

was commenced within three years from the time when the defendants gave up control of the bank to their successors, it is not barred by the statute of limitations. Demurrer overruled.

JOHNSON CO. et al. v. THOMSON-HOUSTON ELECTRIC CO.

(Circuit Court of Appeals, Third Circuit. September 21, 1897.)

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

This was a suit in equity by the Thomson-Houston Electric Company against the Johnson Company and others for alleged infringement of a patent. The circuit court made an order granting a preliminary injunction (78 Fed. 361), from which order the defendants appealed. On September 17, 1897, the following stipulation, signed by counsel for the respective parties, was filed:

"In view of the decision of the circuit court of appeals for the Second circuit in the suit of the complainant and appellee herein against the Hoosick Railway Company, filed July 21, 1897, it is hereby consented that the order for a preliminary injunction granted herein in the circuit court upon the 6th, 7th, 8th, 12th, and 16th claims of Van Depoele patent, No. 495,443, be reversed, with costs, without prejudice to the rights of either party at final hearing upon the said claims or other claims of said letters patent."

G. J. Harding, for appellants.

Frederic H. Betts, for appellee.

Before DALLAS, Circuit Judge, and BUTLER and BRADFORD, District Judges.

PER CURIAM. And now, this 21st day of September, A. D. 1897, in view of the stipulation between counsel attached hereto consenting to the same, it is ordered that the decretal order of the circuit court of the United States for the Western district of Pennsylvania, made January 28, 1897, enjoining the Johnson Company, of Pennsylvania, the Steel Motor Company, and R. T. Lane from infringing the 6th, 7th, 8th, 12th, and 16th claims of patent No. 495,443, issued to C. A. Coffin and Albert Wahl, administrators of Charles J. Van Depoele, deceased, assignors to the Thomson-Houston Electric Company, be reversed, with costs, without prejudice to the rights of either party at final hearing upon the said claims or other claims of said letters patent.

CARTER v. SWEET et al.

(Circuit Court, S. D. California. November 1, 1897.)

No. 730.

1. WITNESS FEES.

Under Rev. St. § 848, witnesses are not entitled to any per diems for time occupied in going to and returning from court. Their only compensation is the prescribed mileage.

2. DOCKET FEE.

Under Rev. St. § 824, a docket fee of \$20 is chargeable where any issue of law or fact has been presented to the court for consideration, and where the expression of the court's opinion thereon, after hearing, results in a final disposition of the cause, even though such disposition be a dismissal on motion of the complainant.

This was a suit in equity by Benjamin F. Carter against H. P. Sweet, the Big Rock Creek Irrigating District, and others. The cause was heard on a motion to retax the costs.

Frank A. Cattern and Wm. J. Hunsaker, for complainant.

Hatch, Miller & Brown and Mulford & Pollard, for defendants.

WELLBORN, District Judge. This is a motion to retax costs. The items objected to are: First, the charges of two witnesses, each for three days, at \$1.50 per day, in going to and returning from court; second, a docket fee of \$20 for defendants' counsel, on dismissal of suit.

The material facts concerning the docket fee are these: A provisional injunction was applied for by the complainant. A hearing was had upon this application, witnesses were examined, and briefs of counsel submitted. No formal order was made at this hearing, other than one allowing complainant leave to amend and to submit additional authorities; but the court did express, upon some of the issues involved, views unfavorable to complainant, and thereupon complainant asked for and obtained said order. Neither an amendment, however, nor further brief, was filed, but the suit was afterwards dismissed on complainant's motion.

1. Witness' fees, as prescribed by law, are these: One dollar and fifty cents for each day's attendance in court, and five cents a mile in going from his residence to the court, and five cents a mile for returning. Rev. St. § 848. There is no provision of law, so far as I am advised, for any other compensation. The objections above mentioned to the charges of the witnesses are sustained.

2. The law applicable to docket fees is as follows:

"On a trial before a jury, in civil or criminal causes or before referees, or on a final hearing in equity or admiralty, a docket fee of twenty dollars." Rev. St. § 824.

The cases are not harmonious, as to what constitutes "a final hearing," within the meaning of the section just quoted. There is one construction, however, which is determinative here, and upon which the cases seem to be agreed, or, at least, with which none are at variance, and that construction is declared, in the leading case, as follows:

"We are of opinion that, upon the face of the statute, the intention of the legislature is manifest that it is only where some question of law or fact, involved in or leading to the final disposition actually made of the case, has been submitted, or at least presented, to the consideration of the court, that there can be said to have been a final hearing which warrants the taxation of a solicitor's or proctor's fee of \$20; as, for instance, where the court, on motion and argument, dismisses for irregularity an appeal from the district court, as in the case before Mr. Justice Nelson of *Hayford v. Griffith*, 3 Blatchf. 79, Fed. Cas. No. 6,264, or where the plaintiff discontinues, after the court has sub-

stantially decided the merits of the case, either by an opinion expressed at the hearing upon the merits, as in the case of *The Bay City*, before Judge Brown, 3 Fed. 47, or by a previous interlocutory decree, as in *Goodyear Dental Vulcanite Co. v. Osgood* [10 Fed. Cas. p. 739], decided by Judge Shepley in February, 1877." *Coy v. Perkins*, 13 Fed. 112.

The rule here enunciated has been referred to approvingly in many subsequent cases, among others *McLean v. Clark*, 23 Fed. 861; *Andrews v. Cole*, 20 Fed. 410; and *Louisville & N. R. Co. v. Merchants' Compress & Storage Co.*, 50 Fed. 449.

It is manifestly within the spirit, if not exact letter, of this rule to hold, as I do, that where there has been presented to the court for consideration any issue of law or fact, and the expression of the court's opinion thereon, after hearing, results in a final disposition of the cause, although such disposition be a dismissal on motion of the complainant, the docket fee is taxable. Objection to docket fee disallowed.

PULLMAN'S PALACE-CAR CO. v. AMERICAN LOAN & TRUST CO. et al.

(Circuit Court of Appeals, Eighth Circuit. December 6, 1897.)

No. 912.

RAILROAD RECEIVERSHIPS—PREFERRED CLAIMS—PULLMAN PALACE-CAR RENTALS.

Mileage due under a contract for the use of Pullman palace cars is not distinguishable from car rentals, and cannot be made a preferred claim on the appointment of a receiver for the railroad company. *Thomas v. Car Co.*, 13 Sup. Ct. 824, 149 U. S. 95, applied.

Appeal from the Circuit Court of the United States for the District of Colorado.

This was an intervening petition filed by Pullman's Palace-Car Company in the foreclosure proceedings against the Union Pacific, Denver & Gulf Railway Company, praying that Frank Trumbull, receiver of the said railway company, be ordered to pay a claim for \$21,505.90, with interest, held by the petitioner against the railway company. The receiver demurred to the petition, and the demurrer was sustained, and the petition dismissed.

The petitioner's claim was for car mileage arising under a contract which, as set forth in the petition, provided, among other things, that the petitioner should have the exclusive right, for a term of 15 years from the date of the contract, to furnish sleeping and parlor cars for the use of the said railroad companies, and all their passenger trains, over their entire lines of road, and over all railroads controlled by them. That the petitioner should remain the owner of said cars, and should retain the right to collect fares for the use of seats and berths therein; should furnish one or more employes for each car; should renew and improve certain portions thereof, as provided in said contract, and as might be necessary to keep the said cars up to the average standard of the best cars of that character in use on railroads of the United States; and should do certain other things with reference to the maintenance and management of the said cars. That, in consideration thereof, the said railroad companies agreed, among other things, that they would furnish to and for said cars certain material and supplies as provided in said contract; that they would pay to the petitioner the cost of repairing and making good all damages to said cars arising from accidents or casualties on the lines of said railroad companies; would promptly make all repairs that might be necessary to put said cars in good order; would furnish, free of charge, at convenient points, necessary space and facilities for storing bedding and other supplies; and