The plaintiff is entitled to a judgment for a revivor of the judgment in the sum of $9,390, and to have an execution issued thereon for that amount; to all of which the defendant, by Henry Crawford, at the time excepted. The defendant prayed an appeal, and the bond is fixed at $10,000; no execution to issue until 30 days from this date. It is agreed by the defendant, as the condition of the staying of issuing execution, that no transfer of property in the state of Indiana shall be made pending the suit.

MINNEAPOLIS, ST. P. & S. S. M. RY. CO. v. EMERSON et al.[1]

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

No. 361.

1. RAILROADS—FIRES FROM LOCOMOTIVES—INSTRUCTIONS—CONFLICTING EVIDENCE.
   Whether a fire which destroyed plaintiff's property was communicated from one of defendant's locomotives or from a forest fire raging in the vicinity, *held* to be a question of conflicting evidence and debatable inferences, which the court properly refused to withdraw from the jury.
2. APPEAL AND ERROR—RULINGS ON NEW TRIAL.
   Rulings by the federal courts on motions for new trials are not reviewable on error.

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

This was an action at law by J. W. Emerson and D. W. Emerson against the Minneapolis, St. Paul & Sault Sainte Marie Railway Company to recover damages alleged to have been caused to plaintiff's property by fire communicated from a locomotive. In the circuit court, verdict and judgment were given for plaintiffs, and the defendant sued out this writ of error.

Michael H. Bright and Charles B. Keeler, for plaintiff in error.

W. H. Flett, for defendants in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The defendants in error recovered a judgment against the plaintiff in error for damages caused by fire to timber lands and to logs, poles, posts, and other forms of timber accumulated near the tracks of the company's railroad at Romulus, Lincoln county, Wisconsin. The negligence charged in the declaration consisted in carelessly managing, operating, and running a locomotive, not properly equipped and constructed to arrest sparks, so as to set fire to grass, weeds, and brush which had been mowed and carelessly permitted to remain upon the company's right of way until extremely dry and inflammable, whereby fire from a locomotive was communicated "to the property, premises, and effects of the plaintiffs, and burned and destroyed the same." The chief question is whether the court erred in refusing to direct a verdict for the plaintiff in error. It would be a laborious task, unavailing as a precedent or for any useful purpose, to summarize the evidence. The contention of the plaintiff in error is: First, that the estab

[1] Rehearing denied June 17, 1897.

lished facts in the case point conclusively to a neighboring forest fire as the cause of the damage to the plaintiff's property; and, second, that if the evidence falls short of the first proposition, it throws the question "whether the engine caused the loss into the field of conjecture." These questions were submitted to the jury upon a charge which could not have made it more clear that the plaintiffs could not recover unless the jury was satisfied by a preponderance of the evidence, and able to say "with a reasonable degree of certainty," what caused the fires seen on the right of way of the company; "that the fire was caused in the manner specified in the declaration"; "that the whole damage was caused that way"; and that, if the preponderance of the evidence was that the fire was caused in some other way, no matter what, or if the evidence was equally balanced, leaving the cause of the injury "in the realm of conjecture" and the jury unable to "settle down to any final conclusion from a preponderance of the evidence," the verdict should be for the defendant. That the evidence was sufficient not only to warrant but to require that the case be submitted to the jury we have no doubt. Of the very elaborate argument to the contrary the most that can be said is that, if made to the jury, it might have been enough to win and to justify a different verdict; but at the same time it demonstrates that the case was one of conflicting evidence and of debatable inferences which could not properly have been withdrawn from the jury.

It follows, of course, that there was no error in refusing a special instruction to the effect that, if the fires seen on the company's right of way might have been caused either by the locomotive or by the forest fire, there was no evidence to warrant the jury in saying that they were caused by the one rather than the other. One of the fires on the right of way was on the south side of the track, where it is insisted it could not have been caused by a spark from the locomotive, because a strong south wind was blowing, which must have carried all sparks from the engine northward, and therefore, it is urged, must have been caused by a spark from the forest fire. That was a question to be determined upon the pertinent circumstances of which there were many disclosed by the evidence.

The other special request for instruction which was refused does not present an essentially different question. It reasserts the proposition that, if sparks carried by the wind from the forest fire might have set the fires upon the company's right of way, there could not be a verdict for the plaintiffs.

Error has been assigned upon exceptions to the admission of testimony. We are of the opinion that no error in that respect was committed, but, if there were, it was unimportant.

The ruling upon the motion for a new trial presents no question. In the federal practice errors of law, and any ruling which may be reviewed upon writ of error, may be assigned as error directly, but should not be embraced in a motion for a new trial; and, if they are, the ruling upon the motion is not thereby made reviewable. In this instance the motion embraces no ruling or question which we have not considered upon the errors properly assigned. The judgment below is affirmed.

DE BEAUMONT v. WILLIAMES.

(Circuit Court of Appeals, Third Circuit. May 10, 1897.)

PATENTS—LIMITATION OF CLAIMS—INFRINGEMENT.

The De Beaumont patent, No. 187,825, for an improvement in heaters and feeders for steam boilers, is limited by the prior state of the art to the particular arrangement and combination of parts described and specified. The apparatus is intended simply to feed the boiler, and has no relation to a system of steam heating, and is therefore not infringed by a vacuum system of steam heating, in which the vacuum pump discharges the hot water from the return pipe into an open tank, whence it is pumped into the boiler by an ordinary boiler-feed pump.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a suit in equity by Delia De Beaumont, administratrix of Alexandre De Beaumont, against Napoleon Williames, for alleged infringement of a patent for an improvement in heaters and feeders for steam boilers. The circuit court held that complainant had failed to prove title to the patent, and therefore dismissed the bill. 71 Fed. 812. The complainant has appealed.

Mrs. Carrie B. Kilgore and David C. Harrington, for appellant.

Ernest Howard Hunter, for appellee.

Before ACHESON, Circuit Judge, and BUTLER and BUFFINGTON, District Judges.

ACHESON, Circuit Judge. This suit, under the amended bill, is founded exclusively upon letters patent No. 187,825, granted on February 27, 1877, to Alexandre De Beaumont for an improvement in heaters and feeders for steam boilers. In his specification the patentee states:

"The main object of my invention is to utilize the whole or a portion of the exhaust steam of a steam engine, by forcing it into a boiler with a supply of water, in the manner described hereafter."

Then, after a brief reference to the accompanying drawing, which exhibits a vertical section of the apparatus for carrying the invention into effect, the specification proceeds thus:

"A is the cylinder, to which is adapted a plunger, B, the latter being reciprocated in the present instance from a shaft, D, through the medium of an eccentric, a, and rod, b, and the shaft being driven by the engine. At the bottom of the cylinder is a tubular projection, d, the upper end of which forms the seat for a valve, e, which rises, when the plunger is moved upward, and permits exhaust steam to enter the cylinder from the pipe, E, which communicates with the exhaust pipe of the steam engine. Water is also admitted in the form of a jet, to the cylinder, beneath the plunger, through the pipe, F, which communicates with a hydrant or reservoir, a check valve, f, in the pipe, F, opening on the ascent of the pump plunger, and closing on its descent. G is the discharge pipe, through which, and through the chest, H, containing a check valve, the exhaust steam may be forced directly into the boiler."

The patentee then states that, as the pump operates continuously, he uses in connection with the discharge pipe, G, a device for automatically regulating the amount of water which passes into the boiler, so that it will accord with the requirements of the latter, and

the specification proceeds to describe this regulating device. This description we need not here reproduce or further mention, for this regulating device is the subject-matter of the second claim of the patent, and that claim is not here involved. The alleged infringement is only of the first claim, which claim is as follows:

"(1) The combination of the pump, A, the pipe, E, communicating with the exhaust pipe of the engine, valve, e, water pipe, F, and force pipe, G, communicating with the boiler."

We have already quoted at length everything contained in the specification of the patent relating to the subject-matter of the first claim. That claim, obviously, is for a combination of specified parts. The specification, in connection with the illustrative drawing, shows very clearly the purpose of the invention, and the means devised by the patentee for carrying the same into effect. The invention is designated as "a new and useful improvement in heater and feeder for steam boiler," and "the main object" is stated to be "to utilize the whole or a portion of the exhaust steam of a steam engine, by forcing it into a boiler with a supply of water." The operation of the described apparatus is this: When the plunger is moved upward the valves, e and f, are opened, and the exhaust steam through the pipe, E, and cold water through the pipe, F, simultaneously enter into the pump cylinder beneath the plunger. Then, upon the descent of the plunger, the valves, e and f, are closed, the check valve in the chest, H, is opened, and the combined exhaust steam and water forced directly into the boiler through the pipe, G. There is no suggestion in the specification, or indication in the patent drawing, that the exhaust steam is to be utilized for any other purpose than thus to supply a hot feed to the boiler. Now, it was not a new thing to utilize exhaust steam for the purpose stated in De Beaumont's patent. For a very long time prior to his invention it had been a common practice to supply steam boilers, by means of feed pumps, with water heated by the condensation of exhaust steam; the cold water and the exhaust steam meeting in a condensing chamber or receptacle, and the water of condensation being pumped therefrom into the boiler. Indeed, the De Beaumont patent purports to be for a mere improvement in heaters and feeders for steam boilers. Under the proofs, it is very clear that at the date of De Beaumont's invention the state of this art was such that no claim was allowable except for the special means devised and described by the patentee for accomplishing the stated purpose. Railway Co. v. Sayles, 97 U. S. 554. Accordingly, we find that the first claim of the patent in suit is for a specific combination of elementary parts. Upon well-settled principles, then, this claim must be construed strictly, and the patentee held to the particular arrangement of parts described and specified. Duff v. Pump Co., 107 U. S. 636, 2 Sup. Ct. 487; Bragg v. Fitch, 121 U. S. 478, 7 Sup. Ct. 978; Snow v. Railway Co., 121 U. S. 617, 7 Sup. Ct. 1343; Wright v. Yuengling, 155 U. S. 47, 15 Sup. Ct. 1. Has infringement of this claim by the defendant been shown?

The defendant is the grantee of letters patent No. 256,089, dated April 4, 1882, for an improvement in apparatus for heating buildings. It appears that the defendant erected under this patent three