlier patent might not have been used without also using the later patent. And, possibly, the same thing is true of the *Barbed-Wire Patent Case*. However this may be, we cannot yield to the argument based on such a distinction, because we cannot accept its minor premise, to wit, that the later granting of the patent for the main invention extends the monopoly of the earlier improvement patent. The patent for the improvement expires in 17 years. After that any one may use the improvement without infringing the patent issued upon it. If he uses the improvement without a license to use the main invention he is liable for the infringement, not of the patent for the improvement, but of the patent for the main invention; and, in estimating the damages for the same, the value of the main invention, and not that of the improvement, would be the basis for estimating the damages.

It can make no difference in considering this question whether the patent for the improvement issues to the patentee of the main invention or to another. The right of the public to use the improvement when the patent on it expires is exactly the same, whether the patentees of the two inventions are the same or not, because in each case

the improvement can only be used with the license of the patentee of the main invention. If the patentee of the improvement is a stranger to the main invention, it is manifest that he can derive no benefit from the limitation upon the use of his invention after his patent expires, because of the patent on the main invention. Why, then, does he derive an advantage if he happens to own the main patent? The only advantage conferred by the issue of the patent for the main invention is the legitimate monopoly for the statutory period of that invention, and of no other. Did the personality of the owner of two different patents affect the validity of either, then the anomalous result would follow that the owner of one patent would avoid it by acquiring ownership of another. According to the argument of counsel, the patentees of the earlier improvement patent and of the later main patent being the same person, the main patent is void. Let us suppose that they were different persons, but that, by mesne assignments, the two patents became the property of one person; the effect upon the public use of the improvement patent is exactly the same as if the now owner had been the inventor and patentee of both. Does the unity of title avoid the main patent, which was valid before? It must do so if the argument of counsel for defendant in this behalf is to be followed, for the effect of the unity of title is "to extend the monopoly" of the earlier improvement patent in the sense in which counsel uses that phrase. To our minds, this conclusion is *reductio ad absurdum*. The fact that a patent for an improvement may expire before the patent for the main invention is the result of several circumstances,—one that a patent may be taken out for an improvement on a patentable invention, another that there is no limitation by statute upon the time within which a patent may issue upon an application after it is filed, provided the applicant is not guilty of violating the two years' restriction imposed by the statute, and a third that the course of an application for a generic or broad invention may legitimately take longer in its course through the patent office than a comparatively unimportant improvement on that invention.

The case upon which counsel for defendant chiefly relies to support his argument is *Miller v. Manufacturing Co.*, 151 U. S. 186, 14 Sup. Ct. 310, where it was held that when two patents issued to the same patentee for the same invention the second patent was void for the reason that the new or later patent would prolong the monopoly beyond the period allowed by law. As pointed out by Mr. Justice Jackson, this was not a new doctrine and found support in a number of earlier cases cited by him. The patents under consideration in that case were for a peculiar form of spring, which, when connecting the plow beams of a plow with the upright portion of the axle, assisted the operator in lifting the plow beams when above the level, and in depressing them when below it, and the patent first issued covered the spring thus used. The spring thus used had the additional function of increasing its lifting force and action the higher the beams were raised. The second patent was taken out to cover this feature of the spring. In effect, the only difference between the patents was that the earlier patent covered a spring with both a de-

pressing and a lifting function, while the second patent covered exactly the same spring with a lifting function increasing in force as the spring rose above the level. Now, the function of the spring described in the second patent was necessarily present in the spring as it was shown in the earlier patent, for no change in form of the spring was suggested in either patent by which it might serve the purpose and claim of the first patent, and discharge the functions therein described, without also at the same time discharging the function which was supposed to distinguish the second patent and its claim from the first. In other words, the division of the original application into two patents was nothing more than an attempt to patent, as two separate inventions, the same device when discharging different functions. The opinion of Mr. Justice Jackson distinctly recognizes that "where the second patent covers matters described in the prior patent, essentially distinct and separable from the invention covered thereby and claims made thereunder, its validity may be sustained," and "that an inventor may make a new improvement on his own invention of a patentable character, for which he may obtain a separate patent," and "that a later patent may be granted where the invention is clearly distinct from and independent of one previously patented." It is, of course, true that, if an improvement is an invention separable from the generic invention, the latter is an invention distinct and separable from the improvement. Hence it follows from the propositions above quoted from the opinion in the case of *Miller v. Manufacturing Co.* that a patent for a generic invention is not avoided by the fact that a prior invention has been issued for a distinct improvement on that invention, provided always that the language of the application for the first patent and the circumstances of filing it are not such as to dedicate the generic invention to the public. The case of *Miller v. Manufacturing Co.*, therefore, instead of sustaining the claim made for it, is distinctly an authority to the contrary. We are of opinion that patent No. 424,695 is not rendered void by patent No. 397,451. We are strongly fortified in this conclusion by the most satisfactory opinion of Judge Wallace, speaking for the circuit court of appeals of the Second circuit, upon exactly the same question,—*Thomson-Houston Electric Co. v. Elmira & H. Ry. Co.*, 18 C. C. A. 145, 71 Fed. 396, affirming the decree of Judge Coxe in the circuit court in the same case, 69 Fed. 257.

We come now to the question whether patent No. 495,443 is rendered void by the prior issue of patent No. 424,695. This presents much more difficulty than the question just disposed of. In this case the drawings and specifications of the two patents are substantially alike, and show a car, a track, a post on top of the car, a swinging and hinged arm pivoted in the post, with a contact wheel at its outer end. A spring is secured to the lower end of the swinging arm, and to the spring is attached a weight which works in suitable vertical grooves down through the roof to the front platform, within reach of the driver. The spring and weight maintain the contact of the outer end of the swinging arm with the overhead conductor. Switches in the overhead conductor are maintained immediately over the point in the track where track switches occur. The trolley post and

arm are in such positions and of such size that the point of contact of the outer end of the arm and the overhead conductor is back of the front wheels of the car. This is for the purpose of imparting to the trolley wheel, as it enters the switch in the overhead conductor, the direction already taken by the front wheels of the car in entering the switches upon the track. The spring and weight working in vertical grooves are intended to keep the trolley arm in the vertical plane of the longitudinal center of the car, and thus to make its contact wheel more certain to follow in the overhead switch the direction of the car as it turns into a track switch. It is shown by the evidence that the inventor first used in his combination a spring attached to the top of the car to secure contact, and then a spring attached to the foot of the trolley post, and finally the spring and weight arrangement shown in the drawings of the patents. The claims of the second patent in question are for the broad claims of a combination in an electric railway of a car, a track, an overhead conductor, a post and swinging hinged arm on the car, and a tension spring for maintaining contact between the arm and the conductor; and the language of the specifications shows that it was the intention of the inventor to make this cover the generic invention. The claims of the first patent that embrace the whole combination include the weight as part of the means for maintaining upward pressure of the arm against the conductor. There are five claims of the first patent that cover the whole combination, and include a spring or weight to perform the function of keeping the trolley arm in the center line of the car. Now, this same spring and weight in the drawings discharge the function of maintaining the upward pressure of the swinging arm. The contention of the counsel for the complainant is that the first patent was a patent for the special and improved form of the invention, including the spring and weight with their upward pressure and centralizing tendency, and that the second patent, though using the same drawings and specifications, shows by the language of the latter and its claims that it was intended to cover, and did cover, a combination with a spring without a weight in such a position that it need only discharge the function of maintaining the upward pressure of the arm without the centralizing tendency, and that the modification of the drawings and specifications to show such a tension spring is only the work of a skilled mechanic. To the objection that the last five claims of the earlier patent are exactly the same as the broad claims of the later patent with the mere statement of a necessary centralizing function of the same spring always present in it, it is answered that the second patent was intended to cover springs that had no centralizing tendency, and that the use of the function in describing the spring, therefore, is a limitation of the claim showing it to be a special form of spring. It is argued, therefore, that, as the claims of the first patent do not cover any of the broad claims of the second patent based on a simpler combination of parts than that shown in the drawings, the second patent may be held to be a separate generic invention, while the earlier patent is merely for improved forms of the same invention entitled to a sep-

rate patent. We think the case on these two patents much nearer *Miller v. Manufacturing Co.* than the case on the two patents already considered, but we are unwilling upon an appeal from a preliminary injunction heard upon affidavits, and without a full review of the art, and without a fuller argument and closer consideration of the claims and specifications, to decide the question mooted. The questions are whether, in determining the separability of the inventions, we may consult evidence dehors the record, and whether, in considering the gist of the second patent, we may supply such variations in the form of the combination shown in the drawings and specifications suggested by mere mechanical skill as would make it one not covered by the first patent, but a simpler and more generic form, and whether the claims of the second patent are limited to the devices actually shown by the words "substantially as described." The main invention is confessedly a meritorious one, and we shall be loath to declare it void because of a mistake in the patent office proceedings, if we can, by any reasonable construction of the patents, do otherwise. The second patent was sustained as valid after a full hearing on the merits, before so good and experienced a patent judge as Judge Townsend, of Connecticut. *Thomson-Houston Electric Co. v. Winchester Ave. Ry. Co.*, 71 Fed. 192. This certainly justified the court below in assuming the validity of the patent on a motion for preliminary injunction. It is well settled that, on appeals like this, this court will ordinarily look into the case merely to see whether the discretion of the court below in issuing or withholding the order of preliminary injunction has been abused; and that only in exceptional cases, in which a controlling question of law may be as fully and fairly considered as upon final hearing, and the court has no doubt upon it, will it finally dispose of the injunction and the case on a hearing like this. *Duplex Printing-Press Co. v. Campbell Printing-Press & Manuf'g Co.*, 16 C. C. A. 220, 69 Fed. 250; *Mayor, etc., v. Africa*, 23 C. C. A. 252, 77 Fed. 501. Questions on appeals of this character are ordinarily to be treated in this court from the standpoint from which they were viewed by the circuit court, and the decision on the merits by a circuit court of another circuit sustaining the patent is therefore usually of controlling weight here, as it should be in the court below.

In an appeal from a preliminary injunction on this same patent, the circuit court of appeals of the Second circuit affirmed the order without examining or deciding the validity of the patent, justifying its course in this regard by the statement that in another cause, heard upon a voluminous record by Judge Townsend, the patent had been sustained. *Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co.*, 22 C. C. A. 1, 75 Fed. 1005. The orders of preliminary injunctions appealed from in both cases are accordingly affirmed, at the costs of the appellant, the defendant below.