

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.

COXE, District Judge. The defendants' counsel, in the memorandum submitted upon this motion, have exhausted the list of adjectives belonging to legal nomenclature in expressing their opinion of the absolutely untenable character of the complainant's case. In their opinion the greater part of the complainant's testimony was "irrelevant," its case "hopeless," the suit "unjust" and the complainant's conduct in maintaining it "a willful and malicious tort." To the extent of holding that the action cannot be maintained the court agrees with them. The court was also of the opinion that a volume 2 $\frac{1}{4}$  inches in thickness and containing nearly 1,000 printed pages was unnecessary to meet such a cause of action. Upon the last proposition the defendants differ with the court. If a nautical metaphor be permissible, they maintain on the one hand that their adversary attacked them in a mud scow, and on the other, that it was imprudent for them to meet the foe until they were defended by an "Oregon."

If the defendants are right as to the worthlessness of the complainant's record it would seem that they are hardly in a position to dispute the proposition of the court as to the overweighted character of their own record. Indeed, as I now recall the oral argument, it was contended by at least one of the counsel for the defendants, that a large part of the record on both sides was wholly useless, and that the defendants had been beguiled into following the complainant wherever it led knowing that they were joining issue upon many questions having nothing whatever to do with the real controversy. I have no doubt that the position taken in the decision (88 Fed. 267) is correct, and a re-examination confirms me in this opinion. I am inclined to think, however, that it will be more equitable to allow the defendants a larger proportion of their costs than there suggested. I find on looking over the record, with this point especially in mind, that the proportion of the evidence which is unobjectionable is somewhat larger than I estimated it to be at the time of the decision.

The principal ground of criticism relates to the depositions of the expert witnesses. That this testimony abounds in repetition and irksome and prolix disquisitions, cannot be denied. There are too many experts and they talk too much. A self-evident proposition is not strengthened by being repeated ad infinitum. Truth does not need such artificial support; it will stand alone. What is said of the defendants' record applies with even greater force to the complainant's record, but the bill is dismissed and the entire expense falls upon the complainant. In brief, it is thought that no impartial mind can examine this record, in the light of the simple issue involved, without being convinced that it is an imposition upon court, counsel and parties alike. Such records obstruct the path of truth, retard equity and tend to shorten life and to promote insanity. If the bar would unite with the bench in confining the records in equity causes within reasonable limits, it is thought that the reform would be even more advantageous to the former than to the latter.

I have now examined the record with considerable care and, without going into details, have reached the conclusion that the defend-

ants are entitled to three-fourths instead of one-half their costs. The decree should, I think, be amended by striking out "one-half" and inserting "three-fourths" in lieu thereof.

## GRAND TRUNK RY. CO. v. CENTRAL VT. R. CO.

(Circuit Court, D. Vermont. December 3, 1898.)

### 1. RAILROADS—RIGHTS OF MORTGAGEE—SUBSEQUENT LEASE OF ROAD.

Neither the mortgagee of a railroad property nor the purchaser at a sale under the mortgage is entitled to enforce the covenants of a lease made by the mortgagor after the execution of the mortgage, binding the lessee to make good all depreciation of the property from wear or otherwise during the term of the lease, when the depreciation was such as would or might have followed the use of the property by the mortgagor, and would not have constituted waste, which could have been restrained or recovered for by the mortgagee.

### 2. SAME—PREFERRED CLAIMS AGAINST—CONSTRUCTION OF VERMONT STATUTE.

R. L. 1880, § 3353 (V. S. § 3803), giving claims against a railroad company for "the loss of property while in the possession of said corporation" preference over mortgages given by the company, applies only to liabilities growing out of the operation of a railroad within the state, and does not include a claim based on the covenants of a lease of a railroad in another state.

On motion for leave to intervene in foreclosure suit, and for the allowance of claims as preferred debts under the state statute.

James Byrne, for petitioners.

Michael H. Cardozo, Henry Crawford, Elmer P. Howe, and Charles M. Wilds, for opposing parties.

WHEELER, District Judge. This is a creditors' bill in behalf of all who may come in, and in which foreclosures are pending. The Ogdensburg & Lake Champlain Railroad Company mortgaged its road, which is in the state of New York, April 1, 1880, "and all and singular the railway, rails, bridges, fences, switches, privileges, rights and real estate, station houses, store houses, elevators, offices, and all other buildings and fixtures, of every kind and description, now owned by said company, or which may be hereafter owned or acquired by it, except as hereinafter stated, together with all the locomotives, engines, and tenders, passenger cars, freight cars, and all other cars, and all shop stock, tools, fuel, machinery, and other property now owned or hereafter to be owned or acquired by said company and in any way belonging or appertaining to the said railroad," to trustees to secure bonds,—and June 1, 1886, entered into an agreement for the operation of the road which was assumed by the defendant, the Central Vermont Railroad Company, by which the latter agreed with the former, "during the continuance of this agreement, to keep up and maintain in good order and condition, by repairs and renewals, as the same may be needed, all the present equipment of the party of the first part, and to add such new cars and engines as may be necessary to provide for waste and depreciation as the same may from time to time occur; to mark distinctly and in the usual manner all such new locomotives and other roll-