

provisions were entirely ignored by the parties, and they aimed to accomplish by the entry of a consent agreement in the circuit court that which they could not do by complying with the provisions of the statute. By this unauthorized procedure they sought to invoke the jurisdiction of the federal court, in a cause in which, owing to the citizenship of the parties, the character of the suit, and the failure to comply with the requirements of the statute providing for the removal of causes, it could not be entertained. That the agreement entered into by the parties could not confer jurisdiction on the federal court is too well settled to admit of discussion. 2 *Fost. Fed. Prac.* p. 813, § 383. In *Bank v. Calhoun*, 102 U. S. 256, Justice Miller, speaking for the court, says:

"It needs no citation of authorities to show that the mere consent of parties cannot confer upon a court of the United States the jurisdiction to hear and decide a case. If this were once conceded, the federal courts would become the common resort of persons who have no right, either under the constitution or the laws of the United States, to litigate in those courts."

The circuit court being without jurisdiction in this cause, the decree appealed from was a nullity. Its action will be reversed, with directions to remand the cause to the state court. As the appellant and the appellees are equally responsible for removing this cause into a court without jurisdiction to entertain it, costs will be allowed to neither party. **Reversed.**

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#### MORRIN v. LAWLER.

(Circuit Court, E. D. New York. January 28, 1899.)

#### APPEAL—EFFECT AS TRANSFER OF CAUSE—APPLICATION TO SUBSTITUTE APPEAL BOND.

It is the rule in federal courts that, when all the steps necessary to perfect an appeal have been properly taken, the action is within the control of the appellate court, and a motion for substitution of the appeal bond must be addressed to that court.

#### On Motion for Leave to Substitute Appeal Bond.

Briesen & Knauth, for complainant.

Dickerson & Brown, for defendants.

Dayton & Swift, for City Trust, Safe-Deposit & Surety Co.

THOMAS, District Judge. The above action is one of three cases jointly heard and determined in this court, and since December, 1898, pending in the circuit court of appeals. After the interlocutory decree and the appeal therefrom, the complainant, by motion, objected to the bond offered by the defendant to perfect such appeal, on the ground that such bond did not provide for the payment of the decree of the trial court as well as that of the appellate court. Thereupon this court held that such bond did cover the damages and costs involved in the decree of the trial court as well as those of the appellate court, and the defendant on December 10, 1898, entered an order upon the decision denying the motion. On the 21st day of January, 1899, the City Trust, Safe-Deposit & Surety Company of Phila-

delphia, the surety on the bond so tendered by the defendant and accepted by the court, applied to the court for an order granting the surety permission to substitute another bond for such bond so before received, upon the ground that the surety did not contemplate issuing a bond whereby the liability of the surety would extend to the costs and damages directed to be paid by the decree of the trial court. The motion is denied, without passing upon the merits of the application, because the action has been transferred from this court to the circuit court of appeals, and that court has now exclusive cognizance of the matter. It is true that in *O'Sullivan v. Connors*, 22 Hun, 137, where there was a similarity of facts and procedure, the motion for correction was made in the first instance at special term, although an appeal to the general term had been perfected, and the latter branch of the court affirmed the order granting the motion. Such, however, does not seem to be the practice in the federal courts, and, on principle, should not be. When all the steps necessary to perfect an appeal to an appellate court have been properly taken, the action is within the control of that court, and the trial court should not engage in undoing or modifying the proceedings by which such jurisdiction has been obtained. The appellate court has been accustomed in instances similar to exercise jurisdiction, and it would appear that its jurisdiction is exclusive. *Railroad Co. v. Schutte*, 100 U. S. 644-647; *Draper v. Davis*, 102 U. S. 370; *Rubber Co. v. Goodyear*, 6 Wall. 153-157; *French v. Shoemaker*, 12 Wall. 86, 99; *Jerome v. McCarter*, 21 Wall. 17; *Bigler v. Waller*, 12 Wall. 142, 149; *McClellan v. Pyeatt*, 49 Fed. 259, 260; *Morgan's L. & T. & S. S. Co. v. Texas Cent. Ry. Co.*, 32 Fed. 525. The discussion of *Hammond, J.*, in *Ferguson v. Dent*, 29 Fed. 1, and the note by the learned judge to his opinion, is a valuable contribution to this subject. In view of these authorities, the motion is denied, without prejudice to renewing the same before the circuit court of appeals.

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**EDISON ELECTRIC LIGHT CO. v. E. G. BERNARD CO. et al.**

(Circuit Court, N. D. New York. January 26, 1899.)

**COSTS IN PATENT SUITS—EXCESSIVE AND IRRELEVANT EVIDENCE.**

A successful defendant in a patent suit who has overloaded the record with a large amount of matter, mainly the testimony of experts, which is irrelevant or immaterial, and abounding in repetition and prolix disquisitions, will be denied costs in the proportion which such testimony bears to the whole amount of evidence in the record.

This was a suit in equity by the Edison Electric Light Company against the E. G. Bernard Company and others for alleged infringement of a patent. The bill was heretofore dismissed, after a hearing on the merits. 88 Fed. 267. The cause is now heard on a motion by defendants to be allowed full costs.

Samuel O. Edmonds, for complainant.

Seward Davis and Barton & Brown, for defendants.