

RUBBER TIRE WHEEL CO. v. COLUMBIA PNEUMATIC WAGON  
WHEEL CO.

(Circuit Court, S. D. New York. September 16, 1898.)

1. EQUITY PRACTICE—MOTION FOR LEAVE TO TAKE PROOFS.

Notice of a motion for leave to take testimony in sur rebuttal should set forth specifically the precise facts which the applicant desires to prove.

2. PATENTS—SUIT FOR INFRINGEMENT—LEAVE TO TAKE PROOFS.

Leave will be granted a defendant to take testimony in sur rebuttal to show that decrees put in evidence in rebuttal, which appear upon their face to show a decision by the court after opposition, were not in fact so rendered.

Motion for Leave to Take Proofs in Sur Rebuttal.

Charles W. Stapleton, for the motion.

Paul A. Staley, opposed.

LACOMBE, Circuit Judge. Inasmuch as the rebuttal testimony is supposed to close the proofs, any application for leave to take sur rebuttal should set forth specifically, and not in general terms, the precise facts which applicant wishes to prove. A notice of motion, such as is given here, for leave "to take proofs in sur rebuttal," is altogether too vague. Inasmuch, however, as there are indications in the accompanying affidavits of some of the facts now sought to be proved, and the motion has been argued at length, it will be disposed of despite the defects in the notice.

1. As to any of the decrees put in evidence by complainant in rebuttal, which appear upon their face to show a decision by the court after opposition, defendant may show that they were in fact entered by consent, or by collusion, and under some arrangement whereby, although the decree would apparently evidence acquiescence by defendant decreed against, both parties to such decree agreed that between themselves it should mean nothing of the kind.

2. As to any particular sample of tire introduced by complainant on rebuttal, and testified to by complainant's witness as being of some particular kind, or grade, or quality, or composition of rubber, defendant may show that it is in fact of some other kind, or grade, or quality, or composition.

3. As to any samples introduced by complainant on rebuttal as "samples of Du Bois tires," defendant may show that they are not in fact "samples of Du Bois tires."

4. Defendant may show the method of applying tires used by complainant at and prior to the time of the commencement of this suit.

In all other respects the motion is denied. Proper practice would require defendant to set forth the names of the witnesses by whom it expects to make these sur rebuttal proofs, or to give proper excuse for their omission. It must be assumed, however, that, before moving, defendant ascertained that it could procure such testimony. It would seem, therefore, that two weeks from the entry of this order should be abundant time in which to put it in, and, inasmuch as the printing of the rest of defendant's record may go on meanwhile (as suggested on the hearing) and the sur rebuttal proof must necessarily

be short, defendant, as a condition of the relief granted, must accept notice of final hearing for October term, and case may be put on the calendar.

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NORTHERN PAC. RY. CO. v. CUNNINGHAM.

(Circuit Court, D. Washington, S. D. October 14, 1898.)

**ANIMALS—INJUNCTION TO PREVENT TRESPASS—RIGHT OF PASTURAGE.**

In the state of Washington, where, by statute, the pasturing of sheep on the lands of another without his consent, whether inclosed or uninclosed, is made unlawful, it is not a defense to a suit to enjoin such pasturage to allege that complainant's lands comprise every alternate section, that they are uninclosed, and that it is necessary for defendant's sheep to pass over them in order to reach the intervening uninclosed sections, which are owned by the government, and on which defendant, in common with all citizens, had a license of pasturage; as the right of way to pass over lands does not give the right of pasturage. The matter so pleaded, however, is proper to be considered as a partial defense, and in determining the limits and conditions of any injunction to which complainant may be entitled.

This is a suit in equity to enjoin defendant from pasturing sheep on uninclosed lands of complainant. Heard on exceptions to answer.

Crowley & Grosscup, for complainant.

A. S. Bennett, for defendant.

HANFORD, District Judge. This is a suit for an injunction to restrain the defendant from pasturing sheep upon uninclosed lands owned by the plaintiff, situated in Yakima county, in the state of Washington, said lands being part of the land grant to the Northern Pacific Railroad Company. The answer sets up that the lands referred to in the plaintiff's bill of complaint are alternate odd-numbered sections, and that the same are uninclosed, and the boundaries thereof unmarked, the original survey stakes set at the section corners having been destroyed; that the alternate even sections are public lands of the United States, upon which the plaintiff claims the right, as a licensee of the government, in common with all other citizens, to pasture sheep; that it is impossible for the defendant, or others having the right, to use the vacant uninclosed grazing lands belonging to the United States in the vicinity described in the complaint without crossing over the alternate odd-numbered sections to which the plaintiff claims title; that the defendant is innocent of any intention to trespass upon the plaintiff's lands; and that his sheep do graze upon the plaintiff's lands only to a limited extent, which the defendant is unable to prevent, because of the failure of the plaintiff to inclose its lands, or to mark the boundary line separating the odd-numbered from the alternate even-numbered sections. The plaintiff has filed exceptions on the ground that the matters so pleaded in the answer do not constitute a defense.

In the argument, counsel for the defendant has presented with earnestness and ability the following propositions:

"(1) That in all such grants or conveyances—that is, where the land granted is entirely surrounded by the land reserved to the grantor, and vice