tion under its alleged license are involved. This is substantially the only question involved in this proceeding. The general rule is that, where there appears to be a subsisting license between the complainant and the defendant, the jurisdiction of the court, under the patent law, will not be extended to cover a suit to enforce the terms of the license, or to forfeit the license, on the ground that the terms thereof have been violated. Hartell v. Tilghman, 99 U. S. 547; Albright v. Teas, 106 U. S. 613, 1 Sup. Ct. 550; Manufacturing Co. v. Hyatt, 125 U. S. 46, 8 Sup. Ct. 756; Marsh v. Nichols, Shepard & Co., 140 U. S. 344, 11 Sup. Ct. 798; Wade v. Lawder, 165 U. S. 624, 17 Sup. Ct. 425. But, on the other hand, it is also well settled that where a suit is brought for infringement, and the existence of a license is alleged by the respondent and denied by the complainant, it is competent for the court to determine whether, at the time of the filing of the bill, there was a subsisting license between the parties. The determination of this fact is, obviously, necessary in order to ascertain whether or not the court has jurisdiction of the suit for an infringement. White v. Rankin, 144 U. S. 628, 12 Sup. Ct. 768; Hammacher v. Wilson, 26 Fed. 239; Oil-Cup Co. v. Manning, 32 Fed. 625. In other words, the claim by a defendant that he has been using an invention under a license is a defense to the charge of infringement, showing the lawful right to use the invention alleged to have been infringed, and if supported by the facts is a ground for the dismissal of the bill. From the averments of the affidavits it is apparent that the Southern California Bituminous Paving Company held at one time a license from the complainant covering the use of the invention alleged to have been infringed, but I am unable to determine whether or not this license existed at the time the bill was filed; that is, whether or not it had been revoked, upon due notice given by the complainant, for good cause, according to the terms of the license. Until this fact is finally determined, the court has jurisdiction of the suit; for, as stated in White v. Rankin, supra, "the subject-matter of the action, as set forth in the bill, gave the court jurisdiction, and exclusive jurisdiction, to try it."

The determination of this question will conclude, equally with the Southern California Bituminous Paving Company, the other defendant corporation, the Union Paving & Contracting Company; for the affidavits presented by the latter tend to show that, under some contractual arrangement with the Southern California Bituminous Paving Company, it had employed that company to do certain paving work, and thereby had had the use of the invention alleged to have been infringed. The other three defendants being officers of the two defendant corporations, no further question arises with respect to them. Meanwhile, no such case is presented by the affidavits filed on behalf of the defendants, in view of the counter allegations contained in the affidavits for the complainant, as would justify the court, at this stage of the case, in dissolving the restraining order, or in refusing the application for a preliminary injunction.

The case will be referred to the master to ascertain (1) whether the license between the complainant and the defendant the South-

ern California Bituminous Paving Company was still subsisting when the acts of infringement complained of are alleged to have occurred; (2) if no such license was then subsisting, whether the acts of infringement complained of took place, and to what extent the complainant has been damaged. The complainant gave a bond in the sum of $2,500 upon the issuance of the restraining order. This sum would seem sufficient to protect the defendants until the further determination of the case. The application for a preliminary injunction will be granted upon the complainant giving a bond in the sum of $2,500, and it is so ordered.

MORRIS et al. v. CANDA et al.

(Circuit Court of Appeals, Fifth Circuit. May 4, 1897.)

1. REVIEW ON ERROR—MOTION FOR NEW TRIAL.
   Alleged error in refusing to grant a motion for a new trial is not reviewable in the federal courts.
2. SAME—TRIAL TO COURT.
   When a jury is waived in writing, and the case tried to the court, and the court makes a mere general finding, there is nothing which can be reviewed under an assignment that the judgment entered is contrary to the law and the evidence.
3. SAME—SPECIAL FINDINGS—BILL OF EXCEPTIONS.
   A paper purporting to be a bill of exceptions, and which opens and closes in the appropriate forms of such a bill, cannot be considered as a special finding of facts, though it contains an extended statement of the evidence submitted at the trial.

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

W. B. Merchant, John D. Rouse, Wm. Grant, E. Williams, Guy M. Hornor, and Jas. Legendre, for plaintiffs in error.

Thos. J. Beall, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and NEWMAN, District Judge.

McCORMICK, Circuit Judge. This is an action of trespass to try title to lands described in the petition. The defendants who answered pleaded the statutory plea,—not guilty. By a stipulation in writing the parties waived a jury, and consented that the matters of law and of fact should be tried by the court. No exceptions were reserved to any action of the judge on exceptions to the pleadings, nor on objection to the admissibility of evidence. There was a general finding and judgment for the defendants. The plaintiffs prosecute this writ of error, and in their assignment say that in the record and proceedings in the circuit court there is manifest error, in this, to wit: First, because the judgment rendered by said court on the 8th day of October, 1894, is contrary to the law and the evidence (stating the evidence relied on); second, because the court committed a material error in refusing to grant the plaintiffs' motion for a new trial. The second error we do not consider, because such action of

the court is not reviewable. The first error we cannot consider, because the judge made no special findings of fact, and, as far as this record discloses, committed no error in the admission or rejection of testimony, and the pleadings are sufficient to support the judgment. City of Key West v. Baer, 30 U. S. App. 140, 13 C. C. A. 572, and 66 Fed. 440. The plaintiffs in error insist that the bill of exceptions which is brought up in this record is substantially a statement of the special findings of fact made by the trial judge. We do not so construe it. It purports to be a bill of exceptions. Its opening words are:

"Be it remembered that upon the trial of the above-entitled cause, the following facts being established by the testimony, to wit."

And its concluding words are:

"And thereupon the court rendered judgment against the plaintiffs, and thereafter the plaintiffs moved the court, on the grounds stated in their motion, for a new trial, which motion the court overruled, as appears by record herein, to which judgment the plaintiffs in open court excepted, and now tender this their bill of exceptions hereinbefore fully stated, and ask that the same be allowed by the court, and filed as a part of the record in this cause.

"W. M. Merchant,
"Attorney for Plaintiffs [naming them].

"Signed this 18th day of October, 1894. T. S. Maxey, Judge."

Between this opening and closing of the bill of exceptions there appears an extended statement of the evidence submitted on the trial, embracing over 50 pages of the printed record; but no note of any exception occurs, nor does it appear that the evidence detailed was all the evidence submitted on the trial. It is manifest upon the face of the paper that it was not the intention of the trial judge to pronounce special findings of fact in the terms which make up this bill of exceptions. It is clear to us that it was not his intention to make any special findings of fact, and that he did not in fact make any. Under the settled rule of this court, and of the supreme court of the United States, construing the statute providing for trials before the judge without a jury when a jury is waived by a stipulation in writing signed by the parties, the record in this case shows nothing that may form a basis for review by this court of the judgment of the circuit court. That judgment is therefore affirmed.

MORRISON et al. v. KUHN.

(Circuit Court of Appeals, Fifth Circuit. April 20, 1897.)

APPEAL—DECISION ON APPEAL BY OTHER PARTNERS.

Where the record shows that the questions presented were necessarily involved and were decided on a previous appeal by another party from the same decree, and in accordance with such decision the judgment below was modified, the court will simply direct an affirmance of the modified decree.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

M. H. Clift, for appellants.

Foster V. Brown and Mark Spurlock, for appellee.

Before PARDEE and McCORMICK, Circuit Judges.