DIGEST

OF

Patent and Trade-Mark Cases

DECIDED BY THE

Court of Appeals of the District of Columbia

on appeal from the Commissioner of Patents

AND OF

Copyright Cases

on appeal from the Supreme Court of the District of Columbia from the date of the organization of the Court of Appeals in 1893 to June 18, 1908, and reported in the official reports of the court, volumes 1 to 31, inclusive; together with cases on those subjects in which the opinions of the Supreme Court of the District of Columbia have been reported in the Washington Law Reporter, volumes 25 to 35 inclusive; and cases decided by the Supreme Court of the United States on appeal from the Court of Appeals.

COMPILED BY

WM. S. TORBERT

OF THE DISTRICT OF COLUMBIA BAR

Published under the direction of the Bar Association of the District of Columbia.

JOHN BYRNE & COMPANY
WASHINGTON, D. C.
1909

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PREFACE.

The Court of Appeals of the District of Columbia, organized in 1893 by act of Congress, has jurisdiction of appeals from the Commissioner of Patents in interference cases. That this right of appeal has been largely availed of is evidenced by the more than four hundred reported cases involving patents and trade-marks decided by the court during the fifteen years of its existence. The importance of its decisions cannot be over-estimated.

This digest, in presenting which the compiler claims credit for little other than the arrangement of matter, covers these decisions and also cases involving the law of copyrights; also reported decisions of the Supreme Court of the District of Columbia in cases where it has been sought to control by mandamus the action of the Commissioner of Patents and other executive officers. Decisions of the Supreme Court of the United States on appeal from the Court of Appeals are also included, as are recent important decisions of that court involving the law of copyrights in cases brought up from other jurisdictions, notably those of White-Smith Music Co. v. Apollo Co., Scribner v. Straus, and Werckmeister v. American Tobacco Co.

Reference to cases has been made to the place of report in the official reports of the court, Official Gazette of the Patent Office and the Commissioners Decisions.

W. S. T.

January 1, 1909.

JUSTICES OF THE COURT OF APPEALS DURING THE TIME COVERED BY THIS DIGEST.

Richard H. Alvey, Chief Justice; commissioned April 15, 1893; retired Dec., 1904.
Seth Shepard, Chief Justice; commissioned Jan. 5, 1905.
Martin F. Morris, Associate Justice; commissioned April 15, 1893; retired June, 1905.
Seth Shepard, Associate Justice; commissioned April 15, 1893; became Chief Justice Jan. 10, 1905.
Charles H. Duell, Associate Justice; commissioned Jan. 5, 1905; resigned Aug., 1906.
Louis E. McComas, Associate Justice; commissioned June 26, 1905; died Nov. 10, 1907.
Charles H. Robb, Associate Justice, commissioned Oct. 5, 1906.
Josiah A. Van Orsdel, Associate Justice; commissioned Dec. 12, 1907.

COMMISSIONERS OF PATENTS DURING THE PERIOD COVERED BY THIS DIGEST.

John S. Seymour, appointed March 31, 1893, resigned April 12, 1897.
Benjamin Butterworth, appointed April 7, 1897, died January 16, 1898.
Charles H. Duell, appointed February 3, 1898, resigned March 31, 1901.
Frederick I. Allen, appointed March 25, 1901, resigned May 31, 1907
Edward B. Moore, appointed May 10, 1907.

ANALYSIS.

Page

ABATEMENT AND REVIVAL, ... 1

ACCOUNTS AND ACCOUNTING, ... 1

ACTIONS, ... 2

APPEALS, ... 3

I. TO THE SUPREME COURT OF THE UNITED STATES, ... 4

II. TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, ... 6

1. Nature of Appeal, ... 6
2. Perfecting, ... 6
3. Time for Taking, ... 6
4. Appealable Rulings, etc., ... 9
5. Scope of Review, ... 13
6. Conclusiveness of Decisions of Patent Office Tribunals, ... 20
7. Right to Appeal, ... 22
8. Assignments of Error, ... 25
9. Record on, ... 25
10. Costs on, ... 26
11. Practice, ... 27
12. Rehearings, ... 28
13. Conclusiveness of Judgment on, ... 28
14. In General, ... 29

III. TO COMMISSIONER OF PATENTS, ... 30

IV. TO EXAMINERS IN CHIEF, ... 31

ATTORNEYS, ... 33

CLOUD ON TITLE, ... 36

COMMISSIONER OF PATENTS, ... 37

CONTRACTS, ... 40

COPYRIGHTS, ... 42

I. What Copyrightable, ... 42
II. Who May Obtain, ... 42
III. Perfecting Right, ... 43

IV. Notice of Copyright, ... 43
V. Publication, ... 44
VI. Rights of Owner of Copyright, ... 44
VII. Mandamus to Compel Issuance, ... 45
VIII. Infringement, ... 45
IX. Assignments, ... 47

COSTS, ... 47

COURTS, ... 47

EQUITY, ... 49

ESTOPPEL, ... 50

HOLIDAYS, ... 54

INJUNCTION, ... 55

JUDICIAL NOTICE, ... 56

LICENSES, ... 57

MANDAMUS, ... 57

I. Office in General, ... 57
II. To Control Action of Commissioner of Patents and Other Officers of the Government, ... 59
III. To compel Allowance of Appeal, ... 62
IV. Practice and Procedure, ... 63

NOTARIES PUBLIC, ... 66

PARTIES TO SUIT, ... 67

PARTNERSHIP, ... 67

PATENTS, ... 68

I. IN GENERAL, ... 71

II. PATENTABILITY, ... 73

1. Invention Generally, ... 73
2. Novelty, ... 76
3. Anticipation, ... 80
4. Operativeness, ... 88
5. Substitution of Elements, ... 89
6. Substitution of Equivalents, ... 90
7. Equivalents, ... 91
8. Combinations, ... 91

9. Change in Location of Elements, ... 91
10. Analogous Use, ... 92
11. Double Use, ... 94
12. Compositions, ... 94
13. Processes, ... 95
14. Arts, ... 95
15. Functional Utility, ... 96
16. Superiority and Popularity, ... 96
17. Determination of Patentability, ... 97
18. Particular Patents, ... 97
19. Generally, ... 98

III. PERFECTING RIGHT TO PATENT, ... 98

1. **Applications,** 98
a. Time for filing, ... 98
b. Diligence in filing, ... 99
c. Second application, ... 102
d. Continuations, ... 103
e. Joinder of inventions in, ... 103
f. Divisional, ... 103
g. Division of applications, ... 104
h. Multiplication of applications, ... 105
i. Amendment and alteration, ... 105
j. New matter in, ... 106
k. Illustrations and descriptions, ... 107
l. Exhibits, ... 107
m. Abandonment, ... 108
n. As evidence, ... 108
o. Affidavits, ... 109
p. In general, ... 109

2. **Diligence,** 109
a. In General, ... 109
b. Disclosure, ... 112
c. Delay after conception, ... 112
d. Filing and prosecution of application, ... 116
e. In making drawings, ... 118
f. Excuses for inactivity, ... 118
g. Failure to assert rights to invention, ... 122
h. Proof of, ... 122

3. **Reduction to Practice,** 122
a. What amounts to, ... 122
b. Constructive reduction, ... 136
c. Diligence in, ... 137
d. Agency in, ... 138
e. Priority in, ... 139
f. Resolving doubt as to, ... 140
g. Excuse for delay, ... 140
h. By whom to be made, ... 141

i. Evidence to establish, ... 141
j. Generally, ... 145

4. Abandoned Experiments, ... 146
5. Experimental Use, ... 149
6. Public Use and Sale, ... 149
7. Tests, ... 151
8. Disclosure of Invention, ... 152
9. Concealment or Suppression of Invention, ... 152.
10. Claims, ... 154
11. Drawings, ... 157
12. Abandonment of Right, ... 158
13. Generally, ... 159

IV. PRIORITY AND ORIGINALITY, ... 160

1. Conception and Reduction to Practice, ... 160
2. Discredited Claims, ... 171
3. Junior and Senior Applicant, ... 172
4. Patentee and Applicant, ... 173
5. Employer and Employee, ... 176
6. Joint Inventors, ... 182
7. Partnership, ... 182
8. Disclosure, ... 182
9. Determination of, ... 185
10. Evidence to Establish, ... 185
11. Presumptions, ... 189
12. Operativeness of machine, ... 190
13. Perfection of Device, ... 190
14. Foreign Inventions and Patents, ... 190
15. Date of Invention, ... 190
16. In General, ... 191

V. CLAIMS, ... 193

VI. ASSIGNMENTS, ... 197

VII. PRACTICE, ... 198

VIII. INTERFERENCE PROCEEDINGS, ... 204

1. Nature of Proceeding, ... 204
2. Parties, ... 204
3. Claims, ... 206
4. Questions in Issue, ... 207
5. Construction of Issues, ... 210
6. Effect on Subsequent Application, ... 212
7. Preliminary Statement, ... 213
8. Evidence, ... 216
9. Dissolution, ... 217
10. Trade-marks Excluded, ... 217
11. In General, ... 217

IX. EVIDENCE, ... 218

1. Rules for taking Testimony, ... 218
2. Admissibility and Competency, ... 218
3. Weight and Sufficiency, ... 222
4. Burden of Proof, ... 232
5. Presumptions, ... 236
6. Extrinsic Evidence, ... 239
7. Depositions, ... 240
8. Cross-examination, ... 241
9. Leading questions, ... 242
10. Exhibits, ... 242
11. Ex-parte affidavits as, ... 242
12. Variance, ... 243
13. Records of Patent Office, ... 244
14. Generally, ... 245

X. REISSUES, ... 245

1. Grounds for, ... 245
2. Applications, ... 246
3. Effect of, ... 247
4. Scope of Claim, ... 248
5. Generally, ... 250

XI. FOREIGN PATENTS, ... 250

XII. INTERNATIONAL CONVENTION, ... 251

XIII. INFRINGEMENT, ... 251

XIV. PARTICULAR PATENTS, ... 253

PLEADING, ... 254

PROCESS, ... 256

PUBLIC OFFICERS, ... 256

REHEARINGS, ... 257

REMEDIES, ... 257

RES ADJUDICATA, ... 258

RULES OF COURT, ... 261

STATUTES, ... 262

TRADE-MARKS, ... 269

I. What Registrable, ... 269
II. Right to, ... 275
III. Application for Registration, ... 281
IV. Commissioner's Power in Determining Right to Registration, ... 283
V. Effect of Registration, ... 284
VI. Cancellation, ... 284
VII. Interference, ... 285
VIII. Evidence, ... 288
IX. Appeals, ... 288
X. Mandamus to Compel Registration, ... 290

WORDS AND PHRASES, ... 291

EXPLANATION OF ABBREVIATIONS USED IN THE FOLLOWING TABLE OF CASES AND THROUGHOUT THE WORK.

App. D. C., Appeal Cases, District of Columbia.
C. D., Commissioners Decisions.
O. G., Official Gazette of the Patent Office.
U. S., United States Reports.
W. L. R., Washington Law Reporter.

TABLE OF CASES DIGESTED.

With Notation of Citation.*

Adams, Glenn *v.*, 12 App. D. C. 175; 83 O. G. 158; 1898 C. D. 407.

Adams, In re, 24 App. D. C. 275; 114 O. G. 2093; 1905 C. D. 602.

Adams v. Murphy, 18 App. D. C. 172; 96 O. G. 845; 1901 C. D. 401.

Adams Manuf. Co., Andrew McLean Co. v., 31 App. D. C. 509; 136 O. G. 440.

Aglar, Pickles v., 13 App. D. C. 556; 86 O. G. 346; 1899 C. D. 268.

A. G. Spalding Bros., In re, 27 App. D. C. 314; 123 O. G. 321; 1906 C. D. 674.

Albert, Wickers v., 29 App. D. C. 23; 129 O. G. 1268; 1907 C. D. 599.

Alexander v. Blackman, 26 App. D. C. 541; 121 O. G. 1979; 1906 C. D. 602.

Allen, Millett v., 27 App. D. C. 70; 124 O. G. 1524; 1906 C. D. 752.

Allen, Newcomb Motor Co. v., 30 App. D. C. 464; 130 O. G. 302.

Allen, Rosell v., 16 App. D. C. 559; 92 O. G. 1036; 1900 C. D. 333.

Allen, Steinmetz v., 22 App. D. C. 56; 31 W. L. R. 358; 102 O. G. 231; 1903 C. D. 632.

*Citations are given only after direct title of case.

Allen v. United States ex rel. Lowry, 26 App. D. C. 8; 33 W. L. R. 354. Cited in 26 App. D. C. 399; 28 Ib. 69, 79, 81; 29 Ib. 66. Affirmed in 203 U. S. 476.

Allen v. United States ex rel. Regina Music Box Co., 22 App. D. C. 271; 31 W. L. R. 476, 114; 105 O. G. 747; 1903 C. D. 615.

Allen, United States ex rel. Tuttle v., 35 W. L. R. 50.

Allen, United States ex rel. Steinmetz v., 22 App. D. C. 56; 31 W. L. R. 358; 102 O. G. 231; 1903 C. D. 632. Reversed in 192 U. S. 543.

American Circular Loom Co., In re, 28 App. D. C. 446, 450; 127 O. G. 393.

American Glue Co., In re, 27 App. D. C. 391; 123 O. G. 999; 1906 C. D. 695.

American Stove Co. v. Detroit Stove Works, 31 App. D. C. 304; 134 O. G. 2245; Cited in 31 App. D. C. 585.

Ams, In re, 29 App. D. C. 91; 127 O. G. 3644; 1907 C. D. 532.

Anderson v. Wells, 27 App. D. C. 115; 122 O. G. 3014; 1906 C. D. 667.

Andrew McLean Co. v. Adams Manuf. Co., 31 App. D. C. 509; 136 O. G. 440.

Andrews v. Nilson, 27 App. D. C. 451; 123 O. G. 1667; 1906 C. D. 717. Cited in 29 App. D. C. 484.

Antisdel, Foster v., 14 App. D. C. 552; 88 O. G. 1527; 1899 C. D. 413.

Antisdel, Lloyd v., 17 App. D. C. 490; 95 O. G. 1645; 1901 C. D. 371.

Appeal of Cheneau, 5 App. D. C. 197; 23 W. L. R. 107; 70 O. G. 924; 1895 C. D. 188.

Appeal of Drawbaugh, 3 App. D. C. 236; 22 W. L. R. 352; 67 O. G. 929; 1894 C. D. 297.

Appeal of Forg, 2 App. D. C. 58; 22 W. L. R. 116; 66 O. G. 515; 1894 C. D. 138.

Appeal of Heroult, 5 App. D. C. 90; 23 W. L. R. 72; 70 O. G. 784; 1895 C. D. 177.

Appeal of Messinger, 12 App. D. C. 532; 26 W. L. R. 562; 83 O. G. 1995; 1898 C. D. 506.

Appeal of Schaeffer, 2 App. D. C. 1; 22 W. L. R. 81; 66 O. G. 514; 1894 C. D. 134.

Appert, Parker v., 8 App. D. C. 270; 24 W. L. R. 550; 75 O. G. 1201; 1896 C. D. 371.

Appert v. Schmertz, 13 App. D. C. 117; 84 O. G. 508; 1898 C. D. 524. Cited in 17 App. D. C. 344, 470; 19 Ib. 378; 27 Ib. 296.
Armat, Latham v., 17 App. D. C. 345; 95 O. G. 232; 1901 C. D. 337.
Armstrong, Whitworth Co. v. Norton, 15 App. D. C. 223; 27 W. L. R. 414.
Arnold v. Tyler, 10 App. D. C. 175; 25 W. L. R. 250; 79 O. G. 156; 1897 C. D. 349. Cited in 14 App. D. C. 53; 19 Ib. 384.
Asencio v. Russell, 24 App. D. C. 105; 112 O. G. 955; 1904 C. D. 676.
Ashworth, Munster v., 29 App. D. C. 84; 128 O. G. 2088; 1907 C. D. 556.
Atkins & Co., In re, 29 App. D. C. 385.
Atterbury, Croskey v., 9 App. D. C. 207; 24 W. L. R. 490; 76 O. G. 163; 1896 C. D. 437.
Austin v. Johnson, 18 App. D. C. 83; 95 O. G. 2685; 1901 C. D. 391. Cited in 21 App. D. C. 201, 205; 23 Ib. 194.
Austin, Winslow v., 14 App. D. C. 137; 86 O. G. 2171; 1899 C. D. 301.
Automatic Scale Co., Computing Scale Co. v., 26 App. D. C. 238; 33 W. L. R. 789; 119 O. G. 1586; 1905 C. D. 704. Affirmed in 204 U. S. 609.

Backus Portable Steam Heater Co. v. Simonds, 2 App. D. C. 290; 22 W. L. R. 137; 66 O. G. 1893; 1894 C. D. 211.
Bader v. Vajen, 14 App. D. C. 241; 87 O. G. 1235; 1899 C. D. 329. Cited in 23 App. D. C. 194; 24 Ib. 473; 27 Ib. 522; 28 Ib. 8.
Baker, In re, 26 App. D. C. 363; 121 O. G. 1352; 1906 C. D. 594.
Ball v. Flora, 26 App. D. C. 394; 121 O. G. 2668; 1906 C. D. 618.
Barnett, Couch v., 23 App. D. C. 446; 110 O. G. 1431; 1904 C. D. 650.
Barratt, In re, 11 App. D. C. 177; 25 W. L. R. 532; 79 O. G. 2020; 1897 C. D. 506.
Barratt, In re, 14 App. D. C. 255; 87 O. G. 1075; 1899 C. D. 320.
Barrett, Harter v., 24 App. D. C. 300; 114 O. G. 975; 1905 C. D. 578.

Barstow Stove Co. v. Detroit Stove Works, 31 App. D. C. 304; 134 O. G. 2245.
Basch, Hammond v., 24 App. D. C. 469; 115 O. G. 804; 1905 C. D. 615.
Battle Creek Sanitarium Co. v. Fuller, 30 App. D. C. 411; 134 O. G. 1299.
Bauer v. Crone, 26 App. D. C. 352; 120 O. G. 1824; 1906 C. D. 545.
Beal (U. S. ex rel.) v. Cox, 14 App. D. C. 368; 27 W. L. R. 230.
Beall, Shuman v., 27 App. D. C. 324, 329; 123 O. G. 1664; 1906 C. D. 710.
Beals v. Finkenbiner, 12 App. D. C. 23; 82 O. G. 598; 1898 C. D. 326. Cited in 14 App. D. C. 41, 54; 15 Ib. 27, 572; 17 Ib. 470; 18 Ib. 147; 21 Ib. 96; 26 Ib. 541.
Beclman v. Southgate, 28 App. D. C. 405; 127 O. G. 1254; 1907 C. D. 489.
Bechman v. Wood, 15 App. D. C. 484; 89 O. G. 2459; 1899 C. D. 453. Cited in 16 App. D. C. 138, 572; 17 Ib. 38, 556, 559; 18 Ib. 134; 21 Ib. 201, 205, 206; 24 Ib. 280, 481; 25 Ib. 307; 26 Ib. 394; 28 Ib. 407; 29 Ib. 428; 31 Ib. 210.
Bedford, In re, 14 App. D. C. 376; 87 O. G. 1611; 1899 C. D. 257.
Beech Hill Distilling Co. v. Brown-Forman Co., 30 App. D. C. 485; 134 O. G. 1565.
Bentley, Burton v., 14 App. D. C. 471; 87 O. G. 2326; 1899 C. D. 393.
Bernard, Huebel v., 15 App. D. C. 510; 90 O. G. 751; 1900 C. D. 223.
Bernardin (U. S. ex rel.) v. Butterworth, 169 U. S. 600; 42 L. Ed. 873; 18 S. Ct. 441; 82 O. G. 1991; 1898 C. D. 403. Reversing 10 App. D. C. 294.
Bernardin, Northall v., 7 App. D. C. 452; 24 W. L. R. 103; 114 O. G. 764; 1896 C. D. 183.
Bernardin (U. S. ex rel.) v. Duell, 13 App. D. C. 379. Affirmed in 172 U. S. 576.
Bernardin (U. S. ex rel.) v. Seymour, 11 App. D. C. 91; 25 W. L. R. 513; 79 O. G. 1190; 1897 C. D. 428.
Bernardin (U. S. ex rel.) v. Seymour, 10 App. D. C. 294; 25 W. L. R. 515; 79 O. G. 1190; 1897 C. D. 428. Reversed in 169 U. S. 600.

Beswick's Appeal, In re, 16 App. D. C. 345; 91 O. G. 1436; 1900 C. D. 294. Cited in 19 App. D. C. 400.
Bigbie Bros. & Co., Bluthenthal & Bickart v., 30 App. D. C. 118; 130 O. G. 2068.
Blackford v. Wilder, 21 App. D. C. 1; 104 O. G. 578; 1903 C. D. 567. Cited in 21 App. D. C. 85; 23 Ib. 254; 25 Ib. 237; 28 Ib. 533, 538; 29 Ib. 174.
Blackford v. Wilder, 28 App. D. C. 535; 127 O. G. 1255; 1907 C. D. 491. Cited in 29 App. D. C. 425, 426, 428, 430; 31 Ib. 172.
Blackman, Alexander v., 26 App. D. C. 541; 121 O. G. 1979; 1906 C. D. 602.
Blake, Fenner v., 30 App. D. C. 507; 134 O. G. 2244.
Bleistein v. Donaldson Lithographing Co., 188 U. S. 239; 31 W. L. R. 99.
Bliss v. McElroy, 29 App. D. C. 120; 128 O. G. 458; 1907 C. D. 537. Cited in 31 App. D. C. 625.
Bliss, United States ex rel. Wedderburn v., 12 App. D. C. 485; 26 W. L. R. 293; 83 O. G. 296; 1898 C. D. 413.
Blood, Brown v., 22 App. D. C. 216; 105 O. G. 976; 1903 C. D. 617.
Bluthenthal & Bickart v. Bigbie Bros. & Co., 30 App. D. C. 118; 130 O. G. 2068.
Boch, Locke v., 17 App. D. C. 75; 93 O. G. 1722; 1900 C. D. 399.
Bollee, McMulkin v., 30 App. D. C. 112; 130 O. G. 1691.
Bossart v. Pohl, 31 App. D. C. 218; 135 O. G. 453.
Bourn v. Hill, 27 App. D. C. 291; 123 O. G. 1284; 1906 C. D. 699.
Bowes, Howard v., 31 App. D. C. 619; 137 O. G. 733.
Boyce, Fowler v., 27 App. D. C. 48, 55; 121 O. G. 1014; 1906 C. D. 580.
Bradshaw, Neilson v., 16 App. D. C. 92; 91 O. G. 644; 1900 C. D. 265.
Braunstein v. Holmes, 30 App. D. C. 328; 133 O. G. 1937.
Breen & Kennedy, Buchanan-Anderson-Nelson Co. v., 27 App. D. C. 573; 124 O. G. 322; 1906 C. D. 750.
Breul v. Smith, 10 App. D. C. 180; 25 W. L. R. 198; 78 O. G. 1906; 1897 C. D. 332. Cited in 14 App. D. C. 135; 16 Ib. 566; 21 Ib. 10; 29 Ib. 70.
Briede, In re, 27 App. D. C. 298; 123 O. G. 322; 1906 C. D. 677.

Briggs, In re, 9 App. D. C. 478; 25 W. L. R. 75; 78 O. G. 169; 1897 C. D. 211. Cited in 14 App. D. C. 184, 477.
Brill v. Washington Railway & Electric Co., 30 App. D. C. 255; 36 W. L. R. 55; 134 O. G. 1563.
Brinkman, Roberts v., 10 App. D. C. 543; 25 W. L. R. 543; 79 O. G. 1190; 1897 C. D. 427.
Brodie (U. S. ex rel.), Seymour v., 10 App. D. C. 567; 25 W. L. R. 183, 253; 79 O. G. 509; 1897 C. D. 372.
Bronson Co. (U. S. ex rel.) v. Duell, 17 App. D. C. 471; 29 W. L. R. 126.
Brooks, Hillard v., 23 App. D. C. 526; 111 O. G. 302; 1904 C. D. 658.
Brooks, Smith v., 24 App. D. C. 75; 112 O. G. 953; 1904 C. D. 672.
Brown v. Blood, 22 App. D. C. 216; 105 O. G. 976; 1903 C. D. 617. Cited in 24 App. D. C. 270.
Brown, Prindle v., 24 App. D. C. 114; 112 O. G. 957; 1904 C. D. 680.
Brown, Rousseau v., 21 App. D. C. 73; 104 O. G. 1120; 1903 C. D. 587.
Brown, Traver v., 14 App. D. C. 34; 1899 C. D. 296.
Brown-Forman Co. v. Beech Hill Distilling Co., 30 App. D. C. 485; 134 O. G. 1565.
Browning, Luger v., 21 App. D. C. 201; 104 O. G. 1123; 1903 C. D. 593.
Bryant, In re, 9 App. D. C. 447; 24 W. L. R. 826; 77 O. G. 1599; 1896 C. D. 648.
Buchanan-Anderson-Nelson Co. v. Breen & Kennedy, 27 App. D. C. 573; 1906 C. D. 750; 124 O. G. 322. Cited in 28 App. D. C. 456.
Buffalo Pitts Co. v. Duell, 28 W. L. R. 789; 93 O. G. 1491; 1900 C. D. 397.
Buhoup, Hein v., 11 App. D. C. 293; 25 W. L. R. 686; 81 O. G. 2088; 1897 C. D. 772.
Bulkley v. Butterworth, 81 O. G. 505; 1897 C. D. 685.
Bundy v. United States ex rel. Darling, 25 App. D. C. 459; 33 W. L. R. 434.
Burkholder, Richards v., 29 App. D. C. 485; 128 O. G. 2533; 1907 C. D. 563.
Burr v. Ford, 5 App. D. C. 26; 22 W. L. R. 811; 70 O. G. 275; 1895 C. D, 120, Cited in 15 App. D. C. 27.

Burson v. Vogel, 29 App. D. C. 388; 131 O. G. 942; 1907 C. D. 669.
Burt, Matthes v., 24 App. D. C. 265; 114 O. G. 764; 1905 C. D. 574.
Burton v. Bentley, 14 App. D. C. 471; 87 O. G. 2326; 1899 C. D. 393.
Busch v. Jones, 16 App. D. C. 23; 28 W. L. R. 535. Reversed in 184 U. S. 598.
Busch v. Jones, 184 U. S. 598; 46 L. Ed. 707; 22 S. Ct. 511; 99 O. G. 229; 1902 C. D. 585. Cited in 122 Fed. R. 866; 124 Ib. 83.
Busell, Glidden v., 5 App. D. C. 480; 23 W. L. R. 485.
Butterfield, In re, 23 App. D. C. 84; 108 O. G. 1589; 1904 C. D. 585.
Butterworth, Bulkley v., 81 O. G. 505; 1897 C. D. 685.
Butterworth, Bernardin v., 169 U. S. 600; 82 O. G. 1991; 1898 C. D. 403.

Cain v. Park, 14 App. D. C. 42; 86 O. G. 797; 1899 C. D. 278. Cited in 15 App. D. C. 109; 23 Ib. 375; 25 Ib. 237; 28 Ib. 435; 31 Ib. 276, 303.
Calm, Belt & Co., In re, 27 App. D. C. 173; 122 O. G. 354; 1906 C. D. 627.
Carlton Importation Co., Gaines v., 27 App. D. C. 571; 123 O. G. 1994; 190 C. D. 731.
Carpenter, In re, 24 App. D. C. 110; 112 O. G. 503; 1904 C. D. 669.
Carroll v. Hallwood, 31 App. D. C. 165; 135 O. G. 896.
Carty v. Kellogg, 7 App. D. C. 542; 24 W. L. R. 106; 74 O. G. 657; 1896 C. D. 188. Cited in 14 App. D. C. 46; 17 Ib. 561; 19 Ib. 384.
Case v. Murphey, 31 App. D. C. 245; 136 O. G. 228.
Chase, La Flare v., 8 App. D. C. 83; 24 W. L. R. 232; 80 O. G. 83; 1896 C. D. 285.
Chase and McKenzie, In re, 31 App. D. C. 154; 135 O. G. 895.
Cheneau, Appeal of, In re, 5 App. D. C. 197; 23 W. L. R. 107; 70 O. G. 924; 1895 C. D. 188.
Cherney v. Clauss, 25 App. D. C. 15; 116 O. G. 597; 1905 C. D. 635. Cited in 27 App. D. C. 291.
Christensen v. Ellis, 17 App. D. C. 498; 94 O. G. 2561; 1901 C. D. 326. Cited in 18 App. D. C. 401; 21 Ib. 64; 27 Ib. 567.

Christensen v. Noyes, 15 App. D. C. 94; 90 O. G. 227; 1900 C. D. 212. Cited in 24 App. D. C. 270; 31 Ib. 301.
Clark, Dancy v., 24 App. D. C. 487; 33 W. L. R. 18.
Clark Publishing Co., United States Playing Card Co. v., 30 App. D. C. 208; 132 O. G. 681.
Clauss v. Cherney, 25 App. D. C. 15; 116 O. G. 597; 1905 C. D. 635.
Cleal, McCormick v., 12 App. D. C. 335; 83 O. G. 1514; 1898 C. D. 492.
Cleaveland v. Wright, 79 O. G. 866; 1897 C. D. 413.
Cleveland v. Wilkin, 27 App. D. C. 311; 123 O. G. 1286; 1908 C. D. 703.
Clifford v. Newell, 31 App. D. C. 195; 135 O. G. 1361.
Clifford v. Rose, 31 App. D. C. 195; 135 O. G. 1361.
Clunies, In re, 28 App. D. C. 18; 123 O. G. 2631; 1906 C. D. 740.
Cobb v. Goebel, 23 App. D. C. 75; 108 O. G. 1591; 1904 C. D. 589.
Coffee v. Guerrant, 3 App. D. C. 497; 22 W. L. R. 461; 68 O. G. 279; 1894 C. D. 384. Cited in 14 App. D. C. 41; 17 Ib. 343; 18 Ib. 138; 24 Ib. 141; 29 Ib. 394.
Colhoun v. Hodgson, 5 App. D. C. 21; 22 W. L. R. 810; 70 O. G. 276; 1895 C. D. 122. Cited in 10 App. D. C. 155; 14 Ib. 231; 27 Ib. 319.
Colton, In re, 21 App. D. C. 17; 104 O. G. 577; 1903 C. D. 566.
Columbia National Sand Dredging Co. v. Miller, 20 App. D. C. 245; 30 W. L. R. 469.
Columbia Phonograph Co., Whitson v., 18 App. D. C. 565; 29 W. L. R. 804; 98 O. G. 418; 1902 C. D. 497.
Computing Scale Co. of America v. Automatic Scale Co., 26 App. D. C. 238; 33 W. L. R. 789; 119 O. G. 1586; 1905 C. D. 704. Affirmed in 204 U. S. 609.
Cook, McBerty v., 16 App. D. C. 133; 90 O. G. 2295; 1900 C. D. 248.
Cooke, Jones v., 25 App. D. C. 529; 117 O. G. 1493; 1905 C. D. 689.
Copeland, Robinson v., 24 App. D. C. 68; 112 O. G. 501; 1904 C. D. 664.
Corner v. Kyle, 24 App. D. C. 291; 114 O. G. 2092; 1905 C. D. 599.
Corry v. McDermott, 25 App. D. C. 305; 117 O. G. 279; 1905 C. D. 668.

Couch v. Barnett, 23 App. D. C. 446; 110 O. G. 1431; 1904 C. D. 650. Cited in 24 App. D. C. 466.
Cowan, Feinberg v., 29 App. D. C. 80; 128 O. G. 889; 1907 C. D. 546.
Crescent Typewriter Supply Co., In re, 30 App. D. C. 324; 133 O. G. 231.
Creveling, In re, 25 App. D. C. 530; 117 O. G. 1167; 1905 C. D. 684.
Cromwell, Gedge v., 19 App. D. C. 1902; 98 O. G. 1486; 1902 C. D. 514.
Crone, Bauer v., 26 App. D. C. 352; 120 O. G. 1824; 1906 C. D. 545.
Cronemeyer, Lewis v., 29 App. D. C. 174; 130 O. G. 300; 1907 C. D. 638.
Croskey v. Atterbury, 9 App. D. C. 207; 24 W. L. R. 490; 76 O. G. 163; 1896 C. D. 437. Cited in 13 App. D. C. 564.
Cross v. Phillips, 14 App. D. C. 228; 87 O. G. 1399; 1899 C. D. 342. Cited in 24 App. D. C. 305, 469; 24 Ib. 310, 472; 26 Ib. 64, 354; 27 Ib. 522; 28 Ib. 8; 29 Ib. 139.
Cummings, McKenzie v., 24 App. D. C. 137; 112 O. G. 148; 1904 C. D. 683.
Cummings, Viele v., 30 App. D. C. 455; 134 O. G. 777.
Cunningham, In re, 21 App. D. C. 29; 102 O. G. 824; 1903 C. D. 524.
Curtis, Turnbull v., 27 App. D. C. 567; 123 O. G. 2312; 1906 C. D. 732.
Cushman v. Lines, 10 App. D. C. 156; 25 W. L. R. 204; 78 O. G. 2051; 1897 C. D. 346. Cited in 14 App. D. C. 135; 16 Ib. 566; 17 Ib. 554.
Cutler v. Leonard, 31 App. D. C. 297; 136 O. G. 438.

Dale, Weeks v., 30 App. D. C. 498; 135 O. G. 218.
Dancy v. Clark, 24 App. D. C. 487; 33 W. L. R. 18. Cited in 25 App. D. C. 459.
Darling, Bundy v., 25 App. D. C. 459; 33 W. L. R. 434.
Darnell v. Grant, 16 App. D. C. 589; 92 O. G. 557; 1900 C. D. 329.
Dashiell v. Tasker, 21 App. D. C. 64; 103 O. G. 2174; 1903 C. D. 551. Cited in 24 App. D. C. 285; 29 Ib. 179.
Davenport, In re. 23 App. D. C. 370; 110 O. G. 2017; 1904 C. D. 653.

Davis v. Garrett, 28 App. D. C. 9; 123 O. G. 1991; 1906 C. D. 724.
Davis v. Horton, 31 App. D. C. 601; 136 O. G. 1768.
Davis, Mead v., 31 App. D. C. 590; 136 O. G. 2001.
Dean, Furman v., 24 App. D. C. 277; 114 O. G. 1552; 1905 C. D. 582.
Dean, Hansen v., 29 App. D. C. 112; 129 O. G. 483; 1907 C. D. 583.
Dean, Lattig v., 25 App. D. C. 591; 117 O. G. 1798; 1905 C. D. 698.
Decker, Marvel v., 13 App. D. C. 562; 86 O. G. 348; 1899 C. D. 271.
De Ferranti v. Lyndmark, 30 App. D. C. 417; 134 O. G. 515.
Denton, In re, 12 App. D. C. 504; 83 O. G. 1347; 1898 C. D. 483.
De Schweinitz, Petrie v., 19 App. D. C. 386; 99 O. G. 1387; 1902 C. D. 534.
Detroit Stove Works, American Stove Co. v., 31 App. D. C. 304; 134 O. G. 2245.
Detroit Stove Works, Barstow Stove Co. v., 31 App. D. C. 304; 134 O. G. 2245.
De Wallace v. Scott, 15 App. D. C. 157; 88 O. G. 1704; 1899 C. D. 416. Cited in 17 App. D. C. 504; 19 Ib. 389; 21 Ib. 212.
Dickey v. Fleming, 12 App. D. C. 509; 83 O. G. 1348; 1898 C. D. 487. Cited in 14 App. D. C. 54.
Dickinson, Jenner v., 25 App. D. C. 316; 117 O. G. 600; 1905 C. D. 672.
Dickinson, Thibodeau v., 25 App. D. C. 316; 117 O. G. 600; 1905 C. D. 672.
Dilg, In re, 25 App. D. C. 9; 115 O. G. 1067; 1905 C. D. 620.
Doble, Henry v., 27 App. D. C. 33; 122 O. G. 1398; 1906 C. D. 654.
Dodge v. Fowler, 11 App. D. C. 592; 24 W. L. R. 477; 82 O. G. 595; 1898 C. D. 320. Cited in 12 App. D. C. 341; 14 Ib. 240; 17 Ib. 555; 19 Ib. 390; 24 Ib. 485; 26 Ib. 354; 28 Ib. 429.
Dodge, Fowler v., 14 App. D. C. 477; 87 O. G. 895; 1899 C. D. 316.
Dodge, Seeberger v., 24 App. D. C. 476; 114 O. G. 2382; 1905 C. D. 603.

Dolan, Shaffer v., 23 App. D. C. 79; 108 O. G. 2146; 1904 C. D. 592.
Donaldson Lithographing Co., Bleistein v., 188 U. S. 239; 31 W. L. R. 99.
Donnelly, Wyman v., 21 App. D. C. 81; 104 O. G. 310; 1903 C. D. 556.
Dover, Greenwood v., 23 App. D. C. 251; 109 O. G. 2172; 1904 C. D. 630.
Downing, Koppel v., 24 W. L. R. 342.
Downing, Koppel v., 11 App. D. C. 93; 25 W. L. R. 511.
Doyle v. McRoberts, 10 App. D. C. 445; 25 W. L. R. 574; 79 O. G. 1029; 1897 C. D. 413. Cited in 12 App. D. C. 529; 14 Ib. 53; 15 Ib. 504; 16 Ib. 572; 17 Ib. 38, 351, 555; 21 Ib. 205; 27 Ib. 228; 28 Ib. 77; 29 Ib. 65.
Draper, In re, 10 App. D. C. 545; 25 W. L. R. 531; 79 O. G. 864; 1897 C. D. 407.
Drawbaugh, Ex parte, 2 App. D. C. 404; 66 O. G. 1451; 1894 C. D. 192.
Drawbaugh, Appeal of, 3 App. D. C. 236; 22 W. L. R. 352; 67 O. G. 929; 1894 C. D. 297.
Drawbaugh, In re, 9 App. D. C. 219; 24 W. L. R. 694; 77 O. G. 313; 1896 C. D. 527.
Drewson, Sherwood v., 29 App. D. C. 161; 130 O. G. 657; 1907 C. D. 642.
Dries, Ex parte, 3 App. D. C. 165; 22 W. L. R. 301.
Droop, In re, 30 App. D. C. 334; 133 O. G. 517.
Duell, United States ex rel. Barnardin v., 13 App. D. C. 379. Affirmed in 172 U. S. 576.
Duell, United States ex rel. Bronson Co. v., 17 App. D. C. 471; 29 W. L. R. 126.
Duell, United States ex rel. Buffalo Pitts Co. v., 28 W. L. R. 789; 93 O. G. 1491; 1900 C. D. 397.
Duell, United States ex rel. New York Condensed Milk Co. v., 28 W. L. R. 789.
Duell, United States ex rel. Stapleton v., 17 App. D. C. 575; 29 W. L. R. 156; 95 O. G. 1049; 1901 C. D. 359.
Duff v. Latshaw, 31 App. D. C. 255; 136 O. G. 658.
Dunbar v. Schellenger, 29 App. D. C. 129; 128 O. G. 2837; 1907 C. D. 567.
Duncan, In re, 28 App. D. C. 457; 126 O. G. 2592; 1907 C. D. 460.

Duncan, Westinghouse v., 2 App. D. C. 131; 22 W. L. R. 83; 66 O. G. 1009; 1894 C. D. 170.
Durham v. Seymour, 6 App. D. C. 79; 23 W. L. R. 273; 71 O. G. 601; 1895 C. D. 307. Dismissed in 161 U. S. 235. Cited in 8 App. D. C. 275; 9 Ib. 482; 10 Ib. 170, 185; 12 Ib. 218; 14 Ib. 184; 20 Ib. 298; 26 Ib. 315; 27 Ib. 19, 70.
Durham v. Seymour, 161 U. S. 235; 40 L. Ed. 682; 16 S. Ct. 452. Cited in 123 Fed. R. 19; 163 U. S. 321; 168 U. S. 435.
Durham v. Seymour, 10 App. D. C. 274; 25 W. L. R. 9.
Durkee v. Winquist, 31 App. D. C. 248; 136 O. G. 229.
Duryea v. Rice, 28 App. D. C. 423; 126 O. G. 1357; 1907 C. D. 443. Cited in 31 App. D. C. 209, 275, 302.
Dyson, Fowler v., 27 App. D. C. 52; 121 O. G. 1015; 1906 C. D. 583.

Eastman v. Houston, 18 App. D. C. 135; 95 O. G. 2064; 1901 C. D. 386.
Eclipse Bicycle Co. v. Farrow, 16 App. D. C. 468; 28 W. L. R. 551; 93 O. G. 1312; 1900 C. D. 389. Cited in 23 App. D. C. 412; 199 U. S. 582, 584.
Eclipse Bicycle Co., Farrow v., 18 App. D. C. 101; 29 W. L. R. 218. Cited in 23 App. D. C. 412.
Eclipse Bicycle Co. v. Farrow, 23 App. D. C. 411; 32 W. L. R. 265. Reversed in 199 U. S. 581.
Eclipse Bicycle Co. v. Farrow, 24 App. D. C. 311; 32 W. L. R. 265.
Edison, In re, 30 App. D. C. 321; 133 O. G. 1190.
Edison, Macdonald v., 21 App. D. C. 527; 105 O. G. 1263; 1903 C. D. 622.
Edna Smelting & Refining Co. v. Nathan Manuf. Co., 30 App. D. C. 487; 135 O. G. 664.
Ehret v. Star Brewing Co., 31 App. D. C. 507; 136 C. D. 1533.
Einstein v. Sawhill, 2 App. D. C. 10; 22 W. L. R. 89; 65 O. G. 1918; 1893 C. D. 677.
Electrolibration Co., Sanche v., 4 App. D. C. 453; 22 W. L. R. 769.
Ellis, Christensen v., 17 App. D. C. 498; 94 O. G. 2561; 1901 C. D. 326.
Elwell, Ruete v., 15 App. D. C. 21; 87 O. G. 2119; 1899 C. D. 379.
Esty v. Newton, 14 App. D. C. 50; 86 O. G. 799; 1899 C. D. 284. Cited in 16 App. D. C. 139; 17 Ib. 470; 18 Ib. 146,

147; 19 Ib. 380; 20 Ib. 261; 22 Ib. 218; 24 Ib. 80; 25 Ib. 313; 27 Ib. 291.
Evered, Pelton v., 77 O. G. 1600; 1896 C. D. 651.
Everson (U. S. ex rel.) v. Young, 26 W. L. R. 546.
Ex parte Drawbaugh, 2 App. D. C. 404; 66 O. G. 1451; 1894 C. D. 192.
Ex parte Dries, 3 App. D. C. 165; 22 W. L. R. 301.
Ex parte Frasch, 192 U. S. 566; 109 O. G. 554; 1904 C. D. 716.

Faber, In re, 31 App. D. C. 531; 136 O. G. 229.
Farrow, Eclipse Bicycle Co. v., 16 App. D. C. 468; 28 W. L. R. 551.
Farrow v. Eclipse Bicycle Co., 18 App. D. C. 101; 29 W. L. R. 218. Cited in 199 U. S. 585.
Farrow, Eclipse Bicycle Co. v., 23 App. D. C. 411; 32 W. L. R. 265. Reversed in 199 U. S. 581.
Farrow, Eclipse Bicycle Co. v., 24 App. D. C. 311; 32 W. L. R. 265.
Fay, In re, 15 App. D. C. 515; 90 O. G. 1157; 1900 C. D. 232.
Fefel v. Stocker, 17 App. D. C. 317; 94 O. G. 433; 1901 C. D. 269. Cited in 18 App. D. C. 141-7; 19 Ib. 378, 380; 24 Ib. 468; 26 Ib. 409.
Feinberg v. Cowan, 29 App. D. C. 80; 128 O. G. 889; 1907 C. D. 546.
Felbel, Oliver v., 20 App. D. C. 255; 100 O. G. 2384; 1902 C. D. 565.
Fenner v. Blake, 30 App. D. C. 507; 134 O. G. 2244.
Fenton Metallic Manuf. Co. v. Office Specialty Manuf. Co., 12 App. D. C. 201. Reversed in 174 U. S. 492. Cited in 14 App. D. C. 185.
Fetzer, McKillop v., 31 App. D. C. 586; 136 O. G. 1770.
Finkenbiner, Beals v., 12 App. D. C. 23; 82 O. G. 598; 1898 C. D. 326.
Fitzgerald v. Wiley, 22 App. D. C. 329; 31 W. L. R. 491.
Flather v. Weber, 21 App. D. C. 179; 104 O. G. 712; 1903 C. D. 561. Cited in 28 App. D. C. 440; 29 Ib. 109.
Fleming, Dickey v., 12 App. D. C. 509; 83 O. G. 1348; 1898 C. D. 487.
Flora, Ball v., 26 App. D. C. 394; 121 O. G. 2668; 1906 C. D. 621.
Flora v. Powrie, 23 App. D. C. 195; 109 O. G. 2443; 1904 C. D. 636. Cited in 26 App. D. C. 541; 27 Ib. 228; 28 Ib. 6.

Ford, Burr v., 5 App. D. C. 26; 22 W. L. R. 811; 70 O. G. 275; 1895 C. D. 120.
Forg, Appeal of, 2 App. D. C. 58: 22 W. L. R. 116; 66 O. G. 515; 1894 C. D. 138.
Foster v. Antisdel, 14 App. D. C. 552; 88 O. G. 1527; 1899 C. D. 413. Cited in 15 App. D. C. 504; 17 Ib. 491; 21 Ib. 205, 211; 22 Ib. 219; 24 Ib. 117; 29 Ib. 136.
Foster, In re, 19 App. D. C. 391.
Fowler v. Boyce, 27 App. D. C. 48, 55; 121 O. G. 1014; 122 O. G. 1726; 1906 C. D. 580, 659. Cited in 28 App. D. C. 8.
Fowler v. Commissioner of Patents, 62 O. G. 1968; 1893 C. D. 268.
Fowler, Dodge v., 11 App. D. C. 592; 24 W. L. R. 477; 82 O. G. 595; 1898 C. D. 320. Cited in 13 App. D. C. 565.
Fowler v. Dodge, 14 App. D. C. 477; 87 O. G. 895. Cited in 16 App. D. C. 565; 28 Ib. 429.
Fowler v. Dyson, 27 App. D. C. 52; 121 O. G. 1015; 1906 C. D. 583.
Fowler v. McBerty, 27 App. D. C. 41, 46; 121 O. G. 1015; 1906 C. D. 585. Cited in 27 App. D. C. 52.
Frasch, Ex parte, 192 U. S. 566; 109 O. G. 554; 1904 C. D. 716.
Frasch, In re, 20 App. D. C. 298; 100 O. G. 1977; 1902 C. D. 560.
Frasch, In re, 27 App. D. C. 25; 122 O. G. 1048; 1906 C. D. 648. Dismissed in 211 U. S. 1.
Frasch v. Moore, 211 U. S. 1; 137 O. G. 230.
Freeman, Garrels v., 21 App. D. C. 207; 103 O. G. 1683; 1903 C. D. 542.
Freeman, In re, 23 App. D. C. 226; 109 O. G. 1339; 1904 C. D. 619. Cited in 26 App. D. C. 366.
French v. Halcomb, 26 App. D. C. 307; 120 O. G. 1824; 1906 C. D. 547.
Fuller, Battle Creek Sanitarium Co. v., 30 App. D. C. 411; 134 O. G. 1299.
Fullman, Herman v., 23 App. D. C. 259; 109 O. G. 1888; 1904 C. D. 625.
Funk v. Haines, 20 App. D. C. 293; 100 O. G. 1766; 1902 C. D. 559.
Funk v. Haines and Matteson, 20 App. D. C. 285; 100 O. G. 1764; 1902 C. D. 553. Cited in 26 App. D. C. 409; 29 Ib. 395.

Funk v. Whitely, 25 App. D. C. 313; 117 O. G. 280; 1905 C. D. 670. Cited in 28 App. D. C. 28.
Furman v. Dean, 24 App. D. C. 277; 114 O. G. 1552; 1905 C. D. 582. Cited in 31 App. D. C. 211.
Fynn, Kelly v., 16 App. D. C. 573; 92 O. G. 1237; 1900 C. D. 339.

Gaines v. Carlton Importation Co., 27 App. D. C. 571; 123 O. G. 1994; 1906 C. D. 731. Cited in 27 App. D. C. 573; 28 Ib. 456.
Gaines v. Knecht, 27 App. D. C. 530; 123 O. G. 657; 1906 C. D. 690. Cited in 27 App. D. C. 571.
Gallagher v. Hastings, 21 App. D. C. 88; 103 O. G. 1165; 1903 C. D. 531. Cited in 21 App. D. C. 211; 23 Ib. 258; 25 Ib. 305; 26 Ib. 541; 27 Ib. 228; 28 Ib. 440, 482; 29 Ib. 109.
Gallagher v. Hein, 25 App. D. C. 77; 115 O. G. 1330; 1905 C. D. 624. Cited in 25 App. D. C. 90; 26 Ib. 336; 27 Ib. 451; 29 Ib. 14, 141, 394.
Gallagher v. Hein. See Ocumpaugh v. Norton.
Garrels v. Freeman, 21 App. D. C. 207; 103 O. G. 1683; 1903 C. D. 542. Cited in 26 App. D. C. 307; 27 Ib. 527.
Garrett, Davis v., 28 App. D. C. 9; 123 O. G. 1991; 1906 C. D. 724.
Garrett, In re, 27 App. D. C. 19; 122 O. G. 1047; 1906 C. D. 645.
Geen, Kreag v., 28 App. D. C. 437; 127 O. G. 1581; 1907 C. D. 502.
Gedge v. Cromwell, 19 App. D. C. 192; 98 O. G. 1486; 1902 C. D. 514. Cited in 21 App. D. C. 208; 27 Ib. 228; 28 Ib. 440, 478; 29 Ib. 108.
Getz, Jackson v., 16 App. D. C. 343; 91 O. G. 1036; 1900 C. D. 284.
Gibbons v. Peller, 28 App. D. C. 530; 127 O. G. 3643; 1907 C. D. 529.
Giles, Giles Remedy Co. v., 26 App. D. C. 375; 120 O. G. 1826; 1906 C. D. 552.
Giles Remedy Co. v. Giles, 26 App. D. C. 375; 120 O. G. 1826; 1906 C. D. 552.
Gillette, Sendelbach v., 22 App. D. C. 168; 109 O. G. 276; 1904 C. D. 597.
Gilman v. Hinson, 26 App. D. C. 409; 122 O. G. 731; 1906 C. D. 634. Cited in 29 App. D. C. 13.

Glenn v. Adams, 12 App. D. C. 175; 83 O. G. 158; 1898 C. D. 407. Cited in 18 App. D. C. 146.
Glidden v. Busell, 5 App. D. C. 480; 23 W. L. R. 485.
Glidden v. Noble, 5 App. D. C. 480; 23 W. L. R. 485; 71 O. G. 141; 1895 C. D. 273.
Goebel, Cobb v., 23 App. D. C. 75; 108 O. G. 1591; 1904 C. D. 589.
Goolman v. Hobart, 31 App. D. C. 286; 135 O. G. 1123.
Gordon v. Wentworth, 31 App. D. C. 150; 135 O. G. 1125.
Grant, Darnell v., 16 App. D. C. 589; 92 O. G. 557; 1900 C. D. 329.
Greenwood v. Dover, 23 App. D. C. 251; 109 O. G. 2172; 1904 C. D. 630. Cited in 24 App. D. C. 304; 26 Ib. 541.
Griffin v. Swenson, 15 App. D. C. 135; 89 O. G. 919; 1899 C. D. 440. Cited in 17 App. D. C. 504; 19 Ib. 390; 29 Ib. 403.
Griswold, In re, 9 App. D. C. 496; 25 W. L. R. 84; 78 O. G. 482; 1897 C. D. 248.
Guerrant, Coffee v., 3 App. D. C. 497; 68 O. G. 279; 1894 C. D. 384.
Guilbert v. Killinger, 13 App. D. C. 107; 84 O. G. 313; 1898 C. D. 522. Cited in 29 App. D. C. 179.
Gueniffet v. Wictorsohn, 30 App. D. C. 432; 134 O. G. 779.

Haines, Funk v., 20 App. D. C. 293; 100 O. G. 1766; 1902 C. D. 559.
Haines & Matteson, Funk v., 20 App. D. C. 285; 100 O. G. 1764; 1902 C. D. 553.
Halcomb, French v., 26 App. D. C. 307; 120 O. G. 1824; 1906 C. D. 547.
Hall & Ruckel v. Ingram, 28 App. D. C. 454; 126 O. G. 759; 1907 C. D. 441.
Halle, Slaughter v., 21 App. D. C. 19; 102 O. G. 469; 1903 C. D. 519.
Hall's Safe Co. v. Herring-Hall-Marvin Safe Co., 31 App. D. C. 498; 135 O. G. 1804. Cited in 31 App. D. C. 506.
Hallwood v. Carroll, 31 App. D. C. 165; 135 O. G. 896.
Hallwood v. Lalor, 21 App. D. C. 61; 103 O. G. 2173; 1903 C. D. 549. Cited in 24 App. D. C. 290.
Hallwood, McCormick v., 30 App. D. C. 106; 130 O. G. 1487; 1907 C. D. 656.

Hammond v. Basch, 24 App. D. C. 469; 115 O. G. 804; 1905 C. D. 615. Cited in 27 App. D. C. 48, 55, 77, 522; 28 Ib. 8; 29 Ib. 139, 392.
Hansen v. Dean, 29 App. D. C. 112; 129 O. G. 483; 1907 C. D. 583.
Hanson, Lotterhand v., 23 App. D. C. 372; 110 O. G. 861; 1904 C. D. 646.
Hanson, Roe v., 19 App. D. C. 559; 99 O. G. 2550; 1902 C. D. 546.
Harrington, Wurts v., 10 App. D. C. 149; 25 W. L. R. 266; 79 O. G. 337; 1897 C. D. 359.
Harris v. Stern, 22 App. D. C. 164; 105 O. G. 746; 1903 C. D. 612.
Harter v. Barrett, 24 App. D. C. 300; 114 O. G. 975; 1905 C. D. 578.
Hastings, Gallagher v., 21 App. D. C. 88; 103 O. G. 1165; 1903 C. D. 531.
Hauser, Loomis v., 19 App. D. C. 401; 99 O. G. 1172; 1902 C. D. 530.
Hawley, In re, 26 App. D. C. 324; 121 O. G. 691; 1906 C. D. 576.
Hay, Holzendorf v., 20 App. D. C. 576; 30 W. L. R. 825.
Hayes, In re, 27 App. D. C. 393; 123 O. G. 1000; 1906 C. D. 697.
Hebbard, Soley v., 5 App. D. C. 99; 23 W. L. R. 56; 70 O. G. 921; 1895 C. D 182.
Hein v. Bulloup, 11 App. D. C. 293; 25 W. L. R. 686; 81 O. G. 2088; 1897 C. D. 772. Cited in 18 App. D. C. 146.
Hein v. Pungs, 9 App. D. C. 492; 77 O. G. 1600; 1896 C. D. 649.
Hendrickson, Silverman v., 19 App. D. C. 381; 99 O. G. 1171; 1902 C. D. 527.
Henry v. Doble, 27 App. D. C. 33; 122 O. G. 1398; 1906 C. D. 654.
Hepburn, Mason v., 13 App. D. C. 86; 84 O. G. 147; 1898 C. D. 510.
Herbst Importing Co., In re, 30 App. D. C. 297; 134 O. G. 1565.
Herman v. Fullman, 23 App. D. C. 259; 109 O. G. 1888; 1904 C. D. 625. Cited in 24 App. D. C. 259, 481; 28 Ib. 409.
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Herring-Hall-Marvin Safe Co., Hall's Safe Co. v., 31 App. D. C. 498; 135 O. G. 1804.
Hess, Howell v., 28 App. D. C. 167; 34 W. L. R. 639; 132 O. G. 1074.
Hess, Howell v., 30 App. D. C. 194.
Hess, Paul v., 24 App. D. C. 462; 115 O. G. 251; 1905 C. D. 610.
Hewitt, Moore v. 31 App. D. C. 577; 136 O. G. 1535.
Hey, Howard v., 18 App. D. C. 142; 95 O. G. 1647; 1901 C. D. 375.
Hien, Gallagher v., 25 App. D. C. 77; 115 O. G. 1330; 1905 C. D. 624. See Ocumpaugh v. Norton.
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Hildreth, Thibodeau v., 25 App. D. C. 320; 117 O. G. 601; 1905 C. D. 675.
Hill, Bourn v., 27 App. D. C. 291; 123 O. G. 1284; 1906 C. D. 699.
Hill v. Hodge, 12 App. D. C. 528; 83 O. G. 1211; 1898 C. D. 480. Cited in 15 App. D. C. 28; 16 Ib. 567; 17 Ib. 555.
Hill, In re, 26 App. D. C. 318; 121 O. G. 340; 1906 C. D. 572.
Hill v. Parmelee, 9 App. D. C. 503; 25 W. L. R. 3; 78 O. G. 170; 1897 C. D. 214.
Hillard v. Brooks, 23 App. D. C. 526; 111 O. G. 302; 1904 C. D. 658.
Hinson, Gilman v., 26 App. D. C. 409; 122 O. G. 731; 1906 C. D. 634.
Hirner, Kilbourn v., 29 App. D. C. 54; 128 O. G. 1689; 1907 C. D. 552.
Hisey v. Peters, 6 App. D. C. 68; 23 W. L. R. 297; 71 O. G. 892; 1895 C. D. 349. Cited in 10 App. D. C. 153, 179, 183, 467; 11 Ib. 279, 596; 12 Ib. 529; 14 Ib. 53, 135; 15 Ib. 504; 16 Ib. 566, 572; 17 Ib. 38, 351, 555; 18 Ib. 146; 21 Ib. 205, 212; 27 Ib. 234, 293; 28 Ib. 76, 514; 29 Ib. 64.
Hitchcock, Riverside Oil Co. v., 21 App. D. C. 252; 31 W. L. R. 174. Affirmed in 190 U. S. 316.
Hitchcock, West v., 19 App. D. C. 333; 30 W. L. R. 136.
Hobart, Goolman v., 31 App. D. C. 286; 135 O. G. 1123.
Hodge, Hill v., 12 App. D. C. 528; 83 O. G. 1211; 1898 C. D. 480.
Hodges, In re, 28 App. D. C. 525; 128 O. G. 887; 1907 C. D. 543.
Hodgins v. Simpson, 82 O. G. 190; 1898 C. D. 296.

Hodgkinson, Lindmark v., 31 App. D. C. 612; 137 O. G. 228.
Hodgson, Colhoun v., 5 App. D. C. 21; 22 W. L. R. 810; 70 O. G. 276; 1895 C. D. 122.
Hoey, In re, 28 App. D. C. 416; 127 O. G. 2817; 1907 C. D. 516.
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Hoffman, Rolfe v., 26 App. D. C. 336; 121 O. G. 1350; 1906 C. D. 588.
Holmes, Braunstein v., 30 App. D. C. 328; 133 O. G. 1937.
Holsclaw, Sobey v., 28 App. D. C. 65; 126 O. G. 3041; 1907 C. D. 465.
Holt, Ingersoll v., 15 App. D. C. 519; 90 O. G. 2507; 1900 C. D. 253.
Holzendorf (U. S. ex rel.) v. Hay, 20 App. D. C. 576; 30 W. L. R. 825.
Hope v. Voight, 25 App. D. C. 22; 115 O. G. 1585; 1905 C. D. 629.
Hopkins, In re, 29 App. D. C. 118; 128 O. G. 890; 1907 C. D. 549.
Hopkins v. Newman, 30 App. D. C. 402; 134 O. G. 2028.
Horine v. Wende, 29 App. D. C. 415; 129 O. G. 2858; 1907 C. D. 615.
Horton, Davis v., 31 App. D. C. 609; 136 O. G. 1768.
Houghton v. Payne, 31 W. L. R. 176. Cited in 194 U. S. 88.
Houston, Eastman v., 18 App. D. C. 135; 95 O. G. 2064; 1901 C. D. 386.
Howard v. Bowes, 31 App. D. C. 619; 137 O. G. 733.
Howard v. Hey, 18 App. D. C. 142; 95 O. G. 1647; 1901 C. D. 375. Cited in 21 App. D. C. 64, 529; 23 Ib. 74; 27 Ib. 293.
Howard, Whitney v., 21 App. D. C. 218; 104 O. G. 1659; 1903 C. D. 597.
Howell v. Hess, 28 App. D. C. 167; 34 W. L. R. 639; 132 O. G. 1074.
Howell v. Hess, 30 App. D. C. 194.
Huebel v. Bernard, 15 App. D. C. 510; 90 O. G. 751; 1900 C. D. 223. Cited in 29 App. D. C. 108.
Hulett v. Long, 15 App. D. C. 284; 89 O. G. 1141; 1899 C. D. 446. Cited in 17 App. D. C. 555; 24 Ib. 483; 26 Ib. 69.
Hundhausen, Sachs v., 21 App. D. C. 511; 105 O. G. 1534; 1903 C. D. 625.

Hunt v. McCaslin, 10 App. D. C. 527; 25 W. L. R. 528; 79 O. G. 861; 1897 C. D. 401. Cited in 14 App. D. C. 52.
Hunter v. Stikeman, 13 App. D. C. 214; 85 O. G. 610; 1898 C. D. 564. Cited in 15 App. D. C. 161; 17 Ib. 336; 29 Ib. 173.
Huson, Yates v., 8 App. D. C. 93; 24 W. L. R. 214; 74 O. G. 1732; 1896 C. D. 278.

Indian Portland Cement Co., In re, 30 App. D. C. 463; 134 O. G. 518.
Ingersoll v. Holt, 15 App. D. C. 519; 90 O. G. 2507; 1900 C. D. 253.
Ingram, Hall & Ruckel v., 28 App. D. C. 454; 126 O. G. 759; 1907 C. D. 441.
In re Adams, 24 App. D. C. 275; 114 O. G. 2093; 1905 C. D. 602. Cited in 27 App. D. C. 228; 28 Ib. 6, 22.
In re A. G. Spalding & Bros., 27 App. D. C. 314; 123 O. G. 321; 1906 C D. 674.
In re American Circular Loom Co., 28 App. D. C. 446; 126 O. G. 2191; 1907 C. D. 452-481. Cited in 30 App. D. C. 119, 144.
In re American Glue Co., 27 App. D. C. 391; 123 O. G. 999; 1906 C. D. 695.
In re Ams, 29 App. D. C. 91; 127 O. G. 3644; 1907 C. D. 532.
In re Appeal of Chenéau, 5 App. D. C. 197; 70 O. G. 924; 1895 C. D. 188.
In re Appeal of Forg, 2 App. D. C. 58; 66 O. G. 515; 1894 C. D. 138.
In re Appeal of Drawbaugh, 3 App. D. C. 236; 67 O. G. 929; 1894 C. D. 297.
In re Appeal of Heroult, 5 App. D. C. 90; 23 W. L. R. 72; 70 O. G. 784; 1895 C. D. 177.
In re Appeal of Schaeffer, 2 App. D. C. 1; 66 O. G. 514; 1894 C. D. 134.
In re Atkins & Co., 29 App. D. C. 385. Cited in 31 App. D. C. 585.
In re Baker, 26 App. D. C. 363; 121 O. G. 1352; 1906 C. D. 594.
In re Barratt, 11 App. D. C. 177; 25 W. L. R. 532; 79 O. G. 2020; 1897 C. D. 506. Cited in 16 App. D. C. 350, 565.
In re Barratt, 14 App. D. C. 255; 87 O. G. 1075; 1899 C. D. 320.

In re Bedford, 14 App. D. C. 376; 87 O. G. 1611; 1899 C. D. 257.
In re Beswick, 16 App. D. C. 345; 91 O. G. 1436; 1900 C. D. 294. Cited in 19 App. D. C. 400.
In re Briede, 27 App. D. C. 298; 123 O. G. 322; 1906 C. D. 677. Cited in 30 App. D. C. 47, 53.
In re Briggs, 9 App. D. C. 478; 25 W. L. R. 75; 78 O. G. 169; 1897 C. D. 211.
In re Bryant, 9 App. D. C. 447; 24 W. L. R. 826; 77 O. G. 1599; 1896 C. D. 648.
In re Butterfield. 23 App. D. C. 84; 108 O. G. 1589; 1904 C. D. 585.
In re Cahn, Belt & Co., 27 App. D. C. 173; 122 O. G. 354; 1906 C. D. 627. Cited in 27 App. D. C. 391.
In re Carpenter, 24 App. D. C. 110; 112 O. G. 503; 1904 C. D. 669.
In re Chase and McKenzie, 31 App. D. C. 154; 135 O. G. 895.
In re Cheneau, 5 App. D. C. 197; 70 O. G. 924; 1895 C. D. 188.
In re Clunies, 28 App. D. C. 18; 123 O. G. 2631; 1906 C. D. 740.
In re Colton, 21 App. D. C. 17; 104 O. G. 577; 1903 C. D. 566.
In re Crescent Typewriter Supply Co., 30 App. D. C. 324; 133 O. G. 231.
In re Creveling, 25 App. D. C. 530; 117 O. G. 1167; 1905 C. D. 684.
In re Cunningham, 21 App. D. C. 29; 102 O. G. 824; 1903 C. D. 524.
In re Davenport, 23 App. D. C. 370; 110 O. G. 2017; 1904 C. D. 653. Cited in 23 App. D. C. 379.
In re Denton, 12 App. D. C. 504; 83 O. G. 1347; 1898 C. D. 483.
In re Dilg, 25 App. D. C. 9; 115 O. G. 1067; 1905 C. D. 620. Cited in 28 App. D. C. 423.
In re Draper, 10 App. D. C. 545; 25 W. L. R. 531; 79 O. G. 864; 1897 C. D. 407. Cited in 14 App. D. C. 184, 477; 15 Ib. 519.
In re Drawbaugh, 9 App. D. C. 219; 24 W. L. R. 694; 77 O. G. 313; 1896 C. D. 527. Cited in 14 App. D. C. 46.
In re Droop, 30 App. D. C. 334; 133 O. G. 517.
In re Duncan, 28 App. D. C. 457; 126 O. G. 2592.
In re Edison, 30 App. D. C. 321; 133 O. G. 1190.
In re Faber, 31 App. D. C. 531; 136 O. G. 229.
In re Fay, 15 App. D. C. 515; 90 O. G. 1157; 1900 C. D. 232.

In re Forg, 2 App. D. C. 58; 66 O. G. 515; 1894 C. D. 138.
In re Foster, 19 App. D. C. 391.
In re Frasch, 20 App. D. C. 298; 100 O. G. 1977; 1902 C. D. 560.
Cited in 28 App. D. C. 15; 31 Ib. 165.
In re Frasch, 27 App. D. C. 25; 122 O. G. 1048; 1906 C. D. 648.
Dismissed in 211 U. S. 1.
In re Freeman, 23 App. D. C. 226; 109 O. G. 1339; 1904 C. D. 619.
In re Garrett, 27 App. D. C. 19; 122 O. G. 1047; 1906 C. D. 645.
Cited in 27 App. D. C. 77.
In re Griswold, 9 App. D. C. 496; 25 W. L. R. 84; 78 O. G. 482; 1897 C. D. 248. Cited in 14 App. D. C. 184.
In re Hawley, 26 App. D. C. 324; 121 O. G. 691; 1906 C. D. 576.
In re Hayes, 27 App. D. C. 393; 123 O. G. 1000; 1906 C. D. 697.
In re Hein, 79 O. G. 507; 1897 C. D. 367.
In re Herault, 5 App. D. C. 90; 70 O. G. 784; 1895 C. D. 177; 29 App. D. C. 42; 127 O. G. 3217; 1907 C. D. 521.
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Cited in 31 App. D. C. 228.
In re Hill, 26 App. D. C. 318; 121 O. G. 340; 1906 C. D. 572.
In re Hodges, 28 App. D. C. 525; 128 O. G. 887; 1907 C. D. 543.
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In re Indian Portland Cement Co., 30 App. D. C. 463; 134 O. G. 518. Cited in 31 App. D. C. 509.
In re Iwan, 17 App. D. C. 566; 95 O. G. 441; 1901 C. D. 344.
In re Key, 189 U. S. 84.
In re Klemm, 21 App. D. C. 186; 103 O. G. 1682; 1903 C. D. 540.
In re Lacroix, 30 App. D. C. 299; 133 O. G. 2181.
In re Locke, 17 App. D. C. 314; 94 O. G. 432; 1901 C. D. 267.
In re Lowry, 14 App. D. C. 473; 88 O. G. 717; 1899 C. D. 410.
In re McCreery, 12 App. D. C. 517; 79 O. G. 1684; 1897 C. D. 480.
In re McNeill, 20 App. D. C. 294; 100 O. G. 2178; 1902 C. D. 563.
In re McNiel, 28 App. D. C. 461; 126 O. G. 3425; 1907 C. D. 478.
In re Mark Cross Company, 26 App. D. C. 101; 116 O. G. 2534; 1905 C. D. 658.
In re Marshutz, 13 App. D. C. 228; 85 O. G. 778; 1898 C. D. 578. Cited in 20 App. D C. 301; 31 Ib. 165.

In re Marsden, 14 App. D. C. 223; 87 O. G. 1239; 1899 C. D. 339.
In re Mason, 31 App. D. C. 539; 136 O. G. 441.
In re Mergenthaler Linotype Co., 66 O. G. 1311; 1894 C. D. 186.
In re Messinger, 12 App. D. C. 532; 83 O. G. 1995; 1898 C. D. 506.
In re Milans, 31 App. D. C. 269; 135 O. G. 1126.
In re Millett, 18 App. D. C. 186; 96 O. G. 1241; 1901 C. D. 410.
In re Mills, 25 App. D. C. 377; 117 O. G. 904; 1905 C. D. 677.
In re Moeser, 27 App. D. C. 307; 123 O. G. 655; 1906 C. D. 685.
In re Mond's Appeal, 16 App. D. C. 351; 91 O. G. 1437; 1900 C. D. 298.
In re Mower, 15 App. D. C. 144; 88 O. G. 191; 1899 C. D. 395. Cited in 17 App. D. C. 343; 19 Ib. 380; 24 Ib. 270; 26 Ib. 418.
In re Musgrave, 10 App. D. C. 164; 25 W. L. R. 285; 78 O. G. 2047; 1897 C. D. 336. Cited in 11 App. D. C. 590.
In re Mygatt, 26 App. D. C. 366; 121 O. G. 1676; 1906 C. D. 596.
In re National Phonograph Co., 29 App. D. C. 142; 128 O. G. 1295; 1907 C. D. 550.
In re Neill, 11 App. D. C. 584; 100 O. G. 1976; 1902 C. D. 313. Cited in 13 App. D. C. 236; 14 Ib. 237; 16 Ib. 565; 20 Ib. 301; 28 Ib. 15.
In re Nimmy, 13 App. D. C. 565; 86 O. G. 345; 1899 C. D. 265.
In re Pearsall, 31 App. D. C. 265; 135 O. G. 221.
In re Schaeffer, 2 App. D. C. 1; 66 O. G. 514; 1894 O. G. 134.
In re Schraubstadter, 26 App. D. C. 331; 120 O. G. 1167; 1906 C. D. 541.
In re Scott, 25 App. D. C. 307; 117 O. G. 278; 1905 C. D. 665.
In re Seabury, 23 App. D. C. 377; 110 O. G. 2238; 1904 C. D. 655.
In re Sheldon, 31 App. D. C. 201; 135 O. G. 1585.
In re Smith, 14 App. D. C. 181; 87 O. G. 893; 1899 C. D. 313. Cited in 15 App. D. C. 519.
In re Snyder, 10 App. D. C. 140; 25 W. L. R. 142; 78 O. G. 485; 1897 C. D. 254. Cited in 12 App. D. C. 520.
In re Spitteler, 31 App. D. C. 271; 134 O. G. 1301.
In re Standard Underground Cable Co., 27 App. D. C. 320; 123 O. G. 656, 1906 C. D. 687.

In re Starkey, 21 App. D. C. 519; 104 O. G. 2150; 1903 C. D. 607. Cited in 30 App. D. C. 97.
In re Swinburne, 19 App. D. C. 565; 99 O. G. 1625; 1902 C. D. 537.
In re Taylor, 31 App. D. C. 529; 136 O. G. 1767.
In re Thomson, 26 App. D. C. 419; 120 O. G. 2756; 1906 C. D. 566. Cited in 30 App. D. C. 54.
In re Thurston, 26 App. D. C. 315; 120 O. G. 1166; 1906 C. D. 539.
In re Tournier, 17 App. D. C. 481; 94 O. G. 2166; 1901 C. D. 306.
In re Verley, 19 App. D. C. 597; 99 O. G. 2323; 1902 C. D. 543.
In re Volkmann, 28 App. D. C. 441; 126 O. G. 2593.
In re Wagner, 22 App. D. C. 267; 105 O. G. 1783; 1903 C. D. 629. Cited in 31 App. D. C. 275.
In re Warren, 30 App. D. C. 308; 134 O. G. 258.
In re Weber, 26 App. D. C. 29; 117 O. G. 1494; 1905 C. D. 693.
In re Weiss, 21 App. D. C. 214; 103 O. G. 1918; 1903 C. D. 546.
In re Welch, 28 App. D. C. 362; 125 O. G. 2767; 1906 C. D. 758.
In re Weston, 17 App. D. C. 431; 94 O. G. 1786; 1901 C. D. 290. Cited in 21 App. D. C. 31.
In re White, 31 App. D. C. 607; 136 O. G. 1771.
In re Wickers & Furlong, 29 App. D. C. 71; 129 O. G. 2074; 1907 C. D. 608.
In re William Conners Paint Manuf. Co., 27 App. D. C. 389; 123 O. G. 999; 1906 C. D. 696. Cited in 27 App. D. C. 391.
In re Williams, 30 App. D. C. 117; 130 O. G. 1692; 1907 C. D. 664.
International Silverware Co., Rogers v., 30 App. D. C. 97; 129 O. G. 3503.
Iwan, In re, 17 App. D. C. 566; 95 O. G. 441; 1901 C. D. 344.

Jackson v. Getz, 16 App. D. C. 343; 91 O. G. 1036; 1900 C. D. 284.
Jackson v. Knapp, 16 App. D. C. 338; 91 O. G. 1034; 1900 C. D. 281.
Jansson v. Larsson, 30 App. D. C. 203; 132 O. G. 477.
Jenner v. Dickinson, 25 App. D. C. 316; 117 O. G. 600; 1905 C. D. 672. Cited in 25 App. D. C. 320.
Johnson, Austin v., 18 App. D. C. 83; 95 O. G. 2685; 1901 C. D. 391.

Johnson v. Mueser, 29 App. D. C. 61. Cited in 29 App. D. C. 140.
Johnson, Paul v., 23 App. D. C. 187; 109 O. G. 807; 1904 C. D. 610.
Jones, Busch v., 16 App. D. C. 23; 28 W. L. R. 535. Reversed in 184 U. S. 598.
Jones v. Cooke, 25 App. D. C. 524, 529; 117 O. G. 1493; 1905 C. D. 694. Cited in 25 App. D. C. 529.
Jones v. Starr, 26 App. D. C. 64; 117 O. G. 1495; 1905 C. D. 694.
Kelch, Tyler v., 19 App. D. C. 180; 98 O. G. 1282; 1902 C. D. 506.
Kelley, Miller v., 18 App. D. C. 163; 96 O. G. 1038; 1901 C. D. 405.
Kelley, Richenbach v., 17 App. D. C. 333; 94 O. G. 1185; 1901 C. D. 282.
Kellogg, Carty v., 7 App. D. C. 542; 24 W. L. R. 106; 74 O. G. 657; 1896 C. D. 188.
Kelly v. Fynn, 16 App. D. C. 573; 92 O. G. 1237; 1900 C. D. 339. Cited in 21 App. D. C. 527, 530; 24 Ib. 285; 27 Ib. 293; 29 Ib. 179.
Kempshall v. Royce, 29 App. D. C. 181; 129 O. G. 3162; 1907 C. D. 626.
Kenneweg Co., Michigan Condensed Milk Co., 30 App. D. C. 491; 135 O. G. 451.
Kenny, Lotz v., 31 App. D. C. 205; 135 O. G. 1801.
Kentucky Distilleries & W. Co. v. Old Lexington Club Distilling Co., 31 App. D. C. 223; 135 O. G. 220.
Key, In re, 189 U. S. 84.
Kilbourn v. Hirner, 29 App. D. C. 54; 128 O. G. 1689; 1907 C. D. 552.
Killinger, Guilbert v., 13 App. D. C. 107; 84 O. G. 313; 1898 C. D. 522.
Kingsley, Milton v., 7 App. D. C. 531; 24 W. L. R. 18, 129; 75 O. G. 2193; 1896 C. D. 420.
Kinney, Stapleton v., 18 App. D. C. 394; 96 O. G. 1432; 1901 C. D. 414.
Kinsman v. Kinter, 31 App. D. C. 293; 136 O. G. 1532.
Kinsman v. Strohm, 31 App. D. C. 581; 136 O. G. 1769.
Kirkegaard, Ries v., 30 App. D. C. 199; 132 O. G. 845.
Klemm, In re, 21 App. D. C. 186; 103 O. G. 1682; 1903 C. D. 540.

Knapp, Jackson v., 16 App. D. C. 338; 91 O. G. 1034; 1900 C. D. 281.
Knecht, Gaines v., 27 App. D. C. 530; 123 O. G. 657; 1906 C. D. 690.
Koppel v. Downing, 24 W. L. R. 342.
Koppel v. Downing, 11 App. D. C. 93; 25 W. L. R. 511.
Krakau, Ritter v., 24 App. D. C. 271; 114 O. G. 1553; 1905 C. D. 585.
Kreag v. Geen, 28 App. D. C. 437; 127 O. G. 1581; 1907 C. D. 502. Cited in 29 App. D. C. 65; 31 Ib. 589.
Kyle, Corner v., 24 App. D. C. 291; 114 O. G. 2092; 1905 C. D. 599.

Laas v. Scott, 26 App. D. C. 354; 122 O. G. 352; 1906 C. D. 621. Cited in 27 App. D. C. 526; 31 Ib. 599.
Lacroix, In re, 30 App. D. C. 299; 133 O. G. 2181.
LaFlare v. Chase, 8 App. D. C. 83; 24 W. L. R. 232; 80 O. G. 83; 1896 C. D. 285.
Lalor, Hallwood v., 21 App. D. C. 61; 103 O. G. 2173; 1903 C. D. 549.
Lane v. Levi, 21 App. D. C. 168; 31 W. L. R. 131; 104 O. G. 1898; 1903 C. D. 601.
Larkin v. Richardson, 28 App. D. C. 471; 127 O. G. 2394; 1907 C. D. 508.
Larsson, Jansson v., 30 App. D. C. 203; 132 O. G. 477.
Latham v. Armat, 17 App. D. C. 345; 95 O. G. 232; 1901 C. D. 337. Cited in 19 App. D. C. 378; 21 Ib. 201, 205; 24 Ib. 468; 27 Ib. 234.
Latshaw, Duff v., 31 App. D. C. 235; 136 O. G. 658.
Lattig v. Dean, 25 App. D. C. 591; 117 O. G. 1798; 1905 C. D. 698.
Lemp v. Mudge, 24 App. D. C. 283; 114 O. G. 763; 1905 C. D. 571.
Leonard, Cutler v., 31 App. D. C. 297; 136 O. G. 438.
Leslie, Tracy v., 14 App. D. C. 126; 87 O. G. 891; 1899 C. D. 306.
Levi, Lane v., 21 App. D. C. 168; 31 W. L. R. 131; 104 O. G. 1898; 1903 C. D. 601.
Levy & Co. v. Uri, 31 App. D. C. 441; 135 O. G. 1363.
Lewis v. Cronemeyer, 29 App. D. C. 174; 130 O. G. 300; 1907 C. D. 638.

Lewis, Parkes v., 28 App. D. C. 1; 123 O. G. 2313; 1906 C. D. 735.
Liberman v. Williams, 23 App. D. C. 223; 109 O. G. 1610; 1904 C. D. 623.
Linde, Tripler v., 21 App. D. C. 32; 102 O. G. 1297; 1903 C. D. 526.
Lindemeyer v. Hoffman, 18 App. D. C. 1; 95 O. G. 838; 1901 C. D. 353. Cited in 19 App. D. C. 404. 564; 23 Ib. 449; 24 Ib. 466.
Lindmark, De Ferranti v., 30 App. D. C. 417; 134 O. G. 515.
Lindmark v. Hodgkinson, 31 App. D. C. 612; 137 O. G. 228.
Lines, Cushman v., 10 App. D. C. 156; 25 W. L. R. 204; 78 O. G. 2051; 1897 C. D. 346.
Lloyd v. Antisdel, 17 App. D. C. 490; 95 O. G. 1645; 1901 C. D. 371.
Lochren v. United States ex rel. Long, 6 App. D. C. 486; 23 W. L. R. 358.
Locke v. Boch, 17 App. D. C. 75; 93 O. G. 1722; 1900 C. D. 399.
Locke, In re, 17 App. D. C. 314; 94 O. G. 432; 1901 C. D. 267.
Loewer, Ross v., 9 App. D. C. 563; 24 W. L. R. 827; 77 O. G. 2141; 1896 C. D. 665.
Long, Hulett v., 15 App. D. C. 284; 89 O. G. 1141; 1899 C. D. 446.
Long, Lochren v., 6 App. D. C. 486; 23 W. L. R. 358.
Loomis v. Hauser, 19 App. D. C. 401; 99 O. G. 1172; 1902 C. D. 530. Cited in 21 App. D. C. 529; 23 Ib. 449; 24 Ib. 466.
Lotterhand v. Hanson, 23 App. D. C. 372; 110 O. G. 861; 1904 C. D. 646.
Lotz v. Kenny, 31 App. D. C. 205; 135 O. G. 1801. Cited in 31 App. D. C. 275.
Louden, Porter v., 7 App. D. C. 64; 23 W. L. R. 689; 73 O. G. 1551; 1895 C. D. 707.
Lowrie v. Taylor, 27 App. D. C. 522: 123 O. G. 1665; 1906 C. D. 713. Cited in 27 App. D. C. 527; 29 Ib. 392, 394.
Lowrie, Taylor v., 27 App. D. C. 527; 123 O. G. 1991; 1906 C. D. 722.
Lowry, Allen v., 26 App. D. C. 8; 33 W. L. R. 354.
Lowry, In re, 14 App. D. C. 473; 88 O. G. 717; 1899 C. D. 410.
Luger v. Browning, 21 App. D. C. 201; 104 O. G. 1123; 1903 C. D. 593. Cited in 24 App. D. C. 481; 27 Ib. 234; 28 Ib. 4, 78, 409; 31 Ib. 164, 210.
Lyndmark, De Ferranti v., 30 App. D. C. 417.

McArthur v. Mygatt, 31 App. D. C. 514; 136 O. G. 661.
McBerty v. Cook, 16 App. D. C. 133; 90 O. G. 2295; 1900 C. D. 248. Cited in 17 App. D. C. 561; 19 Ib. 380; 20 Ib. 261; 21 Ib. 202, 207; 22 Ib. 218; 24 Ib. 80, 270, 281, 483; 26 Ib. 341, 394; 31 Ib. 164, 210.
McBerty, Fowler v., 27 App. D. C. 41, 46; 121 O. G. 1015; 1906 C. D. 585.
McCaslin, Hunt v., 10 App. D. C. 527; 25 W. L. R. 528; 79 O. G. 861; 1897 C. D. 401.
McCormick v. Cleal, 12 App. D. C. 335; 83 O. G. 1514; 1898 C. D. 492. Cited in 15 App. D. C. 164; 17 App. D. C. 401; 21 Ib. 64; 24 Ib. 484; 27 Ib. 570; 29 Ib. 185.
McCormick v. Hallwood, 30 App. D. C. 106; 130 O. G. 1487; 1907 C. D. 656.
McCormick, Robinson v., 29 App. D. C. 98; 128 O. G. 3289; 1907 C. D. 574.
McCreery, In re, 12 App. D. C. 517; 79 O. G. 1684; 1897 C. D. 480.
McDermott, Corry v., 25 App. D. C. 305; 117 O. G. 279; 1905 C. D. 668.
Macdonald v. Edison, 21 App. D. C. 527; 105 O. G. 1263; 1903 C. D. 622. Cited in 24 App. D. C. 467; 26 Ib. 336; 29 Ib. 141.
McDonald, Orcutt v., 27 App. D. C. 228; 123 O. G. 1287; 1906 C. D. 705.
McElroy, Bliss v., 29 App. D. C. 120; 128 O. G. 458; 1907 C. D. 537.
McHenry, Sharer v., 19 App. D. C. 158; 98 O. G. 585; 1902 C. D. 503.
McIlhenny's Son v. New Iberia Extract Co., 30 App. D. C. 337; 133 O. G. 995.
McInerney, Podlesak v., 26 App. D. C. 399; 120 O. G. 2127; 1906 C. D. 558.
McIntosh, Potter v., 28 App. D. C. 510; 127 O. G. 1995; 1907 C. D. 505.
McKee, Wickers v., 29 App. D. C. 4, 21, 25, 28; 129 O. G. 1269; 1907 C. D. 587, 600, 601, 603.
McKenzie v. Cummings, 24 App. D. C. 137; 112 O. G. 1481; 1904 C. D. 683. Cited in 29 App. D. C. 13, 173.
McKillop v. Fetzer, 31 App. D. C. 586; 136 O. G. 1770.
McKnight v. Pohle, 22 App. D. C. 219; 105 O. G. 977; 1903 C. D. 619.

McKnight v. Pohle, 30 App. D. C. 92; 130 O. G. 2069; 1907 C. D. 666.
McLean Co. v. Adams Manuf. Co., 31 App. D. C. 509; 136 O. G. 440.
McMulkin v. Bollee, 30 App. D. C. 112; 130 O. G. 1691.
McNeill, In re, 20 App. D. C. 294; 100 O. G. 2178; 1902 C. D. 563. Cited in 26 App. D. C. 330.
McNeil, In re, 28 App. D. C. 461; 126 O. G. 3425; 1907 C. D. 478.
McRoberts, Doyle v., 10 App. D. C. 445; 25 W. L. R. 574; 79 O. G. 1029; 1897 C. D. 413.
Maltine Co., Peter Schoenhofen Brewing Co. v., 30 App. D. C. 340, 346; 134 O. G. 1805.
Mark Cross Company, In re, 26 App. D. C. 101; 116 O. G. 2534; 1905 C. D. 658.
Marsden, In re, 14 App. D. C. 223; 87 O. G. 1239; 1899 C. D. 339.
Marshutz, In re, 13 App. D. C. 228; 85 O. G. 778; 1898 C. D. 578.
Martin v. Martin & Bowne Co., 27 App. D. C. 59; 122 O. G. 734; 1906 C. D. 642. Cited in 31 App. D. C. 505.
Martin & Bowne Co., Martin v., 27 App. D. C. 59.
Marvel v. Decker, 13 App. D. C. 562; 86 O. G. 348; 1899 C. D. 271. Cited in 19 App. D. C. 384; 24 Ib. 485; 26 Ib. 363.
Mason v. Hepburn, 13 App. D. C. 86; 84 O. G. 147; 1898 C. D. 510. Cited in 14 App. D. C. 49, 53; 15 Ib. 27, 163; 16 Ib. 139; 17 Ib. 322, 343; 18 Ib. 5, 138; 19 Ib. 380, 404, 564; 20 Ib. 261; 21 Ib. 29, 87, 529; 22 Ib. 218; 23 Ib. 449; 24 Ib. 80, 466, 474; 25 Ib. 77; 26 Ib. 340; 29 Ib. 126, 128, 129, 396; 31 Ib. 625.
Mason, In re, 31 App. D. C. 539; 136 O. G. 441.
Matthes v. Burt, 24 App. D. C. 265; 114 O. G. 764; 1905 C. D. 574. Cited in 29 App. D. C. 127; 31 Ib. 625.
Mauldin, Swihart v., 19 App. D. C. 570; 99 O. G. 2322; 1902 C. D. 540.
Mead v. Davis, 31 App. D. C. 601; 136 O. G. 2001.
Meissner, Murphy v., 24 App. D. C. 260; 114 O. G. 1830; 1905 C. D. 592.
Meissner, Richards v., 24 App. D. C. 305; 114 O. G. 1831; 1905 C. D. 595.
Mell v. Midgley, 31 App. D. C. 534; 136 O. G. 1534.

Mergenthaler v. Scudder, 11 App. D. C. 264; 25 W. L. R. 654; 81 O. G. 1417; 1897 C. D. 724. Cited in 14 App. D. C. 141; 15 Ib. 161; 17 Ib. 336; 21 Ib. 212; 19 Ib. 163, 389; 29 Ib. 395.
Mergenthaler Linotype Co., In re, 66 O. G. 1311; 1894 C. D. 186.
Messinger, In re, 12 App. D. C. 532; 26 W. L. R. 562; 83 O. G. 1995; 1898 C. D. 506.
Meyer v. Rothe, 13 App. D. C. 97; 84 O. G. 649; 1898 C. D. 534.
Meyer v. Sarfert, 21 App. D. C. 26; 102 O. G. 1555; 1903 C. D. 529.
Michigan Condensed Milk Co. v. Kenneweg Co., 30 App. D. C. 491; 135 O. G. 451.
Midgley, Mell v., 31 App. D. C. 534; 136 O. G. 1534.
Michle v. Read, 18 App. D. C. 128; 96 O. G. 426; 1901 C. D. 396. Cited in 24 App. D. C. 281.
Miel v. Young, 29 App. D. C. 481; 128 O. G. 2532; 1907 C. D. 561.
Milans, In re, 31 App. D. C. 269; 135 O. G. 1126.
Miller, Columbia National Sand Dredging Co. v., 20 App. D. C. 245; 30 W. L. R. 469.
Miller v. Kelley, 18 App. D. C. 163; 96 O. G. 1038; 1901 C. D. 405. Cited in 21 App. D. C. 99; 28 Ib. 440.
Millett v. Allen, 27 App. D. C. 70; 124 O. G. 1524; 1906 C. D. 752.
Millett, In re, 18 App. D. C. 186; 96 O. G. 1241; 1901 C. D. 410.
Mills, In re, 25 App. D. C. 377; 117 O. G. 904; 1905 C. D. 677.
Milton v. Kingsley, 7 App. D. C. 531; 24 W. L. R. 18, 129; 75 O. G. 2193; 1896 C. D. 420. Cited in 10 App. D. C. 534; 15 Ib. 514; 17 Ib. 496; 19 Ib. 198; 21 Ib. 99, 211; 27 Ib. 234; 28 Ib. 440, 478; 29 Ib. 106, 108.
Moeser, In re, 27 App. D. C. 307; 123 O. G. 655; 1906 C. D. 685.
Mond's Appeal, In re, 16 App. D. C. 351; 91 O. G. 1437; 1900 C. D. 298.
Monell, Talbot v., 23 App. D. C. 108; 109 O. G. 280; 1904 C. D. 606.
Monell, Talbot v., 23 App. D. C. 112; 109 O. G. 554; 1904 C. D. 609.
Moore, Frasch v., 211 U. S. 1; 137 O. G. 230.
Moore v. Hewitt, 31 App. D. C. 577; 136 O. G. 1535.

Moore, United States ex rel. Newcomb Motor Co., v. 30 App. D. C. 464; 133 O. G. 1680.
Mower, Appeal of, In re, 15 App. D. C. 144; 88 O. G. 191; 1899 C. D. 395. Cited in 17 App. D. C. 343; 19 Ib. 380.
Mudge, Lemp v., 24 App. D. C. 282; 114 O. G. 763; 1905 C. D. 571.
Mueser, Johnson v., 29 App. D. C. 61.
Muller, Schuster & Co. v., 28 App. D. C. 409; 126 O. G. 2192; 1907 C. D. 455.
Munster v. Ashworth, 29 App. D. C. 84; 128 O. G. 2088; 1907 C. D. 556.
Murphey, Case v., 31 App. D. C. 245; 136 O. G. 228.
Murphy, Adams v., 18 App. D. C. 172; 96 O. G. 845; 1901 C. D. 401.
Murphy v. Meissner, 24 App. D. C. 260; 114 O. G. 1830; 1905 C. D. 592. Cited in 24 App. D. C. 308.
Musgrave, In re, 10 App. D. C. 164; 25 W. L. R. 285; 78 O. G. 2047; 1897 C. D. 336.
Mutual District Messenger Co. v. Wight, 15 App. D. C. 463; 28 W. L. R. 57.
Mygatt, In re, 26 App. D. C. 366; 121 O. G. 1676; 1906 C. D. 596.
Mygatt, McArthur v., 31 App. D. C. 514; 136 O. G. 661.

Nathan Manuf. Co., Edna Smelting & Refining Co. v., 30 App. D. C. 487; 135 O. G. 664.
National Phonograph Co. v. Allen, 101 O. G. 1133; 1902 C. D. 571.
National Phonograph Co., In re, 29 App. D. C. 142; 128 O. G. 1295; 1907 C. D. 550.
National Railway Publishing Co., Payne v., 20 App. D. C. 581; 30 W. L. R. 791.
Natural Food Co. v. Williams, 30 App. D. C. 348; 133 O. G. 232.
Neill, In re, 11 App. D. C. 584; 100 O. G. 1976; 1902 C. D. 313.
Nelson, Seymour v., 11 App. D. C. 58; 25 W. L. R. 542; 79 O. F. 1522; 1897 C. D. 471.
Neth v. Ohmer, 27 App. D. C. 319; 123 O. G. 998; 1906 C. D. 693.
Neth v. Ohmer, 30 App. D. C. 478; 135 O. G. 662.
Newcomb Motor Co. v. Allen, 130 O. G. 302.
Newcomb Motor Co. v. Moore, 30 App. D. C. 464; 133 O. G. 1680.

Newell, Clifford v., 31 App. D. C. 195; 135 O. G. 1361.
Newell, Rose v., 31 App. D. C. 195; 135 O. G. 1361.
New Iberia Extract Co., McIlhenny's Son v., 30 App. D. C. 337; 133 O. G. 995.
Newman, Hopkins v., 30 App. D. C. 402; 134 O. G. 2028.
Newman, Somers & Co. v., 31 App. D. C. 193; 134 O. G. 2031.
Newton, Esty v., 14 App. D. C. 50; 86 O. G. 799; 1899 C. D. 284.
Newton v. Woodward, 16 App. D. C. 568; 93 O. G. 2319; 1900 C. D. 406. Cited in 17 App. D. C. 351, 555; 27 Ib. 228.
Newton v. Woodward, 17 App. D. C. 34.
Nielson v. Bradshaw, 16 App. D. C. 92; 91 O. G. 644; 1900 C. D. 265. Cited in 17 App. D. C. 470; 27 Ib. 291; 29 Ib. 179.
Nilson, Andrews v., 27 App. D. C. 451; 123 O. G. 1667; 1906 C. D. 717.
Nimmy, In re, 13 App. D. C. 565; 86 O. G. 345; 1899 C. D. 265.
Noble, Glidden v., 5 App. D. C. 480; 23 W. L. R. 485; 71 O. G. 141; 1895 C. D. 273.
Norden v. Spaulding, 24 App. D. C. 286; 114 O. G. 1828; 1905 C. D. 588. Cited in 24 App. D. C. 474; 27 Ib. 522; 29 Ib. 394.
Northall v. Bernardin, 7 App. D. C. 452; 24 W. L. R. 103; 114 O. G. 764; 1896 C. D. 183.
Norton, Armstrong Whitworth & Co. v., 15 App. D. C. 223; 27 W. L. R. 414.
Norton, Ocumpaugh v., 24 App. D. C. 296; 32 W. L. R. 846.
Norton, Ocumpaugh v., 25 App. D. C. 90; 115 O. G. 1850; 1905 C. D. 632.
Noyes, Christensen v., 15 App. D. C. 94; 90 O. G. 227; 1900 C. D. 212.

O'Connell v. Schmidt, 27 App. D. C. 77; 122 O. G. 2065; 1906 C. D. 662. Cited in 29 App. D. C. 13, 400, 403; 31 Ib. 598, 601.
Ocumpaugh v. Norton, 24 App. D. C. 296; 32 W. L. R. 846.
Ocumpaugh v. Norton, 25 App. D. C. 90; 115 O. G. 1850; 1905 C. D. 632. Cited in 27 App. D. C. 291; 29 Ib. 141.
Office Specialty & Manuf. Co. v. Fenton Metallic Manuf. Co., 174 U. S. 492; 43 L. Ed. 1058; 19 S. Ct. 541; reversing 12 App. D. C. 201. Cited in 116 Fed. R. 369; 122 Ib. 648; 133 Ib. 935; 134 Ib. 584.

Ogle, Williams v., 14 App. D. C. 145; 87 O. G. 1958; 1899 C. D. 367.
Ohmer, Neth v., 27 App. D. C. 319; 123 O. G. 998; 1906 C. D. 693.
Ohmer, Neth v., 30 App. D. C. 478; 135 O. G. 662.
Ohmer v. Ohmer, 30 App. D. C. 478; 135 O. G. 662.
Old Lexington Club Distilling Co., Kentucky Distilleries & W. Co. v., 31 App. D. C. 223; 135 O. G. 220.
Oliver v. Felbel, 20 App. D. C. 255; 100 O. G. 2384; 1902 C. D. 565. Cited in 21 App. D. C. 23, 202, 205; 22 Ib. 218; 24 Ib. 80, 270; 25 Ib. 591; 26 Ib. 341; 28 Ib. 78, 79, 531.
Onderdonk v. Parkes, 31 App. D. C. 214; 135 O. G. 665.
Orcutt v. McDonald, 27 App. D. C. 228; 123 O. G. 1287; 1906 C. D. 705. Cited in 29 App. D. C. 489.
Ostergren v. Tripler, 17 App. D. C. 557; 95 O. G. 837; 1901 C. D. 350. Cited in 19 App. D. C. 400; 24 Ib. 481; 28 Ib. 409.
Ostrom, Quist v., 23 App. D. C. 69; 108 O. G. 2147; 1904 C. D. 594.

Park, Cain v., 14 App. D. C. 42; 86 O. G. 797; 1899 C. D. 278.
Parker v. Appert, 8 App. D. C. 270; 24 W. L. R. 550; 75 O. G. 1201; 1896 C. D. 371.
Parkes v. Lewis, 28 App. D. C. 1; 123 O. G. 2313; 1906 C. D. 735. Cited in 28 App. D. C. 81.
Parkes, Onderdonk v., 31 App. D. C. 214; 135 O. G. 665.
Parmelee, Hill v., 9 App. D. C. 503; 25 W. L. R. 3; 78 O. G. 170; 1897 C. D. 214.
Paul v. Hess, 24 App. D. C. 462; 115 O. G. 251; 1905 C. D. 610. Cited in 24 App. D. C. 485; 25 Ib. 313; 26 Ib. 362, 415, 418; 29 Ib. 15, 141; 31 Ib. 581.
Paul v. Johnson, 23 App. D. C. 187; 109 O. G. 807; 1904 C. D. 610. Cited in 28 App. D. C. 8.
Payne v. United States ex rel. National Railway Pub. Co., 20 App. D. C. 581; 30 W. L. R. 791. Cited in 194 U. S. 97; 22 App. D. C. 244.
Pearsall, In re, 31 App. D. C. 265; 135 O. G. 221.
Peckham v. Price, 26 App. D. C. 556.
Peller, Gibbons v., 28 App. D. C. 530; 127 O. G. 3643; 1907 C. D. 529.
Peter Schoenhofen Brewing Co., Maltine Co. v., 30 App. D. C. 340, 346.

Peters, Hisey v., 6 App. D. C. 68; 23 W. L. R. 297; 71 O. G. 892; 1895 C. D. 349.
Peters Cartridge Co., Winchester Repeating Arms Co. v., 30 App. D. C. 505; 134 O. G. 2030.
Petrie v. De Schweinitz, 19 App. D. C. 386; 99 O. G. 1387; 1902 C. D. 534. Cited in 21 App. D. C. 212.
Phillips, Cross v., 14 App. D. C. 228; 87 O. G. 1399; 1899 C. D. 342.
Phillips v. Sensenich, 31 App. D. C. 159; 134 O. G. 1806. Cited in 31 App. D. C. 209.
Pickles v. Aglar, 13 App. D. C. 556; 86 O. G. 346; 1899 C. D. 268.
Platt v. Shipley, 11 App. D. C. 576; 82 O. G. 461; 1898 C. D. 307. Cited in 15 App. D. C. 142; 19 Ib. 384, 390; 24 Ib. 484; 26 Ib. 363; 31 Ib. 601.
Podlesak v. McInerney, 26 App. D. C. 399; 120 O. G. 2127; 1906 C. D. 558. Cited in 28 App. D. C. 4, 89, 514; 29 Ib. 19, 57, 70, 484; 31 Ib. 614.
Pohl, Bossart v., 31 App. D. C. 218; 135 O. G. 453.
Pohle, McKnight v., 22 App. D. C. 219; 105 O. G. 977; 1903 C. D. 619.
Pohle, McKnight v., 30 App. D. C. 92; 130 O. G. 2069; 1907 C. D. 666.
Poor, Woods v., 29 App. D. C. 397; 130 O. G. 1313; 1907 C. D. 651.
Porter v. Louden, 7 App. D. C. 64; 23 W. L. R. 689; 73 O. G. 1551; 1895 C. D. 707. Cited in 9 App. D. C. 212; 10 Ib. 179; 11 Ib. 269; 13 Ib. 89, 564; 14 Ib. 50; 19 Ib. 384; 28 Ib. 545.
Potter v. McIntosh, 28 App. D. C. 510; 127 O. G. 1995; 1907 C. D. 505.
Powrie, Flora v., 23 App. D. C. 195; 109 O. G. 2443; 1904 C. D. 636.
Price, Peckham v., 26 App. D. C. 556.
Prindle v. Brown, 24 App. D. C. 114; 112 O. G. 957; 1904 C. D. 680. Cited in 29 App. D. C. 136; 31 Ib. 222.
Pungs, Hein v., 9 App. D. C. 492; 77 O. G. 1600; 1896 C. D. 649.
Pupin, Stone v., 19 App. D. C. 396; 100 O. G. 1113; 1902 C. D. 550.

Quist v. Ostrom, 23 App. D. C. 69; 108 O. G. 2147; 1904 C. D. 594. Cited in 25 App. D. C. 315.

Read, Miehle v., 18 App. D. C. 128; 96 O. G. 426; 1901 C. D. 396.

Regina Music Box Co. (U. S. ex rel.), Allen v., 22 App. D. C. 271; 31 W. L. R. 476; 105 O. G. 747; 1903 C. D. 615.

Reichenbach v. Kelly, 17 App. D. C. 333; 94 O. G. 1185; 1901 C. D. 282. Cited in 18 App. D. C. 147; 19 Ib. 378, 380; 21 Ib. 64; 24 Ib. 270, 468.

Reynolds, Wells v., 4 App. D. C. 43; 22 W. L. R. 723; 69 O. G. 1507; 1894 C. D. 664.

Reynolds, Wells v., 5 App. D. C. 20; 22 W. L. R. 781.

Rice, Duryea v., 28 App. D. C. 423; 126 O. G. 1357; 1907 C. D. 443.

Richards v. Burkholder, 29 App. D. C. 485; 128 O. G. 2533; 1907 C. D. 563. Cited in 31 App. D. C. 625.

Richards v. Meissner, 24 App. D. C. 305; 114 O. G. 1831; 1905 C. D. 595. Cited in 27 App. D. C. 320; 29 Ib. 138; 31 Ib. 307, 585.

Richardson, Larkin v., 28 App. D. C. 471; 127 O. G. 2394; 1907 C. D. 508.

Ries v. Kirkegaard, 30 App. D. C. 199; 132 O. G. 845.

Riordan v. Stout, 17 App. D. C., 397; 29 W. L. R. 141.

Ritter v. Krakau, 24 App. D. C. 271; 114 O. G. 1553; 1905 C. D. 585.

Riverside Oil Co. v. Hitchcock, 21 App. D. C. 252; 31 W. L. R. 174.

Roberts v. Brinkman, 10 App. D. C. 543; 25 W. L. R. 543; 79 O. G. 1190; 1897 C. D. 427.

Roberts v. United States ex rel. Valentine, 13 App. D. C. 38; 26 W. L. R. 375. Affirmed in 176 U. S. 221. Cited in 18 App. D. C. 564; 20 Ib. 603; 24 Ib. 562; 25 Ib. 123.

Robinson v. Copeland, 24 App. D. C. 68; 112 O. G. 501; 1904 C. D. 664. Cited in 28 App. D. C. 7.

Robinson v. McCormick, 29 App. D. C. 98; 128 O. G. 3289; 1907 C. D. 574.

Robinson v. Seelinger, 25 App. D. C. 237; 116 O. G. 1735; 1905 C. D. 640. Cited in 29 App. D. C. 174.

Robinson v. Thresher, 28 App. D. C. 22; 123 O. G. 2976; 1906 C. D. 743.

Roe v. Hanson, 19 App. D. C. 559; 99 O. G. 2550; 1902 C. D. 546. Cited in 20 App. D. C. 261: 21 Ib. 87; 24 Ib. 80, 270.
Rogers v. International Silverware Co., 30 App. D. C. 97; 129 O. G. 3503.
Rolfe v. Hoffman, 26 App. D. C. 336; 121 O. G. 1350; 1906 C. D. 588. Cited in 31 App. D. C. 200.
Rose v. Clifford, 31 App. D. C. 195; 135 O. G. 1361.
Rose v. Newell, 31 App. D. C. 195; 135 O. G. 1361.
Rose Shoe Manuf. Co. v. Rosenbush, 28 App. D. C. 465; 127 O. G. 394; 1907 C. D. 484.
Rosenbush, Rose Shoe Manuf. Co. v., 28 App. D. C. 465.
Rosell v. Allen, 16 App. D. C. 559: 92 O. G. 1036; 1900 C. D. 333.
Rosey, Stern v., 17 App. D. C. 562; 29 W. L. R. 159.
Ross v. Loewer, 9 App. D. C. 563; 24 W. L. R. 827; 77 O. G. 2141; 1896 C. D. 665.
Rothe, Meyer v., 13 App. D. C. 97; 84 O. G. 649; 1898 C. D. 534.
Rousseau v. Brown, 21 App. D. C. 73; 104 O. G. 1120; 1903 C. D. 587.
Royce, Kempshall v., 29 App. D. C. 181; 129 O. G. 3162; 1907 C. D. 626.
Ruete v. Elwell, 15 App. D. C. 21; 87 O. G. 2119; 1899 C. D. 379. Cited in 25 App. D. C. 316; 26 Ib. 407, 551; 29 Ib. 70.
Rueter & Co., Worster Brewing Corporation, 30 App. D. C. 428; 133 O. G. 1190.
Russel, Asencio v., 24 App. D. C. 105; 112 O. G. 955; 1904 C. D. 676.
Russell, Seeberger v., 26 App. D. C. 344; 121 O. G. 2328; 1906 C. D. 612.

Sachs v. Hundhausen, 21 App. D. C. 511; 105 O. G. 1534; 1903 C. D. 625.
Sanche v. Electrolibration Co., 4 App. D. C. 453; 22 W. L. R. 769.
Sarfert, Meyer v., 21 App. D. C. 26; 102 O. G. 1555; 1903 C. D. 529.
Sawhill, Einstein v., 2 App. D. C. 10; 22 W. L. R. 89; 65 O. G. 1918; 1893 C. D. 677.
Schaeffer, Appeal of, 2 App. D. C. 1; 22 W. L. R. 81.
Schellenger, Dunbar v., 29 App. D. C. 129; 128 O. G. 2837; 1907 C. D. 567.

Schmertz, Appert v.., 13 App. D. C. 117; 84 O. G. 508; 1898 C. D. 524.
Schmidt, O'Connell v., 27 App. D. C. 77; 122 O. G. 2065; 1906 C. D. 662.
Schnabel, Shellaberger v., 10 App. D. C. 145; 25 W. L. R. 269; 79 O. G. 339; 1897 C. D. 364.
Schneider, Union Distilling Co. v., 29 App. D. C. 1; 129 O. G. 2503; 1907 C. D. 613.
Schoenhofen Brewing Co., Maltine Co. v., 30 App. D. C. 340, 346; 134 O. G. 1805.
Schraubstradter, In re, 26 App. D. C. 331; 120 O. G. 1167; 1906 C. D. 541.
Schupphaus v. Stevens, 17 App. D. C. 548; 95 O. G. 1452; 1901 C. D. 365. Cited in 19 App. D. C. 400; 24 Ib. 481; 28 Ib. 409.
Schuster Co. v. Muller, 28 App. D. C. 409; 126 O. G. 2192; 1907 C. D. 455.
Scott, DeWallace v., 15 App. D. C. 157; 88 O. G. 1704; 1899 C. D. 416.
Scott, In re, 25 App. D. C. 307; 117 O. G. 278; 1905 C. D. 665.
Scott, Laas v., 26 App. D. C. 354; 122 O. G. 352; 1906 C. D. 621.
Scott v. Scott, 18 App. D. C. 420; 96 O. G. 1650; 1901 C. D. 419.
Scudder, Mergenthaler v., 11 App. D. C. 264; 25 W. L. R. 654; 81 O. G. 1417; 1897 C. D. 724.
Seabury, In re, 23 App. D. C. 377; 110 O. G. 2238; 1904 C. D. 655.
Seeberger v. Dodge, 24 App. D. C. 476; 114 O. G. 2382; 1905 C. D. 603. Cited in 26 App. D. C. 362, 408; 28 Ib. 6, 22, 409; 29 Ib. 57; 31 Ib. 581, 600.
Seeberger v. Russel, 26 App. D. C. 344; 121 O. G. 2328; 1906 C. D. 612.
Seelinger, Robinson v., 25 App. D. C. 237; 116 O. G. 1735; 1905 C. D. 640.
Seher, Stevens v., 11 App. D. C. 245; 81 O. G. 1932; 1897 C. D. 761.
Seidelbach v. Gillette, 22 App. D. C. 168; 109 O. G. 276; 1904 C. D. 597. Cited in 27 App. D. C. 123, 234; 29 Ib. 109.
Sensenich, Phillips v., 31 App. D. C. 159; 134 O. G. 1806.
Seymour, Durham v., 6 App. D. C. 78; 23 W. L. R. 273; 71 O. G. 601; 1895 C. D. 307. Dismissed in 161 U. S. 235.
Seymour, Durham v., 10 App. D. C. 274; 25 W. L. R. 9.

Seymour v. Nelson, 11 App. D. C. 58; 25 W. L. R. 542; 79 O. G. 1522; 1897 C. D. 471.
Seymour, Southall v., 79 O. G. 1624; 1897 C. D. 480.
Seymour v. South Carolina, 2 App. D. C. 240; 21 W. L. R. 675; 66 O. G. 1167; 1894 C. D. 174. Dismissed in 153 U. S. 353.
Seymour, United States ex rel. Bernardin v., 10 App. D. C. 294; 25 W. L. R. 513; 79 O. G. 1190; 1897 C. D. 428. Reversed in 169 U. S. 600.
Seymour, United States ex rel. Bernardin v., 11 App. D. C. 91; 25 W. L. R. 513; 79 O. G. 1190; 1897 C. D. 428.
Seymour, United States ex rel. Brodie v., 10 App. D. C. 567; 25 W. L. R. 183, 253; 79 O. G. 509; 1897 C. D. 372. Cited in 17 App. D. C. 554.
Seymour v. United ex rel. South Carolina, 2 App. D. C. 240; 21 W. L. R. 675. Dismissed in 153 U. S. 353. Cited in 15 App. D. C. 469; 155 U. S. 509; 161 Ib. 32; 163 Ib. 321; 166 Ib. 311; 168 Ib. 435; 72 Fed. R. 659.
Shaffer v. Dolan, 23 App. D. C. 79; 108 O. G. 2146; 1904 C. D. 592.
Sharer v. McHenry, 19 App. D. C. 158; 98 O. G. 585; 1902 C. D. 503. Cited in 21 App. D. C. 212, 527, 530.
Sheldon, In re, 31 App. D. C. 201; 135 O. G. 1585.
Shellaberger v. Schnabel, 10 App. D. C. 145; 25 W. L. R. 269; 79 O. G. 339; 1897 C. D. 364.
Shellaberger v. Sommer, 8 App. D. C. 3; 24 W. L. R. 136; 74 O. G. 1897; 1896 C. D. 292. Cited in 10 App. D. C. 155.
Sherwood v. Drewson, 29 App. D. C. 161; 130 O. G. 657; 1907 C. D. 642.
Shipley, Platt v., 11 App. D. C. 576; 82 O. G. 461; 1898 C. D. 307.
Shuman v. Beall, 27 App. D. C. 324, 329; 123 O. G. 1664; 1906 C. D. 710.
Silverman v. Hendrickson, 19 App. D. C. 381; 99 O. G. 1171; 1902 C. D. 527.
Simonds, Backus Portable Steam Heater Co. v., 2 App. D. C. 290; 22 W. L. R. 137; 66 O. G. 1893; 1894 C. D. 211.
Simpson, Hodgins v., 82 O. G. 190; 1898 C. D. 296.
Sir W. G. Armstrong Whitworth & Co. v. Norton, 15 App. D. C. 223; 27 W. L. R. 414.
Slaughter v. Halle, 21 App. D. C. 19; 102 O. G. 469; 1903 C. D. 519. Cited in 24 App. D. C. 304; 29 Ib. 106.

Smith's Appeal, In re, 14 App. D. C. 181; 87 O. G. 893; 1899 C. D. 313.
Smith, Breul v., 10 App. D. C. 180; 25 W. L. R. 198; 78 O. G. 1906; 1897 C. D. 332.
Smith v. Brooks, 24 App. D. C. 75; 112 O. G. 953; 1904 C. D. 672.
Smith v. Smith, 31 App. D. C. 518; 136 O. G. 850.
Smith, Warner v., 13 App. D. C. 111; 84 O. G. 311; 1898 C. D. 517.
Snyder, In re, 10 App. D. C. 140; 25 W. L. R. 142; 78 O. G. 485; 1897 C. D. 254.
Sobey v. Holsclaw, 28 App. D. C. 65; 126 O. G. 3041; 1907 C. D. 465. Cited in 28 App. D. C. 513, 514; 29 Ib. 65.
Soley v. Hebbard, 5 App. D. C. 99; 23 W. L. R. 56; 70 O. G. 921; 1895 C. D. 182. Cited in 11 App. D. C. 269; 19 Ib. 384.
Somers & Co. v. Newman, 31 App. D. C. 193; 134 O. G. 2031.
Sommer, Shellaberger v., 8 App. D. C. 3; 24 W. L. R. 136; 74 O. G. 1897; 1896 C. D. 292.
South Carolina, Seymour v., 2 App. D. C. 240; 21 W. L. R. 675; 66 O. G. 1167; 1894 C. D. 174. Dismissed in 153 U. S. 353; 67 O. G. 1191; 1894 C. D. 318.
Southgate, Bechman v., 28 App. D. C. 405; 127 O. G. 1254; 1907 C. D. 489.
Spalding, In re, 27 App. D. C. 314; 123 O. G. 321; 1906 C. D. 674.
Spaulding, Norden v., 24 App. D. C. 286; 114 O. G. 1828; 1905 C. D. 588.
Spitteler and Krische, In re, 31 App. D. C. 271; 134 O. G. 1301.
St. Amand, Tyler v., 17 App. D. C. 464; 94 O. G. 1969; 1901 C. D. 301.
Standard Underground Cable Co., In re, 27 App. D. C. 320; 123 O. G. 656; 1906 C. D. 687.
Stapleton v. Duell, 17 App. D. C. 575; 29 W. L. R. 156; 95 O. G. 1049; 1901 C. D. 359.
Stapleton v. Kinney, 18 App. D. C. 394: 96 O. G. 1432; 1901 C. D. 414.
Star Brewing Co., Ehret v., 31 App. D. C. 507; 136 O. G. 1533.
Starkey, In re, 21 App. D. C. 519; 104 O. G. 2150; 1903 C. D. 607.
Starr, Jones v., 26 App. D. C. 64; 117 O. G. 1495; 1905 C. D. 694.

Steinmetz v. Thomas, 31 App. D. C. 574; 137 O. G. 479.
Steinmetz (U. S. ex rel.) v. Allen, 22 App. D. C. 56; 31 W. L. R. 358; 102 O. G. 231; 1903 C. D. 632. Reversed in 192 U. S. 543; 32 W. L. R. 147; 109 O. G. 549; 1904 C. D. 703.
Stern, Harris v., 22 App. D. C. 164; 105 O. G. 746; 1903 C. D. 612.
Stern v. Rosey, 17 App. D. C. 562; 29 W. L. R. 159. Cited in 209 U. S. 12.
Stevens, Schupphaus v., 17 App. D. C. 548; 95 O. G. 1452; 1901 C. D. 365.
Stevens v. Scher, 11 App. D. C. 245; 81 O. G. 1932; 1897 C. D. 761. Cited in 14 App. D. C. 236; 17 Ib. 556; 24 Ib. 473; 26 Ib. 28; 27 Ib. 522; 28 Ib. 8.
Stikeman, Hunter v., 13 App. D. C. 214; 85 O. G. 610; 1898 C. D. 564.
Stocker, Fefel v., 17 App. D. C. 317; 94 O. G. 433; 1901 C. D. 269.
Stone v. Pupin, 19 App. D. C. 396; 100 O. G. 1113; 1902 C. D. 550. Cited in 24 App. D. C. 481; 28 Ib. 409.
Stout, Riordan v., 17 App. D. C. 397; 29 W. L. R. 141.
Strohm, Kinsman v., 31 App. D. C. 581; 136 O. G. 1769.
Swenson, Griffin v., 15 App. D. C. 135; 89 O. G. 919; 1899 C. D. 440.
Swihart v. Mauldin, 19 App. D. C. 570; 99 O. G. 2322; 1902 C. D. 540. Cited in 21 App. D. C. 201, 205; 24 Ib. 481; 26 Ib. 408; 27 Ib. 233; 28 Ib. 408.
Swinburne, In re, 19 App. D. C. 565; 99 O. G. 1625; 1902 C. D. 537.

Talbot v. Monell, 23 App. D. C. 108; 109 O. G. 280; 1904 C. D. 606. Cited in 23 App. D. C. 112.
Talbot v. Monell, 23 App. D. C. 112; 109 O. G. 554; 1904 C. D. 609.
Tasker, Dashiell v., 21 App. D. C. 64; 103 O. G. 2174; 1903 C. D. 551.
Taylor, In re, 31 App. D. C. 529; 136 O. G. 1767.
Taylor, Lowrie v., 27 App. D. C. 522; 123 O. G. 1665; 1906 C. D. 713.
Taylor v. Lowrie, 27 App. D. C. 527; 123 O. G. 1991; 1906 C. D. 722.
Thibodeau v. Dickinson, 25 App. D. C. 316; 117 O. G. 600; 1905 C. D. 672. Cited in 25 App. D. C. 320.

Thibodeau v. Hildreth, 25 App. D. C. 320; 117 O. G. 601; 1905 C. D. 675.
Thomas, Steinmetz v., 31 App. D. C. 574; 137 O. G. 479.
Thomas, Trissel v., 23 App. D. C. 219; 109 O. G. 809; 1904 C. D. 616.
Thomas, Watson v., 23 App. D. C. 65; 108 O. G. 1590; 1904 C. D. 587.
Thomson, In re, 26 App. D. C. 419; 120 O. G. 2756; 1906 C. D. 566. Cited in 27 App. D. C. 24.
Thomson v. Weston, 19 App. D. C. 373; 99 O. G. 864; 1902 C. D. 521. Cited in 24 App. D. C. 270; 29 Ib. 127; 31 Ib. 625.
Thresher, Robinson v., 28 App. D. C. 22; 123 O. G. 2976; 1906 C. D. 743.
Thurston, In re, 26 App. D. C. 315; 120 O. G. 1166; 1906 C. D. 539.
Tournier, In re, 17 App. D. C. 481; 94 O. G. 2166; 1901 C. D. 306.
Tracy v. Leslie, 14 App. D. C. 126; 87 O. G. 891; 1899 C. D. 306. Cited in 15 App. D. C. 25; 16 Ib. 566; 17 Ib. 555; 21 Ib. 10; 25 Ib. 316; 26 Ib. 407; 29 Ib. 70.
Traver v. Brown, 14 App. D. C. 34; 1899 C. D. Cited in 15 App. D. C. 27; 17 Ib. 344, 470; 18 Ib. 147; 19 Ib. 377; 21 Ib. 64; 23 Ib. 74; 24 Ib. 468; 25 Ib. 313.
Tripler v. Linde, 21 App. D. C. 32; 95 O. G. 837; 1901 C. D. 350.
Tripler, Ostergren v., 17 App. D. C. 557; 95 O. G. 837; 1901 C. D. 350.
Trissel v. Thomas, 23 App. D. C. 219; 109 O. G. 809; 1904 C. D. 616. Cited in 29 App. D. C. 396.
Turnbull v. Curtis, 27 App. D. C. 567; 123 O. G. 2312; 1906 C. D. 732.
Tuttle v. Allen, 35 W. L. R. 50.
Tyler, Arnold v., 10 App. D. C. 175; 25 W. L. R. 250; 79 O. G. 156; 1897 C. D. 349.
Tyler v. Kelch, 19 App. D. C. 180; 98 O. G. 1282; 1902 C. D. 506.
Tyler v. St. Amand, 17 App. D. C. 464; 94 O. G. 1969; 1901 C. D. 301. Cited in 19 App. D. C. 389.

Union Distilling Co. v. Schneider, 29 App. D. C. 1; 129 O. G. 2503; 1907 C. D. 613.
United States ex rel. Bernardin v. Butterworth, 169 U. S. 600.

United States ex rel. Bernardin v. Duell, 13 App. D. C. 379; affirmed in 172 U. S. 576.
United States ex rel. Bernardin v. Seymour, 10 App. D. C. 294; 25 W. L. R. 515; 79 O. G. 1190; 1897 C. D. 428. Reversed in 169 U. S. 600. Cited in 13 App. D. C. 380; 169 U. S. 601.
United States ex rel. Bernardin v. Seymour, 11 App. D. C. 91; 25 W. L. R. 513; 79 O. G. 1190; 1897 C. D. 428.
United States ex rel. Brodie v. Seymour, 25 W. L. R. 182.
United States ex rel. Brodie, Seymour v., 10 App. D. C. 567; 25 W. L. R. 183, 253; 79 O. G. 509; 1897 C. D. 372.
United States ex rel. Bronson Co. v. Duell, 17 App. D. C. 471; 29 W. L. R. 126.
United States ex rel. Darling, Bundy v., 25 App. D. C. 459; 33 W. L. R. 434.
United States ex rel. Everson v. Young, 26 W. L. R. 546.
United States ex rel. Holzendorf v. Hay, 20 App. D. C. 576; 30 W. L. R. 825.
United States ex rel. Long, Lochren v., 6 App. D. C. 486; 23 W. L. R. 358.
United States ex rel. Lowry, Allen v., 26 App. D. C. 8; 33 W. L. R. 354. Affirmed in 203 U. S. 476; 125 O. G. 2365; 1906 C. D. 765.
United States ex rel. Mutual District Messenger Co. v. Wight, 15 App. D. C. 463; 28 W. L. R. 57.
United States ex rel. National Railway Pub. Co., Payne v., 20 App. D. C. 581; 30 W. L. R. 791.
United States ex rel. Newcomb Motor Co. v. Moore, 30 App. D. C. 464; 133 O. G. 1680. Cited in 31 App. D. C. 614.
United States ex rel. Regina Music Box Co., Allen v. 22 App. D. C. 271; 31 W. L. R. 476; 105 O. G. 747; 1903 C. D. 615.
United States ex rel. Riverside Oil Co. v. Hitchcock, 21 App. D. C. 252.
United States ex rel. South Carolina, Seymour v., 2 App. D. C. 240; 21 W. L. R. 675; 66 O. G. 1167; 1894 C. D. 174. Cited in 13 App. D. C. 48; 17 Ib. 473.
United States, ex rel. Stapleton v. Duell, 17 App. D. C. 575; 29 W. L. R. 156; 95 O. G. 1049; 1901 C. D. 359.
United States ex rel. Steinmetz v. Allen, 22 App. D. C. 56; 31 W. L. R. 358; 102 O. G. 231; 1903 C. D. 632. Reversed in 192 U. S. 543.

United States ex rel. Tuttle v. Allen, 35 W. L. R. 50.
United States ex rel. Valentine, Roberts v., 13 App. D. C. 38; 26 W. L. R. 375.
United States ex rel. Wedderburn v. Bliss, 12 App. D. C. 495; 83 O. G. 296; 1898 C. D. 413. Cited in 27 App. D. C. 465.
United States Playing Card Co. v. Clark, 30 App. D. C. 208; 132 O. G. 681.
Upham, Wickers v., 29 App. D. C. 30; 139 O. G. 1612; 1907 C. D. 605.
Uri, Levy & Co. v., 31 App. D. C. 441; 135 O. G. 1363.

Vajen, Bader v., 14 App. D. C. 241; 87 O. G. 1235; 1899 C. D. 329.
Valentine (U. S. ex rel.), Roberts v., 13 App. D. C. 38; 26 W. L. R. 375.
Verley, In re, 19 App. D. C. 577; 99 O. G. 2323; 1902 C. D. 543.
Viele v. Cummings, 30 App. D. C. 455; 134 O. G. 777.
Vogel, Burson v., 29 App. D. C. 388; 131 O. G. 942; 1907 C. D. 669.
Voight, Hope v., 25 App. D. C. 22; 115 O. G. 1585; 1905 C. D. 629.
Volkman, In re, 28 App. D. C. 441; 126 O. G. 2593; 1907 C. D. 462.

Wagner, In re, 22 App. D. C. 267; 31 W. L. R. 487; 105 O. G. 1783; 1903 C. D. 629.
Warner v. Smith, 13 App. D. C. 111; 84 O. G. 311; 1898 C. D. 517. Cited in 14 App. D. C. 49, 53; 15 Ib. 162; 16 Ib. 139; 17 Ib. 322, 470; 18 Ib. 147, 176; 19 Ib. 377; 20 Ib. 261; 23 Ib. 74; 24 Ib. 80, 270; 26 Ib. 336; 29 Ib. 128, 487.
Warren, In re, 30 App. D. C. 308; 134 O. G. 258.
Washington Railway & Electric Co., Brill v., 30 App. D. C. 255; 36 W. L. R. 55; 134 O. G. 1563.
Watson v. Thomas, 23 App. D. C. 65; 108 O. G. 1590; 1904 C. D. 587. Cited in 27 App. D. C. 83.
Weber, Flather v., 21 App. D. C. 179; 104 O. G. 312; 1903 C. D. 561.
Weber, In re, 26 App. D. C. 29; 117 O. G. 1494; 1905 C. D. 693.
Wedderburn (U. S. ex rel.) v. Bliss, 12 App. D. C. 485; 26 W. L. R. 293; 83 O. G. 296; 1898 C. D. 413.
Weeks v. Dale, 30 App. D. C. 498; 135 O. G. 218.

Weiss, In re, 21 App. D. C. 214; 103 O. G. 1918; 1903 C. D. 546.
Welch, In re, 28 App. D. C. 362; 125 O. G. 2767; 1906 C. D. 758.
Wells, Anderson v., 27 App. D. C. 115; 122 O. G. 3014; 1906 C. D. 667.
Wells v. Reynolds, 4 App. D. C. 43; 22 W. L. R. 723; 69 O. G. 1507; 1894 C. D. 664.
Wells v. Reynolds, 5 App. D. C. 20; 22 W. L. R. 781.
Wende, Horine v., 29 App. D. C. 415; 129 O. G. 2858; 1907 C. D. 615.
Wentworth, Gordon v., 31 App. D. C. 150; 135 O. G. 1125.
West (U. S. ex rel.) v. Hitchcock, 19 App. D. C. 333; 30 W. L. R. 186.
Westinghouse v. Duncan, 2 App. D. C. 131; 22 W. L. R. 83. Cited in 13 App. D. C. 236; 20 Ib. 301; 26 Ib. 8, 26, 69; 28 Ib. 15.
Weston, In re, 17 App. D. C. 431; 94 O. G. 1786; 1901 C. D. 290.
Weston, Thomson v., 19 App. D. C. 373; 99 O. G. 864; 1902 C. D. 521.
White, In re, 31 App. D. C. 607; 136 O. G. 1771.
Whitely, Funk v., 25 App. D. C. 313; 117 O. G. 280; 1905 C. D. 670.
Whitney v. Howard, 21 App. D. C. 218; 104 O. G. 1659; 1903 C. D. 597.
Whitson v. Columbia Phonograph Co., 18 App. D. C. 565; 29 W. L. R. 804; 98 O. G. 418; 1902 C. D. 497.
Wickers v. Albert, 29 App. D. C. 23; 129 O. G. 1268; 1907 C. D. 599.
Wickers v. McKee, 29 App. D. C. 4, 21, 25, 28; 129 O. G. 869, 1269, 1270; 1907 C. D. 587, 600, 601, 603.
Wickers v. Upham, 29 App. D. C. 30; 129 O. G. 1612; 1907 C. D. 605.
Wickers and Furlong, In re, 29 App. D. C. 71; 129 O. G. 2074; 1907 C. D. 608.
Wictorsohn, Gueniffet v., 30 App. D. C. 432; 134 O. G. 779.
Wight, Mutual District Messenger Co. v., 15 App. D. C. 463; 28 W. L. R. 57.
Wilder, Blackford v., 21 App. D. C. 1; 104 O. G. 578; 1903 C. D. 567; 28 App. D. C. 535; 127 O. G. 1255.

Wilkin, Cleveland v., 27 App. D. C. 311; 123 O. G. 1286; 1906 C. D. 703.
William Conners Paint Manuf. Co. In re, 27 App. D. C. 389; 123 O. G. 999; 1906 C. D. 696.
Williams, In re, 30 App. D. C. 117; 130 O. G. 1692; 1907 C. D. 664.
Williams, Liberman v., 23 App. D. C. 223; 109 O. G. 1610; 1904 C. D. 623.
Williams v. Ogle, 14 App. D. C. 145; 87 O. G. 1958; 1899 C. D. 367.
Wiiliams, Natural Food Co. v., 30 App. D. C. 348; 133 O. G. 232.
Winchester Repeating Arms Co. v. Peters Cartridge Co., 30 App. D. C. 505; 134 O. G. 2030.
Winquist, Durkee v., 31 App. D. C. 248; 136 O. G. 229.
Winslow v. Austin, 14 App. D. C. 137; 86 O. G. 2171; 1899 C. D. 301. Cited in 19 App. D. C. 389; 21 Ib. 212; 26 Ib. 312, 402; 29 Ib. 188.
Wood, Bechman v., 15 App. D. C. 484; 89 O. G. 2459; 1899 C. D. 453.
Woods v. Poor, 29 App. D. C. 397, 404; 130 O. G. 1313; 1907 C. D. 651. Cited in 31 App. D. C. 606.
Woodward, Newton v., 16 App. D. C. 568.
Woodward, Newton v., 17 App. D. C. 34; 93 O. G. 2319; 1900 C. D. 406.
Worster Brewing Corporation v. Rueter & Co., 30 App. D. C. 428; 133 O. G. 1190. Cited in 31 App. D. C. 228.
Wright, Cleaveland v., 79 O. G. 866; 1897 C. D. 413.
Wurts v. Harrington, 10 App. D. C. 149; 25 W. L. R. 266; 79 O. G. 337; 1897 C. D. 359. Cited in 14 App. D. C. 41, 52, 153; 15 Ib. 30; 17 Ib. 343; 21 Ib. 87.
Wyman v. Donnelly, 21 App. D. C. 81; 104 O. G. 310; 1903 C. D. 556. Cited in 24 App. D. C. 485; 26 Ib. 362; 29 Ib. 106, 107, 111.

Yates v. Huson, 8 App. D. C. 93; 24 W. L. R. 214; 74 O. G. 1732; 1896 C. D. 278. Cited in 9 App. D. C. 214; 11 App. D. C. 599; 13 Ib. 95, 564; 15 Ib. 142, 163; 17 Ib. 322; 23 Ib. 194; 24 Ib. 270, 484.
Young, Miel v., 29 App. D. C. 481; 128 O. G. 2532; 1907 C. D. 561.
Young, United States ex rel. Everson v., 26 W. L. R. 546.

Digest of Patent, Trade-Mark and Copyright Cases.

ABANDONED APPLICATIONS. See PATENTS, 514.

ABANDONED EXPERIMENTS. See PATENTS, III, 3, 4; 919, 930.

ABANDONMENT OF APPLICATION. See APPEALS, 14, 158; PATENTS, 220-222.

ABANDONMENT OF CLAIM. See PATENTS, 990.

ABANDONMENT OF COPYRIGHT. See COPYRIGHTS, 6.

ABANDONMENT OF INVENTION. See PATENTS, 59, 185, 621, 917, 973.

ABANDONMENT OF RIGHT TO PATENT. See PATENTS, 473-479.

ABATEMENT AND REVIVAL.

By the death of a Commissioner of Patents, a suit to compel him to issue a patent abates and cannot be revived so as to bring in his successor; the act of Maryland of 1785, ch. 80, having no application to such a case. *Bernardin v. Butterworth*, 169 U. S. 600.

See ACTIONS, 3; MANDAMUS, 53—55; PARTIES TO SUIT, 6; PUBLIC OFFICERS, 3.

ACCIDENT. See PATENTS, XI.

ACCOUNTS AND ACCOUNTING.

1. In a suit for an accounting by an inventor who had assigned his invention to a company which agreed to manufacture the device with due diligence and pay him royalties on those manufactured, a decree was passed declaring him entitled to royalties not only upon the devices manufactured under his contract, but upon those of a substituted device manufactured by the company, and referring the cause to the auditor to state the account. In

the hearing before the auditor it was developed that subsequent to the decree defendant had ceased to manufacture both of the devices embraced in the reference to the auditor, and was manufacturing another device styled "Exhibit E 10." *Held*, that defendant company must account to complainant for the manufacture of "Exhibit E 10" as well as for the other devices. *Eclipse Bicycle Co. v. Farrow*, 23 App. D. C. 411; 32 W. L. R. 265.

2. Where a decree in a suit for an accounting affirming the auditor's report fails to in terms adjudge the recovery of the amount found due, the Appellate Court may in affirming the decree modify it by adding a clause that complainant recover the amount. *Ib.*

3. As to right of an inventor to an accounting for royalties under contract for manufacture and sale of invention. See *Eclipse Bicycle Co. v. Farrow*, 16 App. D. C. 468; 28 W. L. R. 551.

4. As to effect of expiration of a patent pending suit for an accounting for infringement. See *Busch v. Jones*, 16 App. D. C. 23; 28 W. L. R. 535.

See CONTRACTS, 7; EQUITY 15.

ACTIONS.

1. The objection to the form of an action embodied, after verdict, in a motion for a new trial, comes too late to be available in an appellate court. *American Tobacco Co. v. Werckmeister*, 207 U. S. 284; 133 O. G. 1433.

2. A petition for a writ of mandamus to a public officer of the United States, abates by reason of his retirement from office as well after judgment and pending an appeal therefrom as before. *Seymour v. Nelson*, 11 App. D. C. 58; 25 W. L. R. 542.

3. By the death of a Commissioner of Patents, a suit to compel him to issue a patent abates and cannot be revived so as to bring in his successor. The Act of Maryland of 1785, ch. 80, is not applicable to such a case. *Bernardin v. Butterworth*, 169 U. S. 600.

4. The assignee of a patent and of all claims and demands now accrued or which may hereafter accrue for infringement, can not maintain an action in his own name for damages for past infringement—committed prior to the date of the assignment. The patent laws of the United States are not in conflict with the

common law. *Armstrong Whitewortlh & Co. v. Norton,* 15 App. D. C. 223; 27 W. L. R. 414.

5. By virtue of §§ 4898 and 4919 of the Revised Statutes, the assignee of a patent may sue in his own name for an infringement committed while he was the legal owner of the right or interest transferred to him by assignment. *Ib.*

See ACCOUNTS AND ACCOUNTING, 4; APPEALS, 55; ATTORNEYS, 11; CLOUD ON TITLE; COPYRIGHTS, 5, 10, 20, 21, 24, 25, 26; PARTIES TO SUIT; PATENTS, 10, 703, 706, VIII, 975.

AFFIDAVITS. See APPEALS, 50, 130; PATENTS, 226, 227, 482, 813, 945, 947; TRADE-MARKS, 106, 113.

AGENCY. See PATENTS, 337-380.

AGENTS. See ATTORNEYS.

AGGREGATION OF KNOWN ELEMENTS. See PATENTS, 28, 29, 34, 125.

AMENDMENT OF APPLICATIONS. See APPEALS, 112; PATENTS, 205-215; RES ADJUDICATA, 11; TRADE-MARKS, 78-85, 120.

AMENDMENT OF CLAIMS. See PATENTS, 682, 683.

AMENDMENTS TO REASONS OF APPEAL. See APPEALS, 120.

AMENDMENT OF PRELIMINARY STATEMENTS. See APPEALS, 40-42; PATENTS, 794-801.

AMENDMENT OF PLEADING. See PLEADING, 1.

AMOUNT IN CONTROVERSY. See APPEALS, 4, 5; TRADE-MARKS, 123.

ANALOGOUS USE. See PATENTS II, 10, 11.

ANTICIPATION. See PATENTS.

APPARATUS. See PATENTS, 74, 75, 76, 116.

APPEALS.

I. TO THE SUPREME COURT OF THE UNITED STATES.

II. TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

I. To the Supreme Court of the United States.

1. Nature of Appeal.
2. Perfecting.
3. Time for Taking.
4. Appealable Rulings, etc.
5. Scope of Review.
6. Conclusiveness of Decisions of Patent Office Tribunals.
7. Right to appeal.
8. Assignments of Error.
9. Record on.
10. Costs on.
11. Practice.
12. Rehearings.
13. Conclusiveness of Judgment on.
14. In General.

III. TO COMMISSIONER OF PATENTS.

IV. TO EXAMINERS IN CHIEF.

I. TO THE SUPREME COURT OF THE UNITED STATES.

1. An appeal will not lie to the Supreme Court of the United States from a decree of the Supreme Court of the District of Columbia dismissing a bill to obtain a patent, the money value of the patent not being ascertainable and the validity of the patent not involved. *Durham v. Seymour,* 161 U. S. 235; 74 O. G. 1731; 1896 C. D. 274.

2. No writ of error or appeal to the Supreme Court will be allowed from the decision of the Court of Appeals of the District of Columbia on an appeal from the Patent Office. *Rousseau v. Brown,* 21 App. D. C. 73; 104 O. G. 1122; 1903 C. D. 592.

3. The statutes relating to appeals from the Patent Office do not provide for the entry of final judgments, and the right of appeal to the Supreme Court exists only where final judgments are entered. *Ib.*

4. In order to bring a case by appeal or writ of error from the Court of Appeals of the District of Columbia within the jurisdiction of the Supreme Court of the United States under this alternative, the matter in dispute must be money or some right the value of which can be estimated and ascertained in money and which appears by the record to be of the requisite pecuniary value. *South Carolina v. Seymour,* 153 U. S. 353; 67 O. G. 1191; 1894 C. D. 318.

5. In order that a case may come within this clause, the validity and not the construction only of an authority exercised under the United States must be directly drawn in question. *Ib.*

6. Neither the question whether the Commissioner rightly decided upon the presumptive lawfulness of the right of the State of South Carolina to the trademark sought to be registered nor the question whether his duty was of such a character that a writ of mandamus would lie to compel its performance involved a question of the validity of the authority exercised by him under the United States. *Ib.*

7. The Supreme Court of the United States will not take jurisdiction on appeal of applications for patents, in view of the provisions in relation to appeals from the Circuit Courts of Appeals under the act of March 3, 1891, as the right to apply for a patent and the invention cannot be regarded for jurisdictional purposes as in itself property or a right of property having an actual value susceptible of estimation in money. *Durham v. Seymour,* 161 U. S. 235; 74 O. G. 1731; 1896 C. D. 274.

7½. A decision of the Court of Appeals of the District of Columbia on an appeal from the Commissioner of Patents is not "final" within the meaning of § 8 of the Act of February 9, 1893, (27 Stat. 434, 436, c. 74,) and therefore is not appealable to the Supreme Court of the United States. *Frasch v. Moore,* 211 U. S. 1; 137 O. G. 230.

8. A proceeding involving the validity of a rule of practice of the Patent Office established by the Commissioner under the power conferred by § 483, R. S., is one in which is drawn in question the validity of "an authority exercised under the United States," within the meaning of the act of Feb. 9, 1893, giving an appeal to this court from final judgments and decrees of the Court of Appeals of the District of Columbia in such cases. *Steinmetz v. Allen,* 192 U. S. 543; 32 W. L. R. 147; 109 O. G. 549; 1904 C. D. 703.

9. Without a hard and fixed rule the action of the Patent Office upon the question of dividing applications for patents can be accommodated to the character of invention and discretion can be exercised, and when exercised the courts will not review it except in cases of clear abuse. *Ib.*

II. TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

1. Nature of Appeal.

10. An appeal the the Court of Appeals of the District of Columbia in an interference case is not a proceeding in equity and the provisions of Rev. Stat. § 4915, do not apply. It is a proceeding at law, and hence a decision of the Supreme Court of the United States as to the statute referred to does not apply in this case. *Doyle v. McRoberts,* 10 App. D. C. 445; 79 O. G. 1029; 1897 C. D. 413.

11. The act of Congress approved February 9, 1893, which gave the Court of Appeals of the District of Columbia the power to review the decisions of the Commissioner of Patents, is such an act as Congress was authorized to pass under the Constitution, and in the matter of such appeal no encroachments of the judicial department of the Government on the domain of the executive department are found to justify the courts in holding that the act in question is unconstitutional. *Bernardin v. Duell,* 13 App. D. C. 379; 86 O. G. 995; 1899 C. D. 287.

2. Perfecting.

12. Where an appellant fails to have his cause filed and docketed, it will, on motion of appellee, be docketed and the appeal dismissed. *In re McCreery,* 12 App. D. C. 517; 79 O. G. 1684; 1897 C. D. 480. *Cleveland v. Wright,* 79 O. G. 866; 1897 C. D. 413. *Southall v. Seymour,* 79 O. G. 1624; 1897 C. D. 480. *Morrissey v. Seymour,* 79 O. G. 1684; 1897 C. D. 481.

13. Where the decision appealed from was filed January 16, 1905, the appeal filed March 3, 1905, and the record filed in the court April 18, 1905, or, in other words, the appellant availed himself of all the time allowed by the rules for taking and perfecting his appeal, though by so doing he necessarily prevented the hearing of the appeal until next November, *Held* that in so doing he was within his legal rights, and the court would not on that ground alone, feel justified in dismissing his appeal. *Jones v. Starr,* 26 App. D. C. 64; 117 O. G. 1495; 1905 C. D. 694.

3. Time for Taking.

14. The Court of Appeals of the District of Columbia has au-

thority to limit the time for taking appeals, and there is no restriction by reason of section 4894, Revised Statutes, which has reference solely to the abandonment of an application by failure to prosecute. *In re Hien*, 166 U. S. 432; 79 O. G. 507; 1897 C. D. 367. Affirming 9 App. D. C. 492.

15. Apart from the general rule that courts have power to make reasonable rules not conflicting with express statutes, the Court of Appeals was duly authorized by statute to make rules limiting the time of appeals from the decisions of the Commissioner of Patents. *Ib.*

16. The fact that a rule of the Court of Appeals relating to the time in which an appeal must be taken was promulgated after the decision appealed from is not controlling as to the appeal, since the right of appeal is not a vested right, but one which may be altered by statute or by rule of court. *Ib.*

17. The decision of the Supreme Court in *Gandy v. Marble*, in which it was held that a bill in equity under section 4915, Revised Statutes, was *sub modo* a branch of the application and governed as to laches by section 4894, Revised Statutes, had nothing to do with the time in which an appeal from the decision of the Commissioner of Patents must be taken. *Ib.*

18. Even if there were no rules at the time the right of appeal accrued, after the promulgation of a rule regulating the time for taking appeals the appellant became bound by it. *Hein v. Pungs*, 9 App. D. C. 492; 77 O. G. 1600; 1896 C. D. 649.

19. There is no justification for the theory that, since § 4894 Rev. Stat. gives an applicant a possible two years in which to prosecute his application, he has two years in which to take an appeal to the Court of Appeals of the District of Columbia. *Ib.*

20. The rule limiting the time of appeal from the decision of the Commissioner to the court has no reference to the notice of the decision given to appellant. It is from the date of the decision that the time for taking the appeal must be reckoned, and not from the time of sending notice of the decision to the party against whom it is made. *Burton v. Bentley*, 14 App. D. C. 471; 87 O. G. 2326; 1899 C. D. 393.

21. The terms of the rule must be allowed their ordinary meaning and import, and they plainly limit the commencement of the period of forty days within which an appeal can be taken from

the date of the decision appealed from, excluding the day of the date. *Ib.*

22. Where the decision of the Commissioner of Patents appealed from to the Court of Appeals of the District of Columbia was dated December 10, 1898, but entry was not made on the file-wrapper until December 12, 1898, when the notice of the decision was sent to appellant, and appeal was taken to the court on January 20, 1899, *Held,* that the appeal was taken too late under Rule XX of the court, which requires an appeal to be taken within forty days from the date of the decision of the Commissioner, and not afterward. *Ib.*

23. The rule that all appeals taken from the Commissioner of Patents shall be taken within forty days from the date of the ruling appealed from, and not afterward, is a positive law to the court and to the suitors therein. *Ross v. Loewer,* 9 App. D. C. 563; 77 O. G. 2141; 1896 C. D. 665.

24. Appeal from the decision of the Commissioner of Patents, nearly a year after such decision, is brought in violation of Rule XX of the rules of this court, and should not be entertained, especially when no excuse for the delay is urged. *In re Bryant,* 9 App. D. C. 447; 77 O. G. 1599; 1896 C. D. 648.

25. The contention that a motion for rehearing in the Patent Office should operate as a stay of the running of the time for the prosecution of appeal to this court till after the motion for rehearing has been determined cannot be admitted. *Ross v. Loewer,* 9 App. D. C. 563; 77 O. G. 2141; 1896 C. D. 665.

26. The ruling that the time for prosecuting appeals from decrees in equity or writs of error from a judgment at law is stayed by a motion for rehearing or for new trial and only begins to run from the refusal of such motion is founded upon the principle that the judgment is not complete until the rehearing is disposed of; but the proceedings of the Patent Office are not controlled by the ordinary rules of practice that obtain in the courts of the country, but are controlled by statutory provisions and a code of rules made in pursuance of statutory provisions wholly unlike the rules of practice enforced in the courts. *Ib.*

27. Rule 123 of the Patent Office, which provides that in order to obtain a stay of proceedings motion must be made specifically to that effect, applies in reason and analogy to this case. The

running of the time for appeal was not arrested by filing the motion for rehearing. *Ib.*

28. Where it is not pretended that appellant has been surprised or in any manner prejudiced by computing the time of taking the appeal, as he has had ample time within which to appeal, and as he has thought proper to delay the appeal until after the time for taking it had elapsed, *Held* that he has no one to blame but himself, and the appeal must be dismissed. *Burton v. Bentley*, 14 App. D. C. 471; 87 O. G. 2326; 1899 C. D. 393.

29. Under § 1389, Code D. C., every Saturday, after 12 o'clock noon, is a half holiday in this District for all purposes; and in computing the time within which an appeal to this court from a decision of the Commissioner of Patents, under the rule requiring that such appeals shall be taken within forty days from the date of the ruling or order appealed from, exclusive of Sundays and legal holidays, one-half of each Saturday must be excluded from the computation. *Ocumpaugh v. Norton*, 24 App. D. C. 296; 32 W. L. R. 846.

30. As to time for taking appeal from Commissioner of Patents. See *Hien v. Pungs*, 9 App. D. C. 492; 25 W. L. R. 8.

4. Appealable Rulings, etc.

31. An appeal will not lie from a mere interlocutory or preliminary order or ruling of the Commissioner of Patents in an interference case. *Westinghouse v. Duncan*, 2 App. D. C. 131; 22 W. L. R. 83.

32. The Court of Appeals has no jurisdiction to consider an appeal from a decision of the Commissioner of Patents which is not a final order, and such an appeal will be dismissed. *Union Distilling Co. v. Schneider*, 29 App D. C. 1; 1907 C. D. 613; 129 O. G. 2503.

33. A decision of the Commissioner of Patents dissolving an interference is not a final order. *Ib.*

34. If all collateral and interlocutory proceedings in the Patent Office were subjects of appeal to the Court of Appeals, the proceedings for patents might be made almost interminable, to say nothing of the enormous costs that would be incurred in prosecuting and defending against such appeals. *Hulett v. Long*, 15 App. D. C. 284; 89 O. G. 1141; 1899 C. D. 446.

35. A motion by one of the parties to an interference to dissolve

the interference before the final hearing of the question of priority of invention, and before the case is ready for such hearing, is an interlocutory proceeding, and is not appealable unless made so by statute or rule of court. *Allen v. U. S. ex rel. Lowry*, 26 App. D. C. 8; 33 W. L. R. 354.

36. The requirement for division between process and apparatus is not a refusal of a patent, but is a mere interlocutory order from which there can be no appeal. *In re Frasch*, 20 App. D. C. 298, 100 O. G. 1977; 1902 C. D. 560.

37. After an adverse decision by the Primary Examiner upon a motion to dissolve decisions on priority were rendered by the Examiner of Interferences and the Examiners-in-Chief and appeal was taken to the Commissioner of Patents from the latter decision. Pending this appeal a successor of the Primary Examiner requested jurisdiction of the interference for the purpose of considering the patentability of the issue. Such request was granted, and the Primary Examiner dissolved the interference upon the ground that the issue was not patentable. Upon petition to the Commissioner the decision of the Primary Examiner was set aside and the interference was restored to its prior condition of appeal to the Commissioner on priority. On appeal to the Court of Appeals from the decision of the Commissioner, *Held* that the regularity of the action of the Commissioner in setting aside the decision of the Primary Examiner dissolving the interference is not a question for the consideration of the court. *Mell v. Midgley*, 31 App. D. C. 534; 136 O. G. 1534.

38. The right of a party to make a claim goes to the foundation of an interference, and a judgment of a Primary Examiner denying that right may be appealed to the Court of Appeals of the District of Columbia and that court will take jurisdiction to determine that question as an ancillary question to be considered in awarding priority of invention. *U. S. ex rel. Newcomb Motor Co. v. Moore*, 30 App. D. C. 464; 133 O. G. 1680.

39. The statutes limit the declaration of interferences to the question of priority of invention, and the appeals provided by the statutes relating to interferences are only those upon the question of priority of invention. Appeals upon other questions, and particularly those taken from decisions of the Primary Examiners upon motion affirming the patentability of claims, are left to the

regulation of the Patent Office under the grant of power contained in section 483. *Lowry v. Allen*, 1906 C. D. 765; 125 O. G. 2365.

40. Whether an amendment to preliminary statement shall be allowed in an interference proceeding under the rules of practice of the Patent Office calls for the exercise of a wide latitude of discretion by the Commissioner, and certainly nothing less than an abuse of that discretion, causing a palpable miscarriage of justice, would warrant the review and reversal of his action. *Hammond v. Basch*, 24 App D. C. 469; 115 O. G. 804; 1905 C. D. 615.

41. Where the Commissioner of Patents has refused to reopen an interference for the purpose of permitting the introduction of alleged newly-discovered evidence and has also refused to allow the amendment of a preliminary statement, the Court of Appeals will not remand the case nor review the decision of the Commissioner on these questions where no abuse of discretion is found. *Richards v. Meissner*, 24 App. D. C. 305; 114 O. G. 1831; 1905 C. D. 595.

42. Whether leave shall be given to amend a preliminary statement is a matter within the discretion of the Commissioner and is not reviewable, save possibly in a case of palpable abuse of that discretion. *Neth v. Ohmer*, 27 App. D. C. 319; 1906 C. D. 693; 123 O. G. 998.

43. Where the tribunals of the Patent Office in the exercise of their discretion have refused to reopen a case for the introduction of newly-discovered evidence, their conclusions will be reviewed by the Court of Appeals only in case of an abuse of discretion. *Dunbar v. Schellenger*, 29 App. D. C. 129; 128 O. G. 2837; 1907 C. D. 567.

44. The reopening of a cause for the introduction of newly-discovered evidence is always a matter for the trial court and is in its discretion, and that discretion is not subject to review by a purely appellate tribunal. *Richards v. Meissner*, 24 App. D. C. 305; 114 O. G. 1831; 1905 C. D. 595.

45. The court will not entertain a reason of appeal founded upon a motion for rehearing in the Patent Office. *Greenwood v. Dover*, 23 App. D. C. 251; 109 O. G. 2172; 1904 C. D. 630.

46. Where the Commissioner on appeal reversed the decision of the Examiner of Interferences granting a motion to retake testi-

mony which had been suppressed for gross irregularities in taking, the grant or refusal of the motion was within the lawful discretion of the Commissioner and is not such a decision as the court can review. *Jones v. Starr,* 26 App. D. C. 64; 117 O. G. 1495; 1905 C. D. 694.

47. Rules of practice in interference cases are necessary and should not be disregarded and the court does not sit to review the rulings of the Commissioner of Patents in discretionary matters or to review decisions made by the Examiner of Interferences not lawfully appealed from. *Ib.*

48. Where during interference proceedings between applicant and patentee the patentee applies for and obtains reissue of the patent in interference and the interfering claims are omitted from the reissue and thereafter decisions awarding priority in said interference proceedings are rendered in the Patent Office and appeal is taken to the Court of Appeals, *Held* that the court, equally with the various tribunals of the Patent Office, is without legal authority to render any judgment for the relief of either party and that the appeal must be dismissed. *Lattig v. Dean,* 25 App. D. C. 591; 117 O. G. 1798; 1905 C. D. 698.

49. The grant or denial of a request for permission to inspect an affidavit filed under Rule 75 by the opposing party in an interference rests within the discretion of the Commissioner of Patents and will not be disturbed unless clearly shown to have worked a material injury to the applicant. The mere possibility that such an affidavit might contain some contradiction of the testimony given in the interference held insufficient to warrant a review of the decision of the Commissioner of Patents. *Davis v. Garrett,* 28 App. D. C. 9; 1906 C. D. 724; 123 O. G. 1991.

50. Where an applicant involved in an interference had previously filed an affidavit under Rule 75 for the purpose of antedating certain references cited against claims not included in the interference issue and where there is nothing in the record tending to show any connection between said affidavit and the interference issue, *Held* that the decision of the Commissioner of Patents refusing to permit the other party to the interference to inspect the affidavit was of an interlocutory nature and not the subject of review. *Ib.*

51. The question of striking an application from the files of the Patent Office rests largely within the discretion of the Commis-

sioner of Patents, and his rulings will not be disturbed save when that discretion has been palpably abused. *Ib.*

52. The question whether the description in a design case is a proper one is not reviewable by the Court of Appeals except in an extraordinary case. *In re Mygatt,* 26 App. D. C. 366; 1906 C. D. 596; 121 O. G. 1676.

53. Where a party to an interference did not appeal from the adverse decision of the Examiners-in-Chief upon priority, so that under Rule 132 of the Patent Office the claims which were involved in that interference stand finally rejected, *Held* that such party has no standing before the court in the interference as to those claims. *Fowler v. Boyce,* 27 App. D. C. 48; 1906 C. D. 580; 121 O. G. 1014.

54. The action of the Commissioner of Patents in rejecting a claim for the striker plate in another application by the same inventor, but which rejection was acquiesced in by the applicant, *Held* not to be reviewable on appeal from a decision of the Commissioner rejecting a claim in this application for the combination of the striker-plate and door or casing. *In re Forg,* 2 App. D. C. 58; 66 O. G. 515; 1894 C. D. 138.

55. The exercise by a court of equity of its discretion in retaining a cause brought to enjoin the infringement of a patent and for an accounting, where pending suit the patent has expired, is not reviewable on appeal unless shown to have been clearly illegal. *Busch v. Jones,* 16 App. D. C. 23; 28 W. L. R. 535.

56. No appeal lies from a decision of the Commissioner of Patents in a controversy between rival applicants for the registration of a trade-mark. *Einstein v. Sawhill,* 2 App. D. C. 10; 22 W. L. R. 89; 65 O. G. 1918; 1893 C. D. 677.

57. In the absence of gross abuse of discretion on the part of the Commissioner of Patents in requiring an applicant for a trademark to strike out a description from his petition and refer only to the accompanying drawings, his action will not be reviewed by the Court of Appeals. *In re Atkins & Co.,* 29 App. D. C. 385.

5. Scope of Review.

58. The appeal allowed to the Court of Appeals for the District of Columbia by the Act of Congress of February 9, 1893, in case of interferences is for the purpose of having the final deci-

sion of the Commissioner of Patents on the question of priority of invention reviewed and determined as that question is contemplated and provided for in Section 4904, Rev. Stat. and not for the purpose of having decisions upon collateral or interlocutory questions reviewed and decided. *Hulett v. Long*, 15 App. D. C. 284; 89 O. G. 1141; 1899 C. D. 446.

59. As a general proposition, the power of the Court of Appeals in interference cases is limited to the determination of the question of priority of invention as between the parties to the interference, and neither the question of patentability of the invention nor the propriety of the declaration of interference is open to consideration. *Beckman v. Wood*, 15 App. D. C. 484; 89 O. G. 2459; 1899 C. D. 459.

60. It is not competent for the Court of Appeals of the District of Columbia, in an interference proceeding, to abandon the question of priority and pass upon the patentability of the alleged invention. *Doyle v. McRoberts*, 10 App. D. C. 445; 79 O. G. 1029; 1897 C. D. 413.

61. The patentability of the claims of the contesting parties in an interference case is not involved in an appeal on the question of priority of invention and will not be determined by the court. *Mell v. Midgley*, 31 App D. C. 534; 136 O. G. 1534. *Schupphaus v. Stevens*, 17 App. D. C. 548; 95 O. G. 1452; 1901 C. D. 365. *Hisey v. Peters*, 6 App. D. C. 68; 71 O. G. 892; 1895 C. D. 349.

62. The question of patentability is not ordinarily regarded as open on appeal to the Court of Appeals of the District of Columbia in an interference case, but is to be regarded therein as conclusively established by the Commissioner of Patents. The question in such cases is one of priority and not of patentability. *Latham v. Armat*, 17 App. D. C. 345; 95 O. G. 232; 1901 C. D. 337.

63. Where the question of facts as to priority of invention had been fully considered by the officials of the Patent Office, the decision of the Patent Office must stand, unless the evidence shows beyond any reasonable doubt that the appellant was the first inventor. *Hisey v. Peters*, 6 App. D. C. 68; 71 O. G. 892; 1895 C. D. 349.

64. When lower tribunals of the Office conclude that the inventions of two applications are the same and the Commissioner

concludes that they are different, since in interference cases the question of priority only is before the court, the court will not decide which is the proper theory, but will accept the theory of the Commissioner. Each contestant is accordingly entitled to a patent for his particular invention. *Cushman v. Lines,* 10 App. D. C. 156; 78 O. G. 2051; 1897 C. D. 346.

65. Where the junior party to an interference concedes that his preliminary statement fails to overcome the filing date of the senior party and the patentability of the issue has been favorably passed upon by the tribunals of the Patent Office, before whom the question was brought in accordance with the practice of that Office, on appeal to the Court of Appeals from a judgment on priority the question of patentability will not be considered where it is raised merely for the purpose of preventing the grant of a patent to the senior party, except in an extraordinary case. *Potter v. McIntosh,* 28 App. D. C. 510; 127 O. G. 1995; 1907 C. D. 505.

66. Upon a petition for rehearing on the ground that the Court of Appeals of the District of Columbia had no jurisdiction over an interference case appealed to it, except on the question of priority of invention, and yet that, instead of deciding that question, it decided that appellant was entitled to the patent on account of the relations existing between him and the appellee, *Held* that it was not necessary to adjudge in formal terms that the appellant is the prior inventor when he has been adjudged to be, in law, the only inventor. *Milton v. Kingsley,* 7 App. D. C. 531; 75 O. G. 2195; 1896 C. D. 426.

67. Where appeal was taken to the Court of Appeals on the ground that the Commissioner of Patents erred (1) in refusing to consider whether a patent granted to one of the parties to the interference was for the same invention as that involved in the interference and if so whether it is not a statutory bar to the grant of a patent for said invention to said party; (2) in holding that this question of a statutory bar was an *ex parte* one and therefore not involved in the interference; (3) in declining to consider whether an application as filed disclosed the invention in controversy, and (4) in refusing to hold that the subject-matter of the interference was inserted in one of the applications by amendment after the application had been filed in the Patent Office and subsequently to the application filed by the other party,

upon which his patent had issued, *Held* that these questions are of a preliminary nature and do not arise for consideration by the Court of Appeals upon a decision by the Commissioner of Patents in an interference case. *Hulett v. Long*, 15 App. D. C. 284; 89 O. G. 1141; 1899 C. D. 446.

68. The mode of raising these questions in the Patent Office and of their determination therein specially provided for and prescribed by Rules 122, 124 and 126 of the Rules of Practice of that Office. *Ib.*

69. Where it was urged on appeal to the Court of Appeals from the decision of the Commissioner in an interference case that the application of one of the parties as originally filed did not claim or disclose the subject-matter of the interference and that the matter of interference is new matter put in the case by amendment since the original application was filed, and therefore said party had no right to make the claim in issue, and that he could not be given the benefit of constructive reduction to practice as of the date of filing his original application, *Held* that this is a preliminary question which had been disposed of by the tribunals of the Office on motion to dissolve under Rule 122. *Ib.*

70. The right of appeal in case of refusal of a patent upon the ground of non-patentability of the claim and refusal of a patent because of interference with a prior right of invention are distinct rights, and the latter does not involve the former. *Hisey v. Peters*, 6 App. D. C. 68; 71 O. G. 892; 1895 C. D. 349.

71. The court should not be called upon to decide priority between rival claimants to an invention where the Patent Office expressly reserves for future consideration the question of patentability of the invention. It is not the province of the court to decide moot causes. *Oliver v. Felbel*, 20 App. D. C. 255; 100 O. G. 2384; 1902 C. D. 565.

72. Whether or not an application involved in interference discloses the subject-matter in issue, and therefore whether or not the interference is properly declared, is a question to be ordinarily determined by the Patent Office, but in extreme cases where palpable error has been committed the court may review the decision of the Patent Office on this point. *MacMulkin v. Bolle*, 30 App. D. C. 112; 130 O. G. 1691.

73. On an appeal from the Commissioner of Patents to the Court

of Appeals of the District of Columbia on the question of priority of invention the court has no power to hold that the Commissioner has committed an error for which a case should be reversed because of a claim that he refused to permit counsel to be heard in support of a given contention. The court cannot in such a proceeding control his action in a discretionary matter such as the extent of oral argument he will permit at a hearing of an interference. *Sobey v. Holsclaw,* 28 App. D. C. 65; 1907 C. D. 465; 126 O. G. 3041.

74. Assignments of error by the Commissioner of Patents raising the question of the sufficiency of disclosure in appellee's applications will be given but passing notice by the Court of Appeals where such question was not raised before the tribunals of the Patent Office. It was incumbent upon appellant to raise this question before the Primary Examiner, whose skill in the particular art peculiarly qualified him to consider it. *Cutler v. Leonard,* 136 O. G. 438; 31 App. D. C. 297.

75. The question of interference in fact and the question of patentability of the issue must be presumed to have been finally determined in the Patent Office. They will not be inquired into by the court, except perhaps in very rare and exceptional cases. *Luger v. Browning,* 21 App. D. C. 201; 104 O. G. 1123; 1903 C. D. 593.

76. The court will not, except in extreme cases, go behind the declaration of interference in order to determine the question of identity of the inventions claimed by the parties. *Swihart v. Mauldin,* 19 App. D. C. 570; 99 O. G. 2322; 1902 C. D. 540.

77. Where it was sought to show that the Commissioner of Patents had no authority to refuse a patent when the Primary Examiner had held the alleged invention to be patentable and had put the application in interference with another case, *Held* that it is not competent for the Court of Appeals of the District of Columbia to go behind the records in the case before it and review what had been done in another and distinctly independent proceeding, and that the court has no right to review or supervise the administrative action of the Commissioner. *In re Locke,* 17 App. D. C. 314; 94 O. G. 432; 1901 C. D. 267.

78. Where it was contended that the question whether Steven's application discloses or covers the invention of the issue is necessarily involved in the determination of the question of priority

of invention, *Held* that this contention has no support in any decision of the court. It is a question of patentability and nothing else. *Schupphaus v. Stevens,* 17 App. D. C. 548; 95 O. G. 1452; 1901 C. D. 365.

79. Where the Commissioner in considering the question of priority dissolves the interference as to some of the counts, it is not within the province of the Court of Appeals to review his order in that regard. *Hillard v. Brooks,* 23 App. D. C. 526; 111 O. G. 302; 1904 C. D. 658.

80. Where the Examiners-in-Chief expressed the opinion that some of the counts were anticipated by a patent issued to other parties and the Commissioner did not adopt their recommendation, that question is not for the Court of Appeals to consider. *Hillard v. Brooks,* 23 App. D. C. 526; 111 O. G. 302; 1904 C. D. 658.

81. Where it appears that the Primary Examiner, the Examiner of Interferences, and the Examiners-in-Chief have construed an issue broadly and the Commissioner held that a limited construction must be placed upon the issue in the light of the art, *Held* that the question as to whether the Primary Examiner erred in allowing the broad claims will not be considered by the Court of Appeals, though it might have been considered by the Commissioner, and as the interference was not dissolved by the Commissioner a machine which comes within the broad terms of the issue is a reduction to practice of that issue. *Ib.*

82. As regards the contention of the appellant that "the structure in interference differs from the prior structure of Roberts in but two particulars, it is sufficient to say, that in so far as it appears to raise a question of patentability, that question has been settled by the allowance of the claims. *Dunbar v. Schellenger,* 29 App. D. C. 129; 128 O. G. 2837; 1907 C. D. 567.

83. On an appeal from the decision of the Commissioner award-priority of invention, *Held* that the court will confine its decision to the matter passed upon in his decision and not consider the questions of abandonment, prior public use, and anticipation of the invention, which have not been acted on in the Patent Office. *Colhoun v. Hodgson,* 5 App D. C. 21; 70 O. G. 276; 1895 C. D. 122.

84. On an appeal on priority the court will not review the findings of the Commissioner upon the sufficiency of a showing to

support a petition for the reinstatement of an abandoned application where there appears to have been no abuse of power on the part of the Commissioner. *Kinsman v. Strohm,* 31 App. D. C. 581; 136 O. G. 1769.

85. Where in an interference proceeding the testimony of the party had been suppressed for gross irregularities in taking it and no attempt had been made within the proper time to get the decision suppressing the testimony set aside or to take other testimony, *Held* that the court would not be justified in considering the suppressed testimony were it before them. *Jones v. Starr,* 26 App. D. C. 64; 117 O. G. 1495; 1905 C. D. 694.

86. Where an interference is before the Court of Appeals on appeal from the decision of the Commissioner of Patents, the court cannot and should not interfere with the rulings of the Patent Office upon interloctuory matters that occurred in the office during the pendency of the cause, such as motions for rehearing, motions to vacate orders and to remand the cause, which have no reference to the merits of the controversy, unless perhaps in extreme cases it should be necessary for the maintenance of the jurisdiction of the court. *Ritter v. Krakau,* 24 App. D. C. 271; 114 O. G. 1553; 1905 C. D. 585.

87. The Court of Appeals of the District of Columbia will not consider the operativeness of a device disclosed by one of the interfering parties as incident to the main question of priority where that question has been settled in favor of such party by the Patent Office in accordance with the practice of that office. *Duryea v. Rice,* 28 App. D. C. 423; 126 O. G. 1357; 1907 C. D. 443.

88. On an appeal relating to priority of invention the court will not consider the question whether the device shown in the application of one of the parties is operative. The decision of the Patent Office on that matter will be accepted. *Lotterhand v. Hanson,* 23 App. D. C. 372; 110 O. G. 861; 1904 C. D. 646.

89. Where each party to an interference attacks the invention of the other as impracticable and therefore devoid of patentable novelty, *Held* that that is a question which the Court of Appeals of the District of Columbia can not consider in an interference proceeding. That there may be extreme cases in which it would be proper in interference proceedings to raise and determine the question of the patentability of the device in controversy may

be conceded, but ordinarily no such question can arise in this court in such proceedings. *Dodge v. Fowler,* 11 App. D. C. 592; 82 O. G. 595; 1898 C. D. 320.

6. Conclusiveness of Decisions of Patent Office Tribunals.

90. Where the three tribunals of the Patent Office have concurred in a finding of fact the Court of Appeals will defer to such finding unless error is made plainly to appear. *Onderdonk v. Parkes,* 31 App. D. C. 214; 135 O. G. 665; *Ries v. Kirkegaard,* 30 App. D. C. 199; 132 O. G. 845; Parkes v. Lewis, 28 App. D. C. 1; 123 O. G. 2313; 1906 C. D. 735. *In re Clunies,* 28 App. D. C. 18; 123 O. G. 263; 1906 C. D. 740. *Bourn v. Hill,* 27 App. D. C. 291; 123 O. G. 1284; 1906 C. D. 699. *Orcutt v. McDonald,* 27 App. D. C. 228; 123 O. G. 1287; 1906 C. D. 705. *Flora v. Powrie,* 23 App. D. C. 195; 109 O. G. 2443; 1904 C. D. 636. *Howard v. Hey,* 18 App. D. C. 142; 95 O. G. 1647; 1901 C. D. 375. *Glenn v. Adams,* 12 App. D. C. 175; 83 O. G. 158; 1898 C. D. 407. *In re Barratt,* 11 App. D. C. 177; 79 O. G. 2020; 1897 C. D. 506.

91. Where a junior party to an interference appeals to the Court of Appeals and the three tribunals of the Patent Office have rendered concurrent opinions against him, *Held,* that in order to prevail in the Court of Appeals he must show a clear case of error in these decisions. *Murphy v. Meissner,* 24 App. D. C. 305; 114 O. G. 1830; 1905 C. D. 592.

92. Where the three Patent Office tribunals have been in accord, and consequently the case falls within the decisions of this court that, except in extraordinary cases, it will not disturb the findings of fact of the Patent Office, *Held,* that this does not mean that the court is bound by the conclusions drawn from such facts unless convinced that such conclusions are correct. *O'Connell v. Schmidt,* 27 App. D. C. 77; 1906 C. D. 662; 122 O. G. 2065.

92½. In awarding priority of invention the right of a party to make a claim may be considered as an ancillary question; but where three tribunals of the Patent Office have concurred in answering the question in the affirmative the court will follow them unless a manifest error has been committed. *Lindmark v. Hodgkinson,* 31 App. D. C. 612; 137 O. G. 228.

93. On an appeal to the court the question is as to priority of invention and not as to patentability, and therefore the court will

accept the ruling of the Patent Office that the claims now in issue were sufficiently apparent from the specifications and drawings in the original application and that they constituted part of the invention intended to be covered by the original patent. *Austin v. Johnson,* 18 App. D. C. 83; 95 O. G. 2685; 1901 C. D. 391.

94. Upon an appeal on priority the court will accept the adjudication of the Patent Office as conclusive of the question whether the invention specified in the issue is disclosed in the applications of the parties, and therefore authorized the declaration of interference. *Ostergren v. Tripler,* 17 App. D. C. 557; 95 O. G. 837; 1901 C. D. 350.

95. The decisions of the expert tribunals of the Patent Office on the question of the sufficiency of the disclosure of a party to an interference will be accepted by the Court of Appeals as conclusive, except in extreme cases where palpable error has been committed. *Stone v. Pupin,* 19 App. D. C. 396; 100 O. G. 1113; 1902 C. D. 550. *Kilbourn v. Hiner,* 29 App. D. C. 54; 128 O. G. 1689; 1907 C. D. 552.

96. Where a question of interference in fact or right to make claims has been fully considered by the Primary Examiner, the Examiners-in-Chief and the Commissioner and all have concurred in finding that a party to an interference has the right to make a claim which is the same as the count of the issue of an interference, *Held,* that these conclusions will ordinarily be considered by the court as conclusive. *Podlesak v. McInnerney,* 26 App. D. C. 399; 1906 C. D. 558; 120 O. G. 2127.

97. On appeal to the court the decisions of the expert tribunals of the Patent Office as to the identity of the inventions disclosed and claimed by the parties will ordinarily be accepted as conclusive; but in extreme cases where palpable error has been committed such decisions may be reversed. *Seeberger v. Dodge,* 24 App. D. C. 476; 114 O. G. 2382; 1905 C. D. 603.

98. In a case of interference appealed to a court the decision of the Patent Office must stand unless the evidence shows beyond any reasonable doubt that the appellant was the original inventor. *Arnold v. Tyler,* 10 App. D. C. 175; 79 O. G. 156; 1897 C. D. 349.

99. Where patentable novelty has been denied not only by one but by all the expert tribunals of the Patent Office, the applicant must make out a very clear case of invention, and this is but an-

other application of the same principle that governs in those cases where a patent having been regularly granted all doubt in respect of invention is resolved in favor of the patentee. *In re Smith*, 14 App. D. C. 181; 87 O. G. 893; 1899 C. D. 313.

100. The rule that where patentable novelty has been denied by all of the expert tribunals of the Patent Office it is incumbent upon one appealing therefrom to make out a clear case of error in order to obtain a reversal, *Held*, to be particularly applicable to a case which, for its satisfactory determination, requires technical knowledge of an abstruse art that can only be acquired through thorough training. *Beseick's Appeal*, 16 App. D. C. 345; 91 O. G. 1436; 1900 C. D. 294.

101. When the question as to whom priority should be awarded is doubtful, that doubt demands that the decision of the Commissioner of Patents should be affirmed. *Latham v. Armat*, 17 App. D. C. 345; 95 O. G. 232; 1901 C. D. 337.

102. Ordinarily where the point has been raised whether the application of one of the parties was broad enough in the terms of its specification and claims to embrace the invention of the other, and especially where the invention is one of elaborate and complicated mechanism, the decisions of the expert tribunals of the Patent Office in respect of identity have, for obvious reasons, been accepted as conclusive. *Beckman v. Southgate*, 28 App. D. C. 405; 127 O. G. 1254; 1907 C. D. 489.

7. Right to Appeal.

103. The right of appeal is not a vested right, but may be altered by statute or by rule of court made in pursuance of a statutory authority to enact such rule. *Hien v. Pungs*, 9 App. D. C. 492; 77 O. G. 1600; 1896 C. D. 649.

104. The right to appeal to the Court of Appeals of the District of Columbia from a decision of the Commissioner of Patents is limited to two classes of cases: first, where an application for patent has been finally denied, and, second, where in an interference proceeding there has been a final determination of the question of priority of invention between adverse claimants. *In re Frasch*, 20 App. D. C. 298; 100 O. G. 1977; 1902 C. D. 560.

105. The right of appeal given by sec. 4909, R. S., exists only where claims in an application for patent, or some of them, have been twice considered and rejected by the primary examiner. *Steinmetz v. Allen*, 22 App. D. C. 56; 31 W. L. R. 358.

106. Appeals do not lie to this court from all or any preliminary decision in matters of interference, though seriously affecting the rights of the parties, but only from those wherein the priority of the claim to the invention has been finally awarded. *Cross v. Phillips,* 14 App. D. C. 228; 87 O. G. 1399; 1899 C. D. 342.

107. Neither the rules of the Patent Office nor any section of the Revised Statutes provide for nor permit appeals from a decision rendered upon a motion for dissolution affirming the patentability of the issue. *Sobey v. Holsclaw,* 28 App. D. C. 65; 126 O. G. 3041; 1907 C. D. 465.

108. There is no appeal to the Court of Appeals from any order or ruling of the Commissioner of Patents in any preliminary or interlocutory matter in an interference. *Westinghouse v. Duncan,* 2 App. D. C. 131; 66 O. G. 1009; 1894 C. D. 170.

109. Where the patentability of the claims is not in question, but merely the manner of their presentation to the Patent Office, *Held* that the action of the Office is interlocutory and deprives the applicant of no substantial right which would entitle him to appeal. *Steinmetz v. Allen,* 102 O. G. 231; 1903 C. D. 632.

110. There is no appeal to the Court of Appeals from the opinion of the Commissioner of Patents holding that there is or is not an interference, nor from his refusal to investigate an alleged interference, such matters being left by law to his sound discretion. *Westinghouse v. Duncan,* 2 App. D. C. 131; 66 O. G. 1009; 1894 C. D. 170.

111. Patentability of the invention is a necessary prerequisite to the declaration of an interference, and the court is without jurisdiction in a case where there is not a final favorable decision on that question by the Patent Office. *Oliver v. Felbel,* 20 App. D. C. 255; 100 O. G. 2384; 1902 C. D. 565.

112. A decision was rendered by the Commissioner on February 28, 1891, rejecting the claims. There were no other or further steps taken in the case until October 23, 1896, when appellant moved for a rehearing and for leave to amend by canceling certain claims embraced by the original patent and to insert in lieu thereof modified claims filed with the motion for rehearing. This motion was on March 13, 1897, denied by the Commissioner. On appeal to the Court of Appeals from this ruling of the Commissioner refusing to rehear the case, *Held* that the appeal can-

not be maintained, as an appeal will not lie from a ruling refusing a **rehearing** or an application for leave to amend the original claims. *In re Messinger,* 12 App. D. C. 532; 83 O. G. 1995; 1898 C. D. 506.

113. The appeal cannot be maintained, as it was not taken from the original decision of the Commissioner of February 28, 1891, refusing the reissue of the patent, either to the Supreme Court of the District of Columbia or to the Court of Appeals of the District of Columbia, within the limits prescribed by the rule of the Court of Appeals after the rule was adopted. *Ib.*

114. The rulings on questions of mere practice in the Patent Office will not be reviewed in this court unless it appears that there has been an abuse in the exercise of discretion and that substantial rights have been thereby affected or denied. The practice of refusal by the Commissioner to remand a case to the Primary Examiner is settled by the decisions of the Patent Office. *In re Marshutz,* 13 App. D. C. 228; 85 O. G. 778; 1898 C. D. 578.

115. When the Commissioner decides that one of two issues of an interference was invented by one party and the other by the other party, but that the second issue has no patentable novelty to distinguish it from the one first invented, an appeal from his decision awarding priority of the second issue amounts to nothing more than a moot case and should not be adjudicated. *Shellaberger v. Schnabel,* 10 App. D. C. 145; 79 O. G. 339; 1897 C. D. 364.

116. In an interference of two issues, one of which the Commissioner decided was made by one contestant and the other by the other, when he also holds in the same decision that the two are structurally and patentably different, the party adjudged the prior inventor has no ground of appeal, since if the Commissioner was right in his holding the first issue covers all that there is patentable, and if the Commissioner is not right his mistake does not injure such prior inventor. *Ib.*

117. A decision of the Commissioner of Patents that may be appealed from to the court can only be made after the Primary Examiner, the Board of Examiners-in-Chief, and the Commissioner have all considered the case and made a finding therein. *Westinghouse v. Duncan, 2* App. D. C. 131; 66 O. G. 1009; 1894 C. D. 170.

118. Where the Primary Examiner has held claims to be patent

able and the Examiner of Interferences and the Examiners-in-Chief have omitted or declined to call the attention of the Commissioner to the unpatentability of the issue or where the Commissioner has declined to review the decision of the Primary Examiner after his attention has been called to the alleged unpatentability of the issue, the Court of Appeals of the District of Columbia should hold the question of patentability to be settled, except in an extraordinary case. The statute does not provide for an appeal to the court from a ruling by the Commissioner or of any subordinate tribunals affirming the patentability of a claimed invention. It is only from a decision adverse to the patentability of a claim that an appeal will lie. *Sobey v. Holsclaw,* 28 App. D. C. 65; 126 O. G. 3041; 1907 C. D. 465.

119. A right of appeal lost by delay cannot be revived through the instrumentality of a remedial prerogative writ. *Ex parte Dries,* 3 App. D. C. 165; 22 W. L. R. 301.

8. Assignments of Error.

120. Although neither the rules of the Court of Appeals of the District of Columbia nor of the Patent Office mention amendments to the reasons of appeal, when such amendment is made in due time to correct an assignment of error that may not be sufficiently specific or some inadvertence in its preparation and no possible injury could be done the opposing party, there appears to be no reason why it should not be permitted. *Horine v. Wende,* 29 App. D. C. 415; 129 O. G. 2858; 1907 C. D. 615.

121. On appeal by defendant from an order granting a preliminary injunction in a suit to enjoin the infringement of a patent, an assignment of error that the bill insufficiently describes the patent will not be entertained, where no objection was made on the preliminary hearing and defendant admitted the existence of the patent of the contents of which he was evidently advised and denied infringement. *Lane v. Levi,* 21 App. D. C. 168; 31 W. L. R. 131.

9. Record on.

122. The record of the proceedings in a case in the Patent Office upon being filed with the clerk of the Court of Appeals, becomes a public judicial record of the court and must be so treated. There is no warrant found either in the patent law or the com-

mon law of the land to keep such papers secret and not to allow copies to be made except upon the special order of the court or consent of the appellant. *Ex parte Drawbaugh*, 2 App. D. C. 404; 66 O. G. 1451; 1894 C. D. 192.

123. The complication of the record by testimony which is irrelevant, immaterial, and utterly useless for the elucidation of the substantial issue between the parties and by useless and irrelevant controversies between counsel condemned. *Scott v. Scott*, 18 App. D. C. 420; 96 O. G. 1650; 1901 C. D. 419.

124. Where appellee moves to dismiss the appeal or to affirm the decision below in an interference proceeding, on the ground that that decision could not have been other than in its favor and that the appeal was therefore taken for delay and appellant moves that hearing upon appellee's motion be postponed until the hearing upon the appeal on the ground that it is necessary to have certain testimony made part of the record already filed, *Held* that the appellant's motion to postpone should be denied, as no good excuse is advanced for failing to make the alleged testimony a part of the record already filed, and appellant's good faith in making the motion is open to grave doubt. *Jones v. Starr*, 26 App. D. C. 64; 117 O. G. 1495; 1905 C. D. 694.

125. Failure to print transcript of record is ground for dismissal of appeal. *Pelton v. Evered*, 77 O. G. 1600; 1896 C. D. 651. *Munson v. Carper*, 79 O. G. 160; 1897 C. D. 359.

10. Costs on.

126. The Court of Appeals has no power or jurisdiction to award costs, or to execute any judgment therefor that might be entered in cases of appeals from the Commissioner of Patents. *Wells v. Reynolds*, 5 App. D. C. 20; 69 O. G. 1507; 1894 C. D. 664.

127. Where on appeal from the decision of the Commissioner of Patents a record was allowed to be filed in the case by appellee upon assurance that it would have some material bearing upon the question of the issue presented by the appellee, but on consideration it was found that the record had no such bearing, *Held* that the record so introduced must be at the cost of the appellee. *Stevens v. Scher*, 11 App. D. C. 245; 81 O. G. 1932; 1897 C. D. 761.

11. Practice.

128. Where a question as to the patentability of the invention is raised by some tribunal of the Patent Office after the declaration of an interference, it should be finally settled before a decision on priority is rendered which entitles the defeated party to appeal to the court. *Oliver v. Felbel,* 20 App. D. C. 255; 100 O. G. 2384; 1902 C. D. 565.

129. A motion that an investigation be made as to the alleged loss of a part of an exhibit in the case in the Patent Office denied, since that is a matter which should have been settled in the Patent Office before taking an appeal to the court. *Blackford v. Wilder,* 21 App. D. C. 1; 104 O. G. 580; 1903 C. D. 573.

130. The court will not consider affidavits filed either in the court or the Patent Office relating to changes that may have occurred in drawings, models, experimental machines, and like exhibits after they are introduced in evidence. *Greenwood v. Dover,* 23 App. D. C. 251; 99 O. G. 2172; 1904 C. D. 630.

131. There is no precedent or practice which would justify the court in granting a motion for leave to apply to Patent Office to have an interference that has been finally determined reopened with permission to introduce additional evidence to supply defects and omissions that are supposed to exist. The court has no power to authorize the taking of new or additional testimony upon a motion like the present. *Nielson v. Bradshaw,* 16 App. D. C. 92; 91 O. G. 648; 1900 C. D. 274.

132. Defects in the evidence, if they can be corrected at all, should be corrected in the Patent Office by making a seasonable application for leave to do so, since the appellee should not be subject to the trouble and expense attending an appeal to this Court by the appellant upon a defective state of the record. *Ib.*

133. Where an interference is declared between three parties and all present testimony and but one of these parties takes an appeal to the Court of Appeals, the case made out by the party who has not appealed cannot be considered in the determination of the controversy. *Richards v. Meissner,* 24 App. D. C. 305; 114 O. G. 1831; 1905 C. D. 595.

134. Where in a suit for an accounting the decree of the court below confirmed a report of the auditor finding in favor of the complainant and adjudged that he recover costs from the defend-

ant, but did not in terms adjudge that he recover the amount found due by the auditor, this court, in affirming the decree, may modify it by the addition of a clause that the complainant recover the amount. *Eclipse Bicycle Co. v. Farrow*, 23 App. D. C. 411; 32 W. L. R. 265.

135. Where pending an appeal on a petition for mandamus against a public officer, the officer retires, the appeal will not be dismissed; but the judgment of the court below will be reversed and the cause remanded with directions to dismiss the suit for want of proper parties. The result is the same whether the judgment appealed from is in favor of or against the officer. *Seymour v. Nelson*, 11 App D. C. 58; 25 W. L. R. 542.

136. Where one of the parties to an interference added the claims in issue by amendment without a supplemental oath, the Court of Appeals would not be justified in awarding priority to the opposing party because of such failure. The most that the court could do under the circumstances would be to remand the proceeding in order that a supplemental oath may be made and the matter renewed. *Phillips v. Sensenich*, 134 O. G. 1806; 31 App. D. C. 159.

12. Rehearings.

137. Though there may be cases in which rehearing may well be had, the endeavor of the court is always to bring to a case in the first instance the best judgment which it possesses in the interests of justice, that the determination, when made, should have the element of stability. It is not just to the court or to the parties that argument should be held back by counsel until after decision upon the chance that the judgment may be favorable nevertheless. *Hien v. Pungs*, 9 App. D. C. 492; 78 O. G. 484; 1897 C. D. 253.

138. A motion for rehearing, made after a former motion for the same purpose had been denied, and the case appealed to the Supreme Court of the United States, in which court the appeal was dismissed for want of jurisdiction, dismissed as not having been made in time, under the rules, and that the matter was settled by the decision on the first motion. *Durham v. Seymour*, 10 App. D. C. 274; 25 W. L. R. 9.

13. Conclusiveness of Judgment on.

139. The final judgment of the Court of Appeals entitling a

claimant to a patent, in either an *ex parte* or an interference proceeding, is not conclusive of either patentability or priority. The patent, when issued, may be attacked in the courts by parties whose interests may be affected by the monopoly claimed thereunder; and the defeated party has another remedy by proceeding in a court of equity, as provided in § 4915, Rev. Stat. *Johnson v. Mueser,* 29 App. D. C. 61.

140. In the case of interlocutory appeals taken to or allowed by this court, equally as in the case of appeals from final judgments or decrees, the decision of this court becomes the law of the case, final and irrevocable, upon all questions involved or that might have properly been brought forward in such interlocutory decision, save only that this court may, upon a proper showing, revoke or modify its decision, or allow the cause to be reopened, and save also that upon the final hearing the court below may not necessarily be bound in all cases by such interlocutory decision of this court. *Farrow v. Eclipse Bicycle Co.,* 18 App. D. C. 101; 29 W. L. R. 218.

14. In General.

141. The act of Congress approved February 9, 1893, by which the determination of appeals from the Commissioner of Patents was vested in the Court of Appeals of the District of Columbia, does not overstep the boundaries erected by the Constitution between the three great departments of the Government, but it is within the power of Congress to enact such law. *Bernardin v. Seymour,* 10 App. D. C. 294; 79 O. G. 1190; 1897 C. D. 428.

142. Where the patentability of the claims of an interference issue has been favorably passed upon by the Primary Examiner *ex parte* and also *inter partes* upon a motion to dissolve, from whose affirmative decision in the latter case no right of direct appeal is given either by the patent statutes or the rules of the Patent Office, and both the Examiner of Interferences and the Examiners-in-Chief have refused to direct the attention of the Commissioner, under Rule 126, to the fact that the claims were unpatentable, it cannot be successfully maintained that the Commissioner of Patents decided the question of priority without first determining and deciding that the subject-matter was patentable. *Sobey v. Holsclaw,* 28 App. D. C. 65; 126 O. G. 3041; 1907 C. D. 465.

143. The writ of mandamus can not be used to serve the purposes of an appeal or writ of error. *Tuttle v. Allen,* 35 W. L. R. 50.

144. As to right to mandamus to compel the allowance of an appeal. See *Steinmetz v. Allen,* 22 App. D. C. 56; 31 W. L. R. 358.

145. As to proper remedy to compel Commissioner of Patents to require primary examiner to forward appeal. See *Ex parte Frasch,* 192 U. S. 566; 32 W. L. R. 153.

III. TO COMMISSIONER OF PATENTS.

146. The Primary Examiners, who are given statutory authority to decide questions of patentability, are under the supervision of the Commissioner, and it would seem to be not only his right but his duty to correct any manifest error committed by any of the Primary Examiners relative to the patentability of a supposed invention or of the right of an applicant to claim it whenever such error was called to his attention. To warrant any action on his part in such a case, the error must be so gross that it would be a wrong to the public to permit a patent to issue. It manifestly should not be based upon a mere difference of opinion. *Sobey v. Holscaw,* 28 App. D. C. 65; 126 O. G. 3041; 1907 C. D. 465.

147. Where the question of the patentability of the claims of the issue has been repeatedly raised before the subordinate tribunals of the Patent Office and is again raised upon appeal to the Commissioner on priority, the adoption by the Commissioner of the views of the subordinate tribunals is a sufficient determination by him of the question so far as it is necessary to be determined in an interference proceeding. *Ib.*

148. The Assistant Commissioner has authority vested in him by Congress to hear and decide cases appealed to the Commissioner of Patents when they are assigned to him by the Commissioner, and a mandamus will not lie to compel the Commissioner to decide such cases in person. *Stapleton v. Duell,* 17 App. D. C. 575; 95 O. G. 1049; 1901 C. D. 359.

149. The mere fact that an appeal is taken to the Commissioner *in person* does not prevent the assignment of that case to the Assistant Commissioner for decision. The mere form in which

the appeal is given cannot deprive the Assistant Commissioner of jurisdiction. *Ib.*

IV. TO EXAMINERS-IN-CHIEF.

150. The statute authorizing an appeal when claims have been twice rejected means that the claims must have been considered on their merits and found to be not patentable. *Steinmetz v. Allen,* 102 O. G. 231; 1903 C. D. 632.

151. Where the claims of an application for patent have not been acted upon as to their merits, but the applicant has been required to present them in two applications instead of one, *Held* that the claims have not been rejected within the meaning of the law and the rules and that the applicant is not entitled to appeal to the Examiners-in-Chief. *Ib.*

152. A requirement by the Primary Examiner for division is appealable to the Examiners-in-Chief, although a distinction can be made between his ruling upon that question and one on the merits, if we regard the merits to mean invention, novelty, or the like. *Steinmetz v. Allen,* 192 U. S. 543; 109 O. G. 549; 1904 C. D. 703.

153. By the general terms of Sec. 4909, Rev. Stat., it was not intended by Congress to give the right of appeal in cases of mere preliminary or interlocutory orders. *Steinmetz v. Allen, 22* App. D. C. 56; 104 O. G. 853; 1903 C. D. 578.

154. Section 4909, Revised Statutes, although general in its terms, gives the right of appeal only where the claims or some of them have been considered and twice rejected upon their merits as not being patentable for some of the causes designated by the statutes. *Ib.*

155. A requirement by the Examiner for the division of an application is not an action from which an appeal may be taken to the Examiners-in-Chief. *Ib.*

156. Where an applicant for a design patent presents a claim and the Patent Office rules that the applicant cannot have the claims presented and can have no claim but a suggested one, *Held* that such ruling is, in effect, a rejection of the claim presented and when twice refused is appealable to the Examiners-in-Chief under section 4909 of Revised Statutes. *In re Mygatt,* 26 App. D. C. 366; 1906 C. D. 596; 121 O. G. 1676.

157. Where the unity of the inventions claimed by the petitioner

is not denied, he has the right to join them in one application, and where the Primary Examiner in such case denies that right, the Examiner's action is a rejection of the application and entitles petitioner to an appeal to the Examiners-in-Chief under section 4909, Rev. Stat. *Steinmetz v. Allen,* 192 U. S. 543; 109 O. G. 549; 1904 C. D. 703.

158. Where the ruling is such that the applicant must yield and give up the right claimed, or if he does not yield he will not be heard at all and may subsequently be regarded as having abandoned his application, such ruling must be considered as final and appealable. *Ib.*

159. Where an appeal is filed regular in form, it is the duty of the Examiner to answer the appeal by furnishing the Examiners-in-Chief the statement provided for in Rule 135. *Steinmetz v. Allen,* 192 U. S. 543; 109 O. G. 549; 1904 C. D. 703.

160. There is no appeal to the Examiners-in-Chief of the Patent Office from decisions of primary examiners. *Allen v. Lowrey,* 26 App. D. C. 8; 33 W. L. R. 354.

See ACCOUNTS AND ACCOUNTING, 2; ACTIONS, 1; ATTORNEYS, 3, 4; COMMISSIONER OF PATENTS, 1; COURTS, 1; EQUITY, 3; MANDAMUS, 14, 36-44; PATENTS, 717, 724, 725, 734, 735-739, 811; REMEDIES, 2; RES ADJUDICATA, 12; STATUTES, 2, 6; TRADE-MARKS, 100, IX; WORDS AND PHRASES, 3.

APPLICATIONS. See APPEALS, 51, 112; RES ADJUDICATA, 3, 5.

APPLICATION FOR PATENT. See APPEALS, 157, 158; PATENTS III 1, 260-269, 368-373, 785, 992-994, 1001; RES ADJUDICATA, 11; STATUTES, 11.

APPLICATION FOR REISSUE. See PATENTS X 2; X 4.

APPLICATION FOR REGISTRATION OF TRADE-MARK. See APPEALS, 57; TRADE-MARKS, III.

ARTS. See PATENTS II 14.

ASSIGNMENT. See ACTIONS, 4, 5; COPYRIGHTS, 27-29, PARTIES TO SUIT, 1; PATENTS VI, 765-767, 887; PROCESS.

ASSIGNMENTS OF ERROR. See APPEALS, 74, 120, 121; PATENTS, 733.

ASSISTANT COMMISSIONER OF PATENTS. See APPEALS, 148,149; COMMISSIONER OF PATENTS, 7, 8.

ATTORNEYS.

1. Section 4 of the act of July 4, 1884, applies to agents or attorneys before the Patent Office as well as before the other Bureaus of the Interior Department. *Wedderburn v. Bliss,* 81 O. G. 1783; 1897 C. D. 750.

2. Section 487, Revised Statutes, remits to the Commissioner of Patents the entire cognizance of cases of malpractice occuring before his Bureau and under it the hearing of such cases is to be by him and not by the Secretary of the Interior. It is eminently fitting that this should be so in view of the character of the duties, judicial or quasi-judicial, which are vested in him. *Weddcrburn v. Bliss,* 12 App. D. C. 485; 83 O. G. 296; 1898 C. D. 413.

3. By § 487, Rev. Stat., there is reserved to the Secretary of the Interior a supervisory power over the action of the Commissioner of Patents; but this is no more than an executive or administrative proceeding. The provision that the judgment of the Commissioner shall "be subject to the approval of the Secretary of the Interior" does not make the Secretary a court for the trial of the case, nor does it make him in any proper sense an appellate tribunal before which it would be proper for a party in interest to demand and to be accorded a hearing. *Ib.*

4. The meaning of such supervisory power is not that the Secretary must try or hear the cause, but that the judgment of the Commissioner is not to be carried into effect until it receives the approval of the Secretary, and in order to give it this approval, or conversely and by implication his disapproval, the Secretary is necessitated to go over the record of the proceedings that is made up for him according to law or regulation. This, as we have said, is a judicial or quasi-judicial duty on his part; but it is not the equivalent in any sense of the hearing of a cause. *Ib.*

5. When the act of July 4, 1884, and § 487, Rev. Stat., are compared and construed together, it is clear that it was not the intention of Congress to repeal § 487 by the enactment of the later law, and if such was not the intention of Congress then the only reasonable construction of the act of 1884 was that

the hearing therein provided to be given to the persons charged with malpractice was the hearing implied to be by §487 of the Rev. Stat. So far, at least, as the Patent Office was concerned the act of 1884 made no substantial change in the law. *Ib.*

6. The provision of the act of July 4, 1884, is not that the Secretary might exclude from practice after notice and hearing of the party charged, which would be the more natural form of expression if it was the intention that the hearing should be before the Secretary in person, but that he might exclude "after notice and opportunity for a hearing," meaning plainly a hearing before some proper officer in such reasonable mode as should be provided by regulation of the Department. *Ib.*

7. The word "hearing" in law and in this statute means something more than oral argument. It means, also, the right to adduce testimony. If the sole hearing contemplated by the statute was to be had before the Secretary, the Commissioner of Patents could not hear it at all, and the only duty that could reasonably be imposed upon that officer was that of taking the testimony and reporting it to the Secretary; but this conclusion would be in direct contravention of § 487, Rev. Stat. which explicitly provides that the Commissioner shall determine the matter, subject only to the approval of his action by the Secretary of the Interior. *Ib.*

8. Assuming that mandamus is proper whenever an inferior court or a judicial officer charged with the exercise of discretionary or judicial functions either assumes to exercise jurisdiction when none exists, or refuses to entertain jurisdiction with which he is by law invested, without regard to the question whether there is any appeal from his judgment when rendered and when he has acted, *Held* that it is doubtful whether the refusal of the Secretary to accord to the relator the opportunity to make an argument, especially when it is not shown or in any manner intimated how or where the Secretary erred or was mistaken or misled, is to be regarded as a jurisdictional matter for which the writ of mandamus would be proper. *Ib.*

9. The construction placed by an executive department of the Government upon a statute enacted for its guidance and the regulation of its business must, unless it be plainly erroneous, receive due weight and consideration, and should not be disregarded, except for cogent reasons. When, therefore, the De-

partment, which was called upon to administer the act of 1884 and construe that act in connection with § 487, Rev. Stat., did so construe it that the notice and an opportunity for a hearing therein provided to be given should be given by the head of the proper Bureau and that the investigation should be conducted by such Bureau officer, subject to the approval of his findings by the Secretary of the Interior, it is not apparent that there was error in that construction. *Ib.*

10. Where an agent was furnished with a copy of charges made against him before the Commissioner of Patents as to why he should not be disbarred from practicing as a patent agent, and he had a hearing before the Commissioner of Patents on these charges and the Commissioner recommended that he be disbarred from further practicing as an agent or attorney, and the Secretary approved the reasons given by the Commissioner of Patents without affording the agent a hearing before him in person, *Held* that the refusal of the Secretary to hear oral argument was not arbitrary, oppressive, or unjust, and the proceeding before him was conducted under "due process of law." *Wedderburn v. Bliss,* 81 O. G. 1783; 1897 C. D. 750.

11. The proceeding before executive and ministerial officers and special tribunals exercising quasi-judicial powers in order to constitute due process of law need not be as formal as in courts of justice or conducted after the manner of proceedings in such courts. What would be due process of law before such officers and tribunals might not be considered such in a court of justice. What is due process of law in a particular case depends largely upon the nature and object of the proceeding, the duties and the jurisdiction of the officer or tribunal, and the nature of the right or immunity to be affected by the proceeding. If the mode of procedure be such that the party to be affected has an opportunity of presenting to the officer or tribunal in any reasonable way his contention as to the facts and merits of the question to be determined, the proceeding is due process of law; but if the determination be made in an arbitrary, oppressive, or unjust manner, so that the party to be affected has no reasonable opportunity for hearing, then the proceeding and determination are void because not due process of law. *Ib.*

12. Mistaken advice on the part of a solicitor, from which followed long delay in putting an invention into practice, will not

be allowed to militate against the just claim of others who have been diligent in the realization of their conceptions. *Arnold v. Tyler,* 10 App. D. C. 175; 79 O. G. 156; 1897 C. D. 349.

13. The attorney cannot be made responsible for mistakes in the case, since the client must be charged with the responsibility for the action, mistake, or inadvertence of the attorney. *In re Starkey,* 21 App. D. C. 519; 104 O. G. 2150; 1903 C. D. 607.

AUDITOR OF COURT. See ACCOUNTS AND ACCOUNTING.

AUDITOR'S REPORT. See APPEALS, 134.

BAR OF PATENT ISSUED. See PATENTS, 12.

BAR OF RIGHT TO PATENT. See PATENTS, 174.

BROADENING CLAIMS. See PATENTS.

BURDEN OF PROOF. See PATENTS, 9, 290, 291, 556, 574, 584, IX 4; TRADE-MARKS, 101.

CANCELLATION OF PATENT. See PATENTS, 975.

CANCELLATION OF TRADE-MARK. See TRADE-MARKS. VI.

CHAMPERTY. See COPYRIGHTS, 26.

CHANGE IN LOCATION OF ELEMENTS. See PATENTS II, 9.

CHROMOLITHOGRAPHS. See COPYRIGHTS, 2.

CLAIMS. See APPEALS, 38, 53, 54, 167, 168, 209, 210, 213, 214, 215, 457-465, 549-550, V, VIII 3, X 4.

CLOUD ON TITLE.

A vague and adroitly worded assertion of right, accompanied by threats of litigation, will create a cloud on title to letters patent sufficient to sustain a bill in equity by the patentee to remove the cloud and to justify the granting of a temporary injunction. *Columbia Sand Dredging Co. v. Miller,* 20 App. D. C. 245; 30 W. L. R. 469.

A cloud on title can be created by matter not of record. *Ib.*

See PATENTS, 702.

COAT OF ARMS OF UNITED STATES. See TRADE-MARKS, 9.

COMBINATIONS. See PATENTS, 71, 83, 84, 94, 102 112, 114, 115, II, 8, 9, 137, 157, 1003.

COMITY. See PATENTS, 1008.

COMMISSIONER OF PATENTS.

1. While the Commissioner of Patents is an executive officer and subject in administrative or executive matters to the supervision of the Secretary of the Interior, his actions in deciding patent cases are essentially judicial in their nature and not subject to review by the executive head, an appeal to the courts having been provided for. *Bernardin v. Duell,* 172 U. S. 576; 86 O. G. 995; 1899 C. D. 287.

2. The Commissioner of Patents is empowered by law to establish rules to regulate the procedure and practice in his office, and the requirement that certain claims be presented in two applications instead of one comes within this authority. *Steinmetz. v. Allen,* 102 O. G. 231; 1903 C. D. 632.

3. Notwithstanding that the law has provided certain official agencies to advance the work of the Patent Office, the Commissioner is the head of the Bureau, and if there be any reasonable ground within his knowledge why a patent should not issue, whether specific objection be raised by the Examiners or not, it is his duty to refuse the patent, and it is especially his duty to do so when the Primary Examiner and the Examiners-in-Chief have found such ground for refusal to exist. *Drawbaugh v. Seymour,* 9 App. D. C. 219; 77 O. G. 313; 1896 C. D. 527.

4. As one of the instrumentalities designated by Congress in execution of the power granted, the office of Commissioner of Patents was created, and though he is an executive officer, matters in the disposal of which he exercises functions judicial in their nature may properly be brought within the cognizance of the courts. *Bernardin v. Duell,* 172 U. S. 576; 86 O. G. 995; 1899 C. D. 287.

5. In deciding whether or not a patent shall issue the Commissioner acts on evidence, finds facts, applies the law, and decides questions affecting not only public but private interests, and so as to reissues or extensions or interferences between contesting claimants. In all this he exercises judicial functions. *Bernardin v. Duell,* 172 U. S. 576; 86 O. G. 995; 1899 C. D. 287.

6. The different statutes show that in the gradual development

of the policy of Congress in dealing with the subject of granting patents the recognition of the judicial character of the questions involved became more and more pronounced. *Ib.*

7. Where on appeal from the decision of the Examiners-in-Chief of the Patent Office to the Commissioner, the Commissioner referred the case to the Assistant Commissioner for his consideration and determination, although the Commissioner was present and engaged in other official duties, and the Assistant Commissioner heard and determined the case and thereafter the Commissioner declined to rehear the case, *Held* that a petition for writ of mandamus will not lie to compel the Commissioner to hear the case. *Stapleton v. Duell,* 28 W. L. R. 835 93 O. G. 2532; 1900 C. D. 409.

8. Under the provision contained in the appropriation act of Congress of July 11, 1890, and repeated in each annual appropriation act since that date, whereby it is declared that the Assistant Commissioner of Patents "shall perform such duties pertaining to the office of the Commissioner of Patents as may be assigned to him by the Commissioner," any duty pertaining to the office of the Commissioner, whether of an appellate character or otherwise, may be assigned by him to be performed by the Assistant Commissioner and includes an assignment of the duty of hearing and deciding an appeal taken to the Commissioner in an interference proceeding. *Stapleton v. Duell,* 17 App. D. C. 575; 29 W. L. R. 156; 95 O. G. 1049; 1901 C. D. 359.

9. When an application is made for the registration in the Patent Office of a label under the provisions of sec. 3 of the act of Congress of June 18, 1874, the Commissioner of Patents is called upon to decide whether or not the thing presented for registration is a label as defined by the statute; and his determination of that question can not be controlled by injunction or mandamus. *Allen v. Regina Music Box Co.,* 22 App. D. C. 271; 31 W. L. R. 476.

10. Courts of the United States are bound to take notice of the persons who occupy the positions of heads of Departments, etc., including that of the Patent Office. The Commissioner made a party defendant in this suit having been succeeded in that office by another person, no decree made against him would

bind the present incumbent of the office. *Backus Heater Co. v. Simonds*, 2 App. D. C. 290; 66 O. G. 1893; 1894 C. D. 211.

11. After a decision of the Court of Appeals on the question of priority, the Commissioner of Patents may refuse a patent to the successful interferant. *Sobey v. Holsclaw*, 28 App. D. C. 65; 126 O. G. 3041; 1907 C. D. 465.

12. The performance by the Commissioner of Patents of the duty of determining whether a particular word or words can become the subject of lawful appropriation as a trademark, involves the exercise of discretion, and in such respect his function is judicial. *Bronson v. Duell*, 17 App. D. C. 471; 29 W. L. R. 126.

13. As to power relative to disbarment of attorneys from practice before Patent Office. See *Wedderburn v. Bliss*, 12 App. D. C. 485; 26 W. L. R. 293.

14. As to time within which appeal from the Commissioner of Patents may be taken. See *Hein v. Pungs*, 9 App. D. C, 492; 77 O. G. 1600; 1896 C. D. 649. *Burton v. Bentley*, 14 App. D. C. 471; 87 O. G. 2326; 1899 C. D. 393. *Ross v. Loewer*, 9 App. D. C. 563; 77 O. G. 2141; 1896 C. D. 665. *In re Bryant*, 9 App. D. C. 563; 77 O. G. 1599; 1896 C. D. 648. *Ocumpaugh v. Norton*, 24 App. D. C. 296; 32 W. L. R. 846.

See ABATEMENT AND REVIVAL; ACTIONS, 3; APPEALS, 40, 42, III, 135; ATTORNEYS, 2, 3, 7; MANDAMUS, 18, 19; PARTIES TO SUIT, 1, 3, 6; PATENTS, 190, 705, 727, 770, 773, 959; RES ADJUDICATA, 13; TRADE-MARKS, 39, 104, 130, IV.

COMMON LAW. See COPYRIGHTS, 15.

COMPOSITIONS. See PATENTS II, 12; 64; 118, 1005, 1006.

COMPUTATION OF TIME. See APPEALS, 29.

CONCEALMENT OF INVENTION. See PATENTS, 186, 444-456, 503.

CONCEPTION OF INVENTION. See PATENTS.

CONCLUSIVENESS OF DECISIONS OF PATENT OFFICE TRIBUNALS. See APPEALS, 90-102, 106, 118.

CONCLUSIVENESS OF JUDGMENT OF COURT OF APPEALS. See APPEALS, 139, 140.

CONFUSION AND DECEPTION. See TRADE-MARKS, 19, 21, 22, 23, 26, 53, 54, 101, 110.

CONGRESS, POWERS OF. See PATENTS, 11; STATUTES, 10.

CONSTITUTIONAL LAW. See APPEALS, 11, 141; COPYRIGHTS, 23; PATENTS, 11, 199, 200.

CONSTRUCTION OF CLAIMS. See PATENTS, 457-465, V. 751.

CONSTRUCTION OF ISSUES. See APPEALS, 81; VIII, 4, 5.

CONSTRUCTION OF STATUTES. See STATUTES.

CONSTRUCTIVE REDUCTION TO PRACTICE. See PATENTS, 196, 197, 368-373, 564, 565, 744, 746, 752, 802, 803, 812.

CONTINUATION OF APPLICATION FOR PATENT. See PATENTS, 192, 193, 195.

CONTRACTS.

1. That a licensee of a former owner of patents, having the right under contract to lease phonographs and graphophones, does not itself perform the contract, and sells only graphophones, thereby discriminating against the phonograph, is no answer to an application for a temporary injunction to enjoin a third party, who has become owner of the patents, from infringing upon his rights under the contract; but the fact might be availed of by proper proceedings to enforce or vacate the contracts. *Whitson v. Columbia Phonograph Co.*, 18 App. D. C. 565; 29 W. L. R. 804; 98 O. G. 418; 1902 C. D. 497.

2. Where an agreement provides for the organization of a corporation to handle patents obtained by one of the parties, and the assignment of such patents to the corporation, and the agreement has been performed in part, a court of equity will decree specific performance thereof, even though while still executory it was too vague and uncertain to be then enforced, and was in part for personal services. *Sanche v. Electrolibration Co.*, 4 App. D. C. 453; 22 W. L. R. 769.

3. A bill in equity to enforce specific performance of an alleged

verbal contract to give 1,000 shares of stock in a corporation proposed tc be formed to exploit a patent in consideration of a payment by complainant to defendant of $45 in cash and the assumption by him of an indebtedness of $50 on a certain lot in Wisconsin (which was also conveyed to complainant), was properly dismissed on the ground that the evidence did not establish such a complete and certain contract as would justify a decree of performance, there being no showing as to what was to be the amount of the capital stock or the number and value of the shares into which it was to be divided. *Riordan v. Stout,* 17 App. D. C. 397; 29 W. L. R. 141.

4. An interest in the proceeds of a patent may be transferred by contract; but the interest so acquired is not the right or interest of an inventor upon which a patent can be obtained. *Tyler v. Kelch,* 19 App. D. C. 180; 98 O. G. 1282; 1902 C. D. 506.

5. Where T. executed a release to K. of all claim to the invention for the sum of $75 and alleges in his testimony that this release was of his right as the true inventor and not of a mere pecuniary interest in the invention and it appears that the invention is a very valuable one, *Held* that to accept T.'s statement would be to indulge a supposition contrary to all rational conduct of men understanding the nature of the business in which they were engaged. *Ib.*

6. A contract between the parties whereby they agreed to transfer all inventions made by them to a certain company can have no bearing on the question as to which of these parties is the inventor of a certain machine, but bears only on the question of ownership of the invention. *Hunt v. McCaslin,* 10 App. D. C. 527; 79 O. G. 861; 1897 C. D. 401.

7. A company agreed in consideration of the sale to it by F. of all his interest in an invention for which two applications for patent were pending in the Patent Office to pay him royalty on each device manufactured and to use due diligence in manufacturing and selling, and the company's attorney took charge of the prosecution of the applications, and the manufacture of the device was begun and it was extensively advertised, but subsequently M., an officer of the company, obtained a patent for a device effecting the same purpose as that of F., whereupon the company ceased to make the latter's device and substituted that of M., and one of F.'s applications after being allowed was

placed in interference with other applications and was abandoned by the failure of the attorney to prosecute it and the other application was allowed to become forfeited by failure of the company to pay the final Government fee, and meanwhile the company became the owners of another patent claimed to dominate the devices of both F. and M. under which it continued to manufacture the device of M., and on the failure of the company to make any returns or render any account F. instituted proceedings for an accounting, *Held* that a decree holding F. entitled to royalty from the company for the devices manufactured under M.'s patent, as well as for those professedly manufactured under its contract with him, and directing a reference to the auditor for a statement of such account should be affirmed. *Eclipse Bicycle Co. v. Farrow,* 16 App. D. C. 468; 93 O. G. 1312; 1900 C. D. 389.

See COPYRIGHTS, 26; ESTOPPEL, 9; PATENTS, 3, 998.

COPYRIGHTS.

I. What Copyrightable.
II. Who May Obtain.
III. Perfecting Right.
IV. Notice of Copyright.
V. Publication.
VI. Rights of Owner of Copyright.
VII. Mandamus to Compel Issuance.
VIII. Infringement.
IX. Assignments.

I. What Copyrightable.

1. A blank book of forms containing not a complete English sentence or composition of any kind is not the subject of copyright. *Everson v. Young,* 26 W. L. R. 546.

2. A Chromolithograph is a "pictorial illustration" within the meaning of section 4952, R. S. U. S., and is within the protection of the copyright law (secs. 4952, 4956, and 4965 R. S. U. S., as amended by Act of March 3, 1891, ch. 565, 26 Stat. 119, and Act of March 2, 1895, 28 Stat, 965). *Bleistein v. Donaldson Lith. Co.,* 188 U. S. 239; 31 W. L. R. 99.

II. Who May Obtain.

3. The interests of a party as printer and publisher merely of a dramatic composition will not entitle him to obtain a copyright

for the protection of that interest. *Koppel v. Downing,* 11 App. D. C. 93; 25 W. L. R. 511.

4. A mere temporary licensee of the use of a dramatic composition, without any proprietary right or interest in it, and without special authority from the proprietor to act as his agent, has no right to take out a copyright of the manuscript, and no authority to confer upon a printer or publisher employed by him the right to take out a copyright in his own name. *Ib.*

5. Where a temporary licensee of the use of a dramatic composition, without authority from the proprietor, authorized a publisher employed by him to take out a copyright in his own name, which was done, and thereafter the proprietor agreed with the publisher to defray the expenses of a suit for infringement to recover penalties provided by § 4966 R. S., the recovery to be apportioned between them; held that the interest of the publisher was not sufficient to entitle him to a copyright, and that the proprietor could not, by retroactive adoption, constitute him a trustee so as to enable him to maintain the suit. *Ib.*

6. Where a proprietor of a work, after filing a copy of the title, neglects to perfect his copyright, and by such neglect abandons such right, that right cannot, sixteen years thereafter, be revived by authorizing another to apply for and obtain a copyright in a name different from that of the real proprietor. *Ib.*

III. Perfecting Right.

7. To secure a copyright of a book of dramatic composition, the work must be published within a reasonable time after the filing of the title page, and two copies delivered to the Librarian of Congress. *Koppel v. Downing,* 11 App. D. C. 93; 25 W. L. R. 511.

8. The policy of the law of copyright requires that the public should have notice, by a true and correct official registry, of the real author or proprietor entitled to the enjoyment of the monopoly granted thereby as against the public. *Koppel v. Downing,* 11 App. D. C. 93; 25 W. L. R. 511.

IV. Notice of Copyright.

9. Section 4962 of the Revised Statutes as amended by act of June 18, 1874, ch. 301, (18 Stat. L., 78; U. S. Comp. St. 1901, p. 3411,) providing "that no person shall maintain an action for the infringement of his copyright unless he shall give notice

thereof by inserting in the several copies of every edition published * * * · by inscribing upon some visible portion thereof, or of the substance on which the same shall be mounted," the notice of copyright, has not for its object to require the inscription upon the original painting, map, &c., but only upon those published copies concerning which it is designed to convey information to the public which shall limit its use and circumscribe the rights of the purchaser. *American Tobacco Co. v. Werckmeister*, 207 U. S. 284; 133 O. G. 1433.

V. Publication.

10. The requirement of the act of June 18, 1874, chapter 301, section 1, 18 Stat., 78, (Rev. Stat., sec. 4962,) that "no person shall maintain an action for the infringement of his copyright" unless the required notice shall be inserted "in the several copies of every edition published" does not extend to publications abroad, and the owner of a work copyrighted in this country may restrain the publication thereof by another who has imported for purposes of reproduction copies published by such owner abroad without such notice. *United Dictionary Co. v. G. & C. Merriam Co.*, 208 U. S. 260; 133 O. G. 515.

11. The exhibition of a painting at a public gallery by the author prior to copyrighting the same does not deprive him or his assigns from subsequently securing a valid copyright where the same was expressly entered at the gallery with copyright reserved. *American Tobacco Co. v. Werckmeister*, 207 U. S. 284; 133 O. G. 1433.

VI. Rights of Owner of Copyright.

12. Copyright property under the Federal law is wholly statutory and depends upon the rights created under acts of Congress passed in pursuance of authority conferred by § 8 of Art. I of the Constitution. *Bobbs-Merrill Co. v. Strauss*, 210 U. S. 339.

13. Property in copyright is the creature of the Federal statute passed in the exercise of the power vested in Congress by the Federal Constitution in Article I, section 8, "to promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." *American Tobacco Co. v. Werckmeister*, 207 U. S. 284; 133 O. G. 1433.

14. The right of an author in the United States to multiply

copies of his works after publication is the creation of a new right by Federal statute under constitutional authority and not a continuation of a common-law right. *Globe Newspaper Co. v. Walker,* 210 U. S. 356.

15. At common law an author had a property in his manuscript and might have redress against anyone undertaking to pubiish it without his consent. *Bobbs-Merrill Co. v. Strauss,* 210 U. S. 339.

16. The rights of a patentee are not necessary to be applied by analogy to those claiming under copyright. *Bobbs-Merrill Co. v. Strauss,* 210 U. S. 339.

17. The sole right to vend granted by § 4952, Rev. Stat., does not secure to the owner of the copyright the right to qualify future sales by his vendee or to limit or restrict such future sales at a specified price, and a notice in the book that a sale at a different price will be treated as an infringement is ineffectual as against one not bound by contract or license agreement. *Bobbs-Merrill Co. v. Strauss,* 210 U. S. 339. *Scribner v. Strauss,* 210 U. S. 352.

18. Whatever rights one may have as author and composer of musical compositions and vocal selections must depend wholly for recognition and remedy upon the provisions of the Copyright Act. *Stern v. Rosey,* 17 App. D. C. 562; 29 W. L. R. 159.

VII. Mandamus to Compel Issuance.

19. A writ of mandamus will not be issued to compel the Librarian of Congress to register a publication claimed to be the subject of copyright, unless it appears that the publication comes fairly within the purview of the Copyright Act. *Everson v. Young,* 26 W. L. R. 546.

VIII. Infringement.

20. An action to recover damages for the infringement of a copyright cannot be maintained by the person who, though not the proprietor of the thing copyrighted but merely the printer and publisher thereof under a contract with the proprietor, unlawfully takes out a copyright in his own name. *Koppel v. Downing,* 24 W. L. R. 342.

20a. Reproduction, through the agency of the phonograph, of the sounds of musical instruments playing the music composed

and published by the appellants was not a copy or publication of the same within the meaning of the Copyright Act (R. S. § 4952). *Stern v. Rosey*, 17 App. D. C. 562; 29 W. L. R. 159.

21. Congress having by §§ 4965-4970, Rev. Stat., provided a remedy for those whose copyrights in maps are infringed, a civil action at common law for money damages cannot be maintained against the infringers. *Globe Newspaper Co. v. Walker*, 210 U. S. 356.

22. The copyright of a musical composition which is published in the form of sheet-music is not infringed by a perforated roll of paper designed to be used in connection with an automatic piano-player in reproducing the music recorded in the copyrighted sheets, since such perforated roll is not a "copy" within the meaning of the copyright statutes. *White-Smith Music Publishing Co. v. Apollo Co.*, 209 U. S. 1; 133 O. G. 762.

23. Constitutional rights of a corporate defendant in an action for the forfeiture of infringing copies of a painting protected by copyright are not violated by the admission in evidence of the replevin proceedings under which such infringing copies were seized over the objection that by such proceedings rights under the fourth and fifth amendments to the Federal Constitution were invaded. *American Tobacco Co. v. Werckmeister*, 207 U. S. 284; 133 O. G. 1433.

24. After judgment of forfeiture of infringing copies of a copyrighted painting under § 4965 of the Revised Statutes (U. S. Comp. St. 1901, p. 3414) a separate action cannot be maintained to recover the penalty prescribed in said section for every infringing copy of the copyrighted painting found in the infringer's possession or sold by him, since such section contemplates but a single action in the nature of replevin, in which may be had both a forfeiture and a recovery of penalties. *Werckmeister v. American Tobacco Co.*, 207 U. S. 375; 133 O. G. 2179.

25. Where the jurisdiction of the Circuit Court is invoked for the protection of rights under the copyright statute that court cannot consider questions of contract right not dependent on the statute where diverse citizenship does not exist, or if it does exist, where the statutory amount is not involved. *Scribner v. Strauss*, 210 U. S. 352.

26. As to whether an agreement between the owner of a translation, who had failed to take out a copyright, and a publisher,

who had unlawfully done so, that the latter should bring suit for infringement in his own name, the expense to be borne by the owner and any recovery to be for their mutual benefit, is not champertous. See *Koppel v. Downing*, 24 W. L. R. 342.

IX. Assignments.

27. An instrument providing that "I hereby transfer the copyright in my picture 'Chorus' to the Photographische Gesellschaft, Berlin (The Berlin Photographic Company) for the sum of £200, London, April 2, 1894." signed by the author of the painting, *Held* to constitute a complete transfer of the property right of copyright existing in the picture, there being no evidence of any intention on the part of the author to retain any further interest in the copyright. *American Tobacco Co. v. Werckmeister*, 207 U. S. 284; 133 O. G. 1433.

28. An author may, before publication, assign the right or privilege of taking a copyright independent of the transfer of the copyrightable thing itself. *Ib.*

29. The word "assigns" in § 4952, Rev. Stats., as amended March 3, 1891, (26 Stat. L. 1106, c. 565; U. S. Comp. St., 1901, p. 3406), is not used as descriptive of the character of the estate which the "author, inventor, designer or proprietor" may acquire. The statute was intended to give to the assigns of the original owner of the right to copyright an article the right to take out the copyright secured by the statute independently of the ownership of the article itself. *Ib.*

See STATUTES, 7.

COSTS.

The Court of Appeals has no power or jurisdiction to award cost, or to execute any judgment therefor that might be entered in cases of appeals from the Commissioner of Patents. *Wells v. Reynolds*, 5 App. D. C. 20.

See APPEALS, 126, 127, 134; MANDAMUS, 52.

COURTS.

1. The Court of Appeals has ample authority, under the statute creating it, to frame rules to limit the time in which appeals may be taken from decisions of the Commissioner of Patents; and Rule 22 of the court is a valid and appropriate one and bind-

ing alike upon court and parties. *Hien v. Pungs,* 9 App. D. C. 492; 25 W. L. R. 8.

2. The Court of Appeals has no power or jurisdiction to award cost, or to execute any judgment therefor that might be entered in cases of appeals from the Commissioner of Patents. *Wells v. Reynolds,* 5 App. D. C. 20.

3. The Court of Appeals cannot review by mandamus the determination by the Commissioner of Patents of the question whether a label is entitled to registration. *Allen v. Regina Music Box Co.,* 22 App. D. C. 271; 31 W. L. R. 476.

4. The Court of Appeals of the District of Columbia has no original jurisdiction to direct and supervise the administration of the affairs of the Patent Office and a petition that the Commissioner of Patents be instructed to allow a party to an interference to take testimony denied. *De Ferranti v. Lindmark,* 30 App. D. C. 417; 137 O. G. 733.

5. The jurisdiction of the Supreme Court of the District of Columbia to proceed in a suit under section 4915 Rev. Stat. can arise only in case of refusal of an application by the Commissioner of Patents or the Supreme Court on appeal from him. *Durham v. Commissioner of Patents,* 69 O. G. 507; 1894 C. D. 547.

See APPEALS; COMMISSIONER OF PATENTS, 4, 10; COPYRIGHTS, 25; PATENTS, 106, 768, 959; PUBLIC OFFICERS, 2; TRADEMARKS, 109.

DAMAGES. See ACTIONS, 4; EQUITY, 4, 5.

DEATH. See ABATEMENT AND REVIVAL.

DECLARATIONS. See ESTOPPEL, 1; PATENTS, 625.

DECLARATION OF INTERFERENCE. See APPEALS, 39; PATENTS.

DELAY. See PATENTS, 174-189; III, 2; 374, 376, 387-389, 416, 485, 486, 491, 493, 919, 925, 964-966, 972, 973.

DEPOSITIONS. See PATENTS, IX, 7.

DESCRIPTIVE MARKS. See TRADE-MARKS, 12, 13, 18, 20, 25, 27, 28, 31, 32, 33, 35.

DESIGNS. See APPEALS, 52; PATENTS, 52-57, 155, 160, 162, 466, 467, 472.

DETERMINATION OF PATENTABILITY. See PATENTS II, 17.

DILIGENCE. See PATENTS, 173-189; III 2, 374-376, 486, 487, 491, 493, 494, 496, 501, 505, 506, 509, 511, 512, 527, 597, 621, 626.

DISBARMENT OF ATTORNEYS. See ATTORNEYS.

DISCLOSURE OF INVENTION. See APPEALS, 95; ESTOPPEL, 3; PATENTS, 60, 240, 443, 508, 531, 605-620, 829, 873, 874, 921, 922, 924.

DISCREDITED CLAIMS. See PATENTS, 549-550.

DISSOLUTION OF INTERFERENCE. See APPEALS, 33, 35, 37, 79, 107, 719, 730, 749, VIII 9.

DIVISIONAL APPLICATIONS. See PATENTS, 193-202, 373.

DIVISION OF APPLICATION. See APPEALS, 36, 152, 155; MANDAMUS, 25; PATENTS, 203 et seq., 716; REMEDIES, 2.

DOUBLE USE. See PATENTS, 82; II 11.

DRAWINGS. See PATENTS, 60, 216, 217, 219, 270, 324, 359, 360, 361, 466-472; TRADE-MARKS, 72, 73.

DUE PROCESS OF LAW. See ATTORNEYS, 10, 11.

EMPLOYER AND EMPLOYEE. See PATENTS, 575-601.

EQUITABLE ESTOPPEL. See ESTOPPEL, 10; PATENTS, 503.

EQUITY.

1. The expiration of a patent pending a suit to enjoin its infringement and for an accounting will not defeat the jurisdiction of equity to take the account prayed. *Busch v. Jones,* 16 App. D. C. 23; 28 W. L. R. 535.

2. The fact that an alleged infringer of a patent covering a process and machine is not a manufacturer of the article but a mere user, does not affect the jurisdiction of a court of equity to entertain a suit for infringement. *Ib.*

3. Where, pending a suit to enjoin the infringement of a patent and for an accounting, the patent expires, it is discretionary with

the court either to retain the bill and proceed with the cause or to dismiss it and turn the parties over to their action at law; and the exercise of its discretion in favor of retaining the cause and taking the account will not be reviewed unless shown to have been clearly illegal. *Ib.*

4. Where a bill seeks to foreclose a mortgage on certain inventions and domestic and foreign patents to be granted therefor, damages growing out of the same transactions, sought to be recouped by defendant by means of a cross-bill, consisting of loss of profits by the mortgagor on the sale of one of the patents abroad, which he had negotiated at a fixed price, but which had failed of consummation by failure of mortgagees to perform their obligations under the mortgage, *held,* not too remote and speculative. *Fitzgerald v. Wiley,* 22 App. D. C. 329; 31 W. L. R. 491.

5. Where an agreement provides for the organization of a corporation to handle patents obtained by one of the parties, and the assignment of such patents to the corporation, and the agreement has been performed in part, a bill will lie to enjoin the patentee from manufacturing the devices patented and for an accounting and assignment of the patents, even though the agreement while still executory was too vague and uncertain to be then enforced, and was in part for personal services. *Sanche v. Electrolibration Co.,* 4 App. D. C. 453; 22 W. L. R. 769.

6. Claims cancelled in the Patent Office cannot be reinstated or reviewed by bill in equity under § 4915, Rev. Stat. *Durham v. Seymour,* 6 App. D. C. 79; 71 O. G. 601; 1895 C. D. 307.

See APPEALS, 55; CLOUD ON TITLE, CONTRACTS, 2, 3; PATENTS, 702, 1007, 1008; TRADEMARKS, 43.

EQUIVALENTS. See PATENTS, II. 6, 7.

ESTOPPEL.

1. A declaration by one of the parties to an interference made to parties in interest that his invention was different from the invention of the other party does not necessarily raise an estoppel, as the effect of such a declaration could be explained by testimony, inasmuch as there might well be differences of detail between the two claims, while they might be the same in substance. *Furman v. Dean,* 24 App. D. C. 277; 114 O. G. 1552; 1905 C. D. 582.

2. A party is not estopped from subsequently making a claim to an invention unless there is a failure of the specification to disclose it. The absence of a definite and specific claim for an invention when the application was originally filed does not act as an estoppel to the subsequent making of the claim. *Ib.*

3. The doctrine of estoppel announced in the cases of *Beehman v. Wood* and *Michle v. Read* was based upon the failure of the parties to disclose the invention. Those cases refer to substantial differences between the original claims and specifications of an application and new and enlarged claims subsequently introduced for the first time after rights of third parties have intervened. *Ib.*

4. When the lapse of time between H.'s conception and his date of reduction to practice would be fatal if unexplained, but his delay is claimed to have been caused by an infringement suit and the same suit is relied upon by B. to explain delay, *Held* that B. is in no condition to take advantage of the omission to show what there was in that suit to excuse delay in the matter of this invention. *Hammond v. Basch,* 24 App. D. C. 469; 115 O. G. 804; 1905 C. D. 615.

5. While the courts are zealous to protect an inventor to the full extent of the contribution which he has made to the art, they must give due weight to any estoppel which he has created by anything done either prior or subsequent to the issue of his patent which prevents him from claiming his invention in its entirety. *Computing Scale Co. v. Automatic Scale Co.,* 26 App. D. C. 238; 119 O. G. 1586; 1905 C. D. 704.

6. Where in an interference between an application filed March 22, 1897, for the reissue of McB's patent, dated Aug. 13, 1895, and an application of C. filed July 29, 1896, it was contended that C.'s original application contained no claim to the invention of the issue, that not until five months thereafter and after the rejection of his claims in part did he amend by setting up the claims of the McB. patent now in interference, and that consequently he is estopped, under *Beehman v. Wood,* from claiming priority of invention as against McB.'s subsequent application for reissue, *Held* that the attitude of the parties is different from that shown in *Beehman v. Wood.* McB. did not come into the office originally after C., but before, and when he made his reissue application C.'s later claims had been made. He does not

therefore stand in the situation of one who claims a specific invention with specification and claims that are not embraced in the original application of an earlier applicant, but which the latter seeks by subsequent amendment to dominate with claims that have no foundation in the original description of his invention. *McBerty v. Cook,* 16 App. D. C. 133; 90 O. G. 2295; 1900 C. D. 248.

7. The amended claims of Cook are clearly shown and described in the specification of his original application and his amendment constitutes no departure which would subordinate him to the claim of even an intervening applicant. *Ib.*

8. Where the senior party informed the junior party that he had applied for a patent on the invention and the junior party made no protest and signified neither by word nor by act that the invention was his own, *Held* that it was then, if ever, he should have spoken. *Scott v. Scott,* 18 App. D. C. 420; 96 O. G. 1650; 1901 C. D. 419.

9. A party is estopped to repudiate a contract when the other parties to it have been induced by his action and conduct to expend money in carrying it out. *Sanche v. Electrolibration Co.,* 4 App. D. C. 453; 22 W. L. R. 769.

10. The doctrine of equitable estoppel applies in the administration of the patent law, as it does in other cases, for the prevention of injustice. *In re Mower,* 15 App. D. C. 144; 88 O. G. 191; 1899 C. D. 395.

11. Hodge's evidence in respect of his conception of the invention does not show an intention to disclaim and is not of a nature to estop him from claiming an invention as broad as the issue. The decision of the Commissioner of Patents awarding priority to Hodge affirmed. *Hill v. Hodge,* 12 App. D. C. 528; 83 O. G. 1211; 1898 C. D. 480.

12. An appellant is not to be heard to urge non-patentability of his claim after it has been placed in interference. He is estopped on that question by reason of his own affirmative assertion that his claim is patentable. *Hisey v. Peters,* 6 App. D. C. 68; 71 O. G. 892; 1895 C. D. 349.

13. Where an applicant in the Patent Office withdrew claims which were rejected and substituted others with the statement that they were the ones on which he would want a final decision, *Held* that such action was a waiver by the applicant of his right to

assert title to the withdrawn claims in a bill in equity under § 4915. *Durham v. Commissioner of Patents*, 69 O. G. 507; 1894 C. D. 547.

See PATENTS, 503; RES ADJUDICATA.

EVIDENCE. See APPEALS, 41, 43, 44, 46, 130-133; ATTORNEYS, 7; COPYRIGHTS, 23; JUDICIAL NOTICE; PATENTS, 99, 223-225, 226, 227, 391-410, 468, 469, 514, 552, 557, 559, 498, 623-642, 718, 720, 758, 789, 790; VIII 8; IX; 1004, 1009; TRADE-MARKS, 96, VIII.

EXAMINERS. See APPEALS, 159; COMMISSIONER OF PATENTS, 3.

EXAMINERS IN CHIEF. See APPEALS, IV; COMMISSIONER OF PATENTS, 3; MANDAMUS, 14; PATENTS, 733.

EXAMINER OF INTERFERENCES. See APPEALS, 47; PATENTS, 733, 976; TRADE-MARKS, 100.

EXCUSES FOR INACTIVITY IN PERFECTING RIGHT TO PATENT. See PATENTS, 271-287; 388, 389.

EXECUTIVE DEPARTMENTS. See ATTORNEYS, 9.

EXECUTIVE OFFICERS. See ATTORNEYS, 11; COMMISSIONER OF PATENTS; MANDAMUS, 30-35.

EXHIBITS. See APPEALS, 129, 130; PATENTS, 219, 397, 817, IX 10.

EXPERIMENTS. See PATENTS, III 3, 4.

EXPERIMENTAL TESTS. See PATENTS, 440 et seq.

EXPERIMENTAL USE. See PATENTS, 428, 429.

EXPIRATION OF PATENT. See APPEALS, 55; EQUITY, 1, 3; PATENTS, 1007; TRADE-MARKS, 56.

EXTENSION OF INTERFERENCES. See COMMISSIONER OF PATENTS, 5.

EXTINGUISHMENT OF PATENT. See PATENTS, 975.

FALSE REPRESENTATIONS. See TRADE-MARKS, 53.

FELLOW EMPLOYEES. See PATENTS, 576.

FLAG OF UNITED STATES. See TRADE-MARKS, 9.

FOREIGN APPLICATIONS FOR PATENTS. See PATENTS, 172.

FOREIGN COMMERCE. See TRADE-MARKS, 68-70.

FOREIGN PATENTS AND INVENTIONS. See PATENTS, 650, 651; XI.

FORFEITED APPLICATIONS. See PATENTS, 220, 221, 371.

FORFEITURES. See COPYRIGHTS, 24.

FRAUDULENT ASSIGNMENT. See PATENTS, 702.

FUNCTIONAL UTILITY. See PATENTS, II. 15.

GEOGRAPHICAL NAMES. See TRADE-MARKS, 4, 14, 15, 16, 28.

GREAT SEAL OF UNITED STATES. See TRADE-MARKS, 6, 7.

HEARINGS. See APPEALS, 73; ATTORNEYS, 4-7, 10.

HOLIDAYS.

Saturday, after 12 o'clock noon, is a half holiday for all purposes. *Ocumpaugh v. Norton*, 24 App. D. C. 296; 32 W. L. R. 846.

HUSBAND AND WIFE. See PATENTS, 829, 873, 874.

IDENTITY OF INVENTIONS. See APPEALS, 76; PATENTS.

ILLUSTRATIONS AND DESCRIPTIONS. See PATENTS, 60, 216, 217, 219, 270, 324, 359-361, 466-472; TRADE-MARKS, 72, 73.

IMPROVEMENTS. See PATENTS, 16, 17, 58, 88, 89, 110, 575-577, 580, 581, 583, 588, 600, 918.

INADVERTENCE, ACCIDENT AND MISTAKE. See PATENTS, X 1.

INFRINGEMENT OF COPYRIGHT. See COPYRIGHT, 5, 17, 20-26.

INFRINGEMENT OF PATENTS. See ACCOUNTS AND

ACCOUNTING, 4; ACTIONS, 4; APPEALS, 55, 121; CONTRACTS, 1; EQUITY, 1, 2; PATENTS.

INJUNCTION.

1. Determination by Commissioner of Patents of question whether a label is entitled to registration cannot be controlled by injunction. *Allen v. Regina Music Box Co.*, 22 App. D. C. 271; 31 W. L. R. 476.

2. The N. A. Co., owning the Edison patents for the phonograph and graphophone, granted to complainant, the C. P. Co., for a term of years not yet expired, the exclusive right to deal in these instruments and their appurtenances within this District. The N. A. Co. subsequently became insolvent and its assets were disposed of under the direction of the court of chancery in New Jersey. Whitson Bros. are dealers in phonographs and phonograph supplies in this District, such supplies purchased from the N. P. Co., which company was alleged in the bill to be the successor of the N. A. Co. and bound by its agreements, though this was denied by the defendants in affidavits filed by them. In a suit in equity by complainant to enjoin Whitson Bros. and the National Company from dealing in phonographs and phonograph supplies in this District, a temporary injunction was granted; *held*, on appeal, that complainant had stated a case which entitled it to a temporary injunction. *Whitson v. Columbia Phonograph Co.*, 18 App. D. C. 565; 29 W. L. R. 804; 98 O. G. 418; C. D. 1902, p. 497.

3. Non-performance of contract by complainant as ground for refusal to restrain an infringement of complainant's rights under such contract. *Ib.*

4. Since it appears that the complainant acquired from the owners of the patents the exclusive right to deal in phonographs in this District, an injunction *pendente lite* was properly granted restraining the defendants from dealing in phonograph supplies. *Whitson v. Columbia Phonograph Co.*, 18 App. D. C. 565; 98 O. G. 418; 1902 C. D. 497.

See APPEALS, 55, 121; COMMISSIONER OF PATENTS, 9; CONTRACTS, 1; EQUITY, 1, 5; MANDAMUS, 28; TRADE-MARKS, 43.

INOPERATIVENESS AND IMPERFECTION.

See PATENTS, 105.

INSPECTION OF AFFIDAVITS. See APPEALS, 50.

INSPECTION OF RECORDS OF PATENT OFFICE. See MANDAMUS, 20.

INTERFERENCE PROCEEDINGS. See APPEALS; COMMISSIONER OF PATENTS, 5; ESTOPPEL; MANDAMUS, 16; PATENTS; RES ADJUDICATA, 10; TRADE-MARKS, VII.

INTERLOCUTORY ORDERS. See APPEALS, 31-36.

INTERNATIONAL CONVENTION. See PATENTS, XII

INTERPRETERS. See PATENTS, 937, 938.

INVENTION. See PATENTS.

ISSUES IN INTERFERENCE. See PATENTS, VIII, 4, 5.

JOINDER OF INVENTIONS IN APPLICATION. See APPEALS, 157; PATENTS, 194, 716.

JOINT INVENTORS. See PATENTS.

JUDGMENTS AND DECREES. See APPEALS, 49, 134, 139, 140; COMMISSIONER OF PATENTS, 10; MANDAMUS, 23; PARTIES TO SUIT, 2; PATENTS, 975, 976; PUBLIC OFFICERS, 1: RES ADJUDICATA.

JUDICIAL NOTICE.

1. The process of taking judicial notice does not necessarily imply that the judge at the moment actually knows and feels sure of the truth of the matter submitted. It merely relieves the party from offering evidence, because the matter is one which the judge either knows or can easily discover. *Ball v. Flora,* 26 App. D. C. 394; 1906 C. D. 618; 121 O. G. 2668.

2. While the allowance of an application is not evidence for the interested party in the ordinary sense, yet it is a record of an official action in the Office and under the authority of the Commissioner of which the Court of Appeals may take notice in order that justice may be done. *Cain v. Park,* 14 App. D. C. 42; 86 O. G. 797; 1899 C. D. 278.

3. In passing upon an application for a patent the Commissioner may go outside of the record and take notice of the official

entries made in his own Office and under his own supervision in order that justice may be done to parties. *Ib.*

See COMMISSIONER OF PATENTS, 10; PATENTS, 718; PUBLIC OFFICERS, 2.

JUNIOR AND SENIOR APPLICANTS. See PATENTS.

JURISDICTION. See APPEALS; COSTS; COURTS; EQUITY; MANDAMUS.

LABELS. See COMMISSIONER OF PATENTS, 9; COURTS, 3; INJUNCTION, 1; MADAMUS, 12, 17, 18.

LACHES. See APPEALS, 17; ATTORNEYS, 12; PATENTS, 174-189, III 2; TRADE-MARKS, 59.

LIBRARIAN OF CONGRESS. See COPYRIGHTS, 19.

LICENSES.

The rights of a licensee are not destroyed by a subsequent transfer of the patent. *Whitson v. Columbia Phonograph Co.*, 18 App. D. C. 565; 29 W. L. R. 804; 98 O. G. 418; C. D. 1902, p. 497.

See CONTRACTS, 1; COPYRIGHTS, 4, 5.

LIMITATIONS. See PATENTS, 171, 172, 438.

MALPRACTICE BY ATTORNEYS. See ATTORNEYS.

MANDAMUS.

I. Office in General.
II. To Control Action of Commissioner of Patents and Other Officers of the Government.
III. To Compel Allowance of Appeal.
IV. Practice and Procedure.

1. Office in General.

1. Mandamus will not lie where there is another plain legal remedy. *Lochren v. Long*, 6 App. D. C. 486; 23 W. L. R. 358; *Stapleton v. Duell*, 28 W. L. R. 835; 93 O. G. 2532; 1900 C. D. 1109; *Newcomb Motor Co. v. Allen*, 130 O. G. 302.

2. Mandamus lies only where there is no other legal remedy to compel performance of an act when that performance has been imposed as a positive duty to or on behalf of the party seeking the remedy. *Mutual Dis. Messenger Co. v. Wight*, 15 App. D. C. 463; 28 W. L. R. 57.

3. Mandamus is not the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gives him the power and imposes upon him the duty of deciding for himself. *Riverside Oil Co. v. Hitchcock,* 190 U. S. 316; *West v. Hitchcock,* 26 App. D. C. 290; 34 W. L. R. 3; 205 U. S. 80.

4. The use of the writ is limited to enforcement of a purely ministerial duty and to the protection of a plain legal right denied arbitrarily or without due warrant of law. *Riverside Oil Co. v. Hitchcock,* 21 App. D. C. 252; 31 W. L. R. 174.

5. There is no ministerial act to which the writ of mandamus would be applicable that does not involve the exercise of judgment and discretion. An act may be ministerial although it may occur in the course of judicial proceedings, or in the exercise of discretionary power when it is merely a ministerial thing to be done after the judicial authority over the subject-matter has been exercised. *Payne v. National Ry. Co.,* 20 App. D. C. 581; 30 W. L. R. 791.

6. The writ cannot be used to serve the purposes of an appeal or writ of error, nor to control the exercise of judicial discretion. *Tuttle v. Allen,* 35 W. L. R. 50; *In re Key,* 189 U. S. 84.

7. The fact that an act which is sought to be compelled by mandamus is the culmination of proceedings of a judicial nature, or is an act in the course of such proceedings, does not exempt it from judicial control by the courts by mandamus, when the officer or person charged to perform it arbitrarily and without just legal cause refuses such performance. *West v. Hitchcock,* 19 App. D. C. 333; 30 W. L. R. 186.

8. Although the writ of mandamus might serve as an inexpensive and summary conclusion of the whole matter, providing this court had jurisdiction to issue the writ, yet neither economy of time, nor expense can weigh anything as against the orderly procedure under the law of a given case. *Newcomb Motor Co. v. Allen,* 130 O. G. 302.

9. A mandamus lies for the enforcement of the performance of some act or duty required by law to be performed in the performance or non-performance of which the applicant for the writ is interested where there is no other legal remedy. *Seymour v. Brodie,* 10 App. D. C. 567; 79 O. G. 509; 1897 C. D. 372.

10. The mere fact that the relator has been put to trouble or ex-

pense in legal proceedings or has suffered commercial injury is no basis for the writ of mandamus when the respondent has failed in no legal duty. *Ib.*

II. To Control Action of Commissioner of Patents and Other Officers of the Government.

11. The writ will not lie to compel the Commissioner of Patents to register a trademark after an application therefor has been rejected by him. *Seymour v. South Carolina,* 2 App. D. C. 240; 21 W. L. R. 675.

12. Determination by Commissioner of Patents of question whether a label is entitled to registration cannot be controlled by mandamus. *Allen v. Regina Music Box Co.,* 22 App. D. C. 271; 31 W. L. R. 476.

13. As proper remedy to compel Commissioner of Patents to require primary examiner to forward appeal to board of examiners in chief. *Ex parte Frasch,* 192 U. S. 566; 32 W. L. R. 153; *Steinmetz v. Allen,* 192 U. S. 543; 32 W. L. R. 147.

14. The writ will not lie to compel the Commissioner of Patents to direct examiners-in-chief to reinstate and take jurisdiction of an appeal taken by the relator from a ruling of the primary examiner denying his motion to dissolve an interference. *Allen v. U. S. ex rel. Lowrey,* 26 App. D. C. 8; 33 W. L. R. 354.

15. The issuance of the writ to compel the Commissioner of Patents to register the words "Ever-Ready" as a trademark for coffee mills, properly denied. *Bronson v. Duell,* 17 App. D. C. 471; 29 W. L. R. 126; 95 O. G. 229; 1901 C. D. 330.

16. Mandamus will not lie to compel the Commissioner of Patents to reinstate an interference and to decide the question of priority of invention therein presented. *Brodie v. Seymour,* 10 App. D. C. 567; reversing 25 W. L. R. 183.

17. A mandamus does not lie to compel the Commissioner of Patents to register in the Patent Office an alleged label which in his opinion is not a label as defined by the statute. *Allen v. Regina Music Box Co.,* 22 App. D. C. 271; 105 O. G. 747; 1903 C. D. 615.

18. Section 3 of the Act of June 18, 1874, imposes upon the Commissioner of Patents the duty of determining whether or not the thing presented for registration is a label as defined by the

statute, and his decision whether right or wrong is not subject to control by mandamus. *Ib.*

19. Where an applicant sought to register a trademark under § 13 of the trademark act for the purpose of registering abroad and the Commissioner refused to register it on the ground that it was not a lawful trademark, upon petition for a writ of mandamus to compel the Commissioner to register, *Held* that the Commissioner had jurisdiction to consider the question, and the petition denied. *Buffalo Pitts Co. v. Duell*, 28 W. L. R. 789; 93 O. G. 1491; 1900 C. D. 397.

20. In a petition for mandamus against the Commissioner of Patents where the prayer was for premission "to inspect the abandoned cases in the United States Patent Office," and was not confined to a specific case, *Held* that no such broad right exists to the public, and writ refused. *Fowler v. Commissioner of Patents*, 62 O. G. 1968; 1893 C. D. 268.

21. Where the Commissioner has in fact acted and rendered his decision touching the very matter in controversy and has the clear legal right to act and decide for himself, the court is without jurisdiction to review his action and above all to compel him by its writ to undo what he has done. *Newcomb Motor Co. v. Allen*, 130 O. G. 302.

22. Where the Commissioner had the power to act and has acted, *Held* that it is wholly immaterial whether in the judgment of the court he was right or wrong in his determination and that in overruling the motion for a writ of mandamus no opinion will be expressed as to the merits of the relator's contentions. *Ib.*

23. Where a primary examiner on a motion to dissolve decides that one of the parties has no right to make the claims of an interference issue and such party, after filing an appeal from such decision, fails to prosecute the same and abandons it, such judgment becomes final and binding upon the parties, and mandamus is the proper proceeding to secure the enforcement of such judgment and a vacation of any subsequent *ex parte* or *inter partes* proceedings adjudicating the same question or based upon such an adjudication. *U. S. ex rel. Newcomb Motor Co. v. Moore*, 30 App. D. C. 464; 133 O. G. 1680.

24. Where a party alleges that an invention has been in public use for more than two years before an application for a patent upon

it was filed by another party and asks the court for a mandamus to compel the Commissioner of Patents to institute public-use proceedings and recognize him as a party in interest, *Held* that the petition will be denied because the petitioner is without legal interest in the matter. *National Phonograph Co. v. Allen,* 101 O. G. 1133; 1902 C. D. 571.

25. The requirement for division of an application is interlocutory and cannot be remedied by mandamus, since the question is peculiarly within the jurisdiction of the Commissioner of Patents and requires judgment on his part to decide. *Steinmetz v. Allen,* 102 O. G. 231; 1903 C. D. 632.

26. The action of the head of a Department in construing the law for his guidance is not subject to revision by mandamus. *South Carolina v. Seymour,* 2 App. D. C. 240; 66 O. G. 1167; 1894 C. D. 174.

27. In order to maintain an application for a mandamus upon a public officer, the authorities are very clear that he must have a legal interest in the matter. A mere commercial interest is not sufficient. *National Phonograph Co. v. Commissioner of Patents,* 101 O. G. 1133; 1902 C. D. 571.

28. Where an officer has jurisdiction to decide at all, he necessarily has jurisdiction and it is his duty to decide as he thinks the law is, and the courts have no power whatever to review his determination by mandamus or injunction. *Allen v. Regina Music Box Co.,* 22 App. D. C. 271; 105 O. G. 747; 1903 C. D. 615.

29. Upon a demurrer to the petition for writ of mandamus to compel the Secretary of the Interior to grant a hearing in person to a patent agent whom the Commissioner of Patents had recommended to the Secretary for disbarment, the reasons for which recommendation the Secretary had approved without a hearing before him in person, *Held* that the demurrer should be sustained, the rule to show cause discharged, and the petition for writ of mandamus dismissed. *Wedderburn v. Bliss,* 81 O. G. 1783; 1897 C. D. 750.

30. The Supreme Court of the District of Columbia has authority to issue the writ of mandamus to the head of a department of the Federal Government or the chief of a bureau upon whom some special duty has been devolved by law, to compel the performance of a ministerial duty by such officer. *West v. Hitchcock,* 19 App. D. C. 333; 30 W. L. R. 186.

31. As to jurisdiction of Supreme Court D. C. to issue mandamus against highest officers of Government. See *Houghton v. Payne,* 31 W. L. R. 178.

32. Writ will lie to control acts of executive officers where the exercise of discretion is not involved. *Daly v. Macfarland,* 28 App. D. C. 552; 35 W. L. R. 81.

33. While this court has power to direct by mandamus an executive officer of the Government to perform an act commanded by law and which he declines to perform, such writ will not be granted unless the act is a mechanical one, a plain, purely ministerial duty involving no consideration of testimony or exercise of judgment or discretion on the part of such executive officer. *U. S. ex rel. West v. Hitchcock,* 29 W. L. R. 704.

34. Mandamus will not lie in a case where its effect is to direct or control the head of an executive department in the discharge of an executive duty involving the exercise of judgment and discretion. *International Co. v. Lamont,* 2 App. D. C. 532; 22 W. L. R. 173.

35. The courts will not interfere by mandamus with the executive officers of the Government in the exercise of their ordinary official duties, even where such duties require an interpretation of the law. *Mut. Dist. Messenger Co. v. Wight,* 15 App. D. C. 463.

III. To Compel Allowance of Appeal.

36. Where a party has a clear right to an appeal he may resort to an appellate court for a mandamus to compel its enforcement. *Beal v. Cox,* 14 App. D. C. 368; 27 W. L. R. 231.

37. To entitle a party to a mandamus to compel the allowance of an appeal, it is incumbent on him to show affirmatively not only a right of appeal, but that such right has been denied under circumstances that entitle him to a mandamus to enforce it. *Steinmetz v. Allen, 22* App. D. C. 56; 31 W. L. R. 358.

38. Mandamus will not lie to compel the approval of an appeal bond which had been offered in time and approval refused and re-offered after the expiration of the time limited for taking an appeal, no application having been made for time within which to perfect it. *Beal v. Cox,* 14 App. D. C. 368; 27 W. L. R. 231.

39. An applicant for a patent having the right to appeal from a decision of the primary examiner cannot resort to mandamus to

compel a reconsideration of the decision even though it be erroneous. *Tuttle v. Allen,* 35 W. L. R. 50.

40. A mandamus will not issue directing the Commissioner of Patents to order the primary examiner to forward to the examiners-in-chief an appeal from a requirement for division. *Ib.*

41. Where an appellant delayed in applying to the Court of Appeals of the District of Columbia beyond the time provided in the rules of said court, in consequence of which said appeal was dismissed, *Held* that a writ of mandamus to compel the Court of Appeals to entertain the appeal will not lie to the Supreme Court of the United States. *In re Hien,* 79 O. G. 507; 1897 C. D. 367.

42. Where the Commissioner of Patents refuses to direct the primary examiner to forward to the examiners-in-chief an appeal from the primary examiner's action in requiring the applicant to divide his application, *Held* that his action will not be interfered with by mandamus, since the applicant has no right of appeal. *Steinmetz v. Allen,* 102 O. G. 231; 1903 C. D. 632.

43. Petition for a mandamus to the Court of Appeals to hear and determine an appeal from a decision of the Commissioner of Patents requiring division of an application for patent *dismissed,* since the remedy was not by appeal to the court, but by mandamus to compel the allowance of an appeal from the primary examiner to the examiners-in-chief upon the question of division. *Ex parte Frasch,* 192 U. S. 566; 109 O. G. 554; 1904 C. D. 716.

44. Where the Commissioner of Patents refused to direct the primary examiner to forward to the examiners-in-chief an appeal from his ruling that process and apparatus claims should be divided and presented separately, *Held* that a mandamus will lie to compel him to forward the appeal. *Steinmetz v. Allen,* 192 U. S. 543; 109 O. G. 549; 1904 C. D. 703.

IV. Practice and Procedure.

45. The court may refuse to grant mandamus, even though relator may technically be entitled to it, when its issuance would not promote the substantial ends of justice, or when it would prove unavailing or be without beneficial results to the relator. *Dancy v. Clark,* 24 App. D. C. 487; 33 W. L. R. 18.

46. The use of the name of the United States in a petition for a writ of mandamus, even if not abolished by §§ 1273-1282, Code D. C., is a mere formality, which should not be permitted to affect

the substance of the action, and its omission may be supplied by amendment, either in the trial court or in this court. *Ib.*

47. The relator in mandamus proceedings is, as matter of course, permitted to use the name of the United States, without resort to the intervention of the district attorney; and even that formality is not now essential to maintain the action. *Dancy v. Clark,* 24 App. D. C. 487. *Bundy v. U. S. ex rel. Darling,* 25 App. D. C. 460; 33 W. L. R. 434.

48. The statute of 9 Anne, ch. 20, regulating proceedings in mandamus, equally with §§ 1273-1282 of the District Code, contemplates a return or answer to the writ, not a demurrer to the petition, and the practice of demurring to the petition upon which the writ or rule to show cause has been issued condemned. *West v. Hitchcock,* 19 App. D. C. 333; 30 W. L. R. 186.

49. The return to a rule to show cause why a writ of mandamus should not issue should be an answer or statement of facts showing the grounds of the respondent's action or refusal to act. It may state the fact in part or in whole by denying or admitting the allegations of the petition, or by qualifying or explaining them, but should state all the facts necessary and proper for the determination of the cause. *Ib.*

50. On appeal from a judgment denying mandamus, the substantial allegations of respondent's return will be taken as true. *Mut. Dis. Messenger Co. v. Wight,* 15 App. D. C. 463; 28 W. L. R. 57.

51. The word "may" in § 1274 D. C. Code, providing that on the filing of a petition for a writ of mandamus the court may lay a rule requiring the defendant to show cause, etc., is used in a permissive, and not a mandatory sense; and the court may refuse the rule if the petition itself shows that further proceedings would be a waste of time and would ultimately prove futile. *Holzendorf v. Hay,* 20 App. D. C. 576; 30 W. L. R. 825.

52. Where a peremptory writ of mandamus is awarded against a public officer to compel the performance of a ministerial duty, the costs will be awarded against the defendant. *Roberts v. United States,* 13 App. D. C. 38; 26 W. L. R. 375.

53. A petition for a writ of mandamus to a public officer of the United States abates by reason of his retirement from office, as well after judgment and pending an appeal therefrom as before.

Seymour v. Nelson, 11 App. D. C. 58; 25 W. L. R. 542; 79 O. G. 1522; 1897 C. D. 471.

54. Where pending an appeal on a petition for a writ of mandamus against a public officer the officer retires, *Held* that the appeal will not be dismissed; but the judgment of the court below will be reversed and the cause remanded to said court, with directions to dismiss the suit for want of proper parties. The result is the same whether the judgment appealed from is in favor of or against the officer. *Ib.*

55. Where a mandamus proceeding against an officer of the Government abated on the death of the officer and a motion was made for leave to substitute his successor, who consented to be substituted, *Held* that, in the absence of statutory authority, after such a cause had abated, the court cannot bring a new party into the case. Nor is the want of such authority supplied by the consent of a person not a party in the cause. *Bernardin v. Butterworth,* 169 U. S. 600; 82 O. G. 1991; 1898 C. D. 403.

56. Where a principal examiner in the Patent Office was made respondent to a petition for a writ of mandamus commanding him to perfect an appeal to the examiners-in-chief, the examiner having refused, under the Rules of the Patent Office and instructions from the Commissioner, to answer the appeal, on demurrer to the petition on the ground that the Commissioner, the responsible head of the Office, and not the examiner, should have been made respondent, *Held* that the demurrer should be sustained. *Hodgins v. Simpson,* 82 O. G. 190; 1898 C. D. 296.

See ACTIONS, 2; APPEALS, 135, 143, 144; ATTORNEYS, 8; COMMISSIONER OF PATENTS, 7, 9; COPYRIGHTS, 19; COURTS, 3; PUBLIC OFFICERS, 3; TRADEMARKS, 87, X.

MECHANICAL INGENUITY. See PATENTS.

MISTAKE. See ATTORNEYS, 12; PATENTS, 271, 273, 276; X 1; 988.

MODELS. See PATENTS, 216, 219; III 3; 414.

MODIFICATION OF FORMER INVENTION. See PATENTS, 72.

MORTGAGE. See EQUITY, 4.

MULTIPLICATION OF APPLICATIONS. See PATENTS, 204.

NAMES. See TRADE-MARKS.

NEWLY DISCOVERED EVIDENCE. See APPEALS, 41, 43, 44, 46.

NEW MATTER. See PATENTS, 205-215.

NEW TRIAL. See ACTIONS, 1.

NON-TECHNICAL MARKS. See TRADE-MARKS, 5.

NOTARIES PUBLIC.

The provisions of § 558 of the Code of the District of Columbia, which provides that no notary public shall be authorized to take acknowledgments, administer oaths, certify papers, or perform any official acts in connection with matters in which he is employed as counsel, attorney, or agent, or in which he may be in any way interested, for any of the Departments of the United States Government in the District of Columbia or elsewhere, applies to all notaries, whether within or without the District of Columbia. *Hall's Safe Co. v. Herring-Hall-Marvin Safe Co.*, 135 O. G. 1804; 31 App. D. C. 498.

See TRADEMARKS, 114, 115.

NOTICE.

An inventor is charged with knowledge of the prior art as exhibited in prior patents whether he had actual knowledge of them or not. *Millett v. Allen*, 27 App. D. C. 70; 1906 C. D. 752; 124 O. G. 1524.

See ATTORNEYS; COPYRIGHTS, 8-10; PATENTS, 727; TRADE-MARKS.

NOVELTY. See APPEALS, 89, 99, 100; PATENTS, II. 2; 117, 162.

OATHS. See AFFIDAVITS; PATENTS, 971.

OBJECTIONS TO EVIDENCE. See PATENTS, 940, 943.

OPERATIVENESS OF DEVICE. See APPEALS, 87, 88; PATENTS, II, 4; 504, 648.

OPPOSITION. See TRADE-MARKS, VII.

ORIGINALITY OF INVENTION. See PATENTS, IV.

PARTICULAR PATENTS. See PATENTS, II. 18; XIV.

PARTIES TO SUIT.

1. To a suit in equity for the cancellation and surrender of an alleged fraudulent assignment of a patent and to expunge such assignment from the records of the Patent Office, the parties by and to whom the assignment was made and the Commissioner of Patents are necessary parties. *Backus Co. v. Simonds,* 2 App. D. C. 290; 22 W. L. R. 137.

2. It is not necessary that a person should appear upon the record as a technical party to the proceedings in order to be bound by a judgment. If he be a substantial party, he will be bound by the finding in the case. *In re Drawbaugh,* 9 App. D. C. 219; 77 O. G. 313; 1896 C. D. 527.

3. Where there are adverse parties, the Commissioner of Patents is not a necessary party to and cannot be joined in a suit under § 4915, Revised Statutes of the United States. *Mergenthaler Linotype Co. v. Commissioner,* 66 O. G. 1311; 1894 C. D. 186.

4. The allegation by a party that he has invested money in a factory and machinery for making a device does not give him a legal interest in the invention embodied in it nor in the question whether or not a patent shall be issued upon it. *National Phonograph Co. v. Allen,* 101 O. G. 1133; 1902 C. D. 571.

5. Where a party has no patent upon an invention and does not claim the right to secure a patent upon it and merely says that it is not patentable to anybody, he is not entitled to interfere with the consideration by the Commissioner of Patents of an application for that invention filed by another party. *Ib.*

6. By the death of a Commissioner of Patents, a suit to compel him to issue a patent abates and cannot be revived so as to bring in his successor; the act of Maryland of 1785, ch. 80, having no application to such a case. *Bernardin v. Butterworth,* 169 U. S. 600.

See ABATEMENT AND REVIVAL; APPEALS, 135; COMMISSIONER OF PATENTS, 10; MANDAMUS, 55, 56; PATENTS, VIII, 2, 702.

PARTNERSHIP.

One partner may not, without the consent of his co-partners, carry on for his exclusive advantage any business within the scope of the business of the partnership; and this rule is as applicable to partnerships entered into for the purpose of perfecting and exploiting inventions in the useful arts as to any other class

of partnerships. *Milton v. Kingsley*, 7 App. D. C. 531; 24 W. L. R. 18.

See TRADEMARKS, 45-47.

PATENTABILITY. See PATENTS; RES ADJUDICATA, 2.

PATENTEE AND APPLICANT. See PATENTS, 556-574.

PATENTS.

I. IN GENERAL.

II. PATENTABILITY.

1. Invention Generally.
2. Novelty.
3. Anticipation.
4. Operativeness.
5. Substitution of Elements.
6. Substitution of Equivalents.
7. Equivalents.
8. Combinations.
9. Change in Location of Elements.
10. Analogous Use.
11. Double Use.
12. Compositions.
13. Processes.
14. Arts.
15. Functional Utility.
16. Superiority and Popularity.
17. Determination of Patentability.
18. Particular Patents.
19. Generally.

III. PERFECTING RIGHT TO PATENT.

1. *Applications.*
   - a. Time for filing.
   - b. Diligence in filing.
   - c. Second application.
   - d. Continuations.
   - e. Joinder of inventions in.
   - f. Divisional.
   - g. Division of applications.
   - h. Multiplication of applications.
   - i. Amendment and alteration.
   - j. New matter in.
   - k. Illustrations and descriptions.
   - l. Exhibits.
   - m. Abandonment.
   - n. As evidence.

o. Affidavits.
p. In general.
2. *Diligence.*
a. In General.
b. Disclosure.
c. Delay after conception.
d. Filing and prosecution of application.
e. In making drawings.
f. Excuses for inactivity.
g. Failure to assert rights to invention.
h. Proof of.
3. *Reduction to Practice.*
a. What amounts to.
b. Constructive reduction.
c. Diligence in.
d. Agency in.
e. Priority in.
f. Resolving doubt as to.
g. Excuse for delay.
h. By whom to be made.
i. Evidence to establish.
j. Generally.
4. *Abandoned Experiments.*
5. *Experimental Use.*
6. *Public Use and Sale.*
7. *Tests.*
8. *Disclosure of Invention.*
9. *Concealment or Suppression of Invention.*
10. *Claims.*
11. *Drawings.*
12. *Abandonment of Right.*
13. *Generally.*

IV. PRIORITY AND ORIGINALITY.

1. Conception and Reduction to Practice.
2. Discredited Claims.
3. Junior and Senior Applicant.
4. Patentee and Applicant.
5. Employer and Employee.
6. Joint Inventors.
7. Partnership.
8. Disclosure.
9. Determination of.
10. Evidence to Establish.
11. Presumptions.
12. Operativeness of machine.
13. Perfection of Device.
14. Foreign Inventions and Patents.

15. Date of Invention.
16. In General.

V. CLAIMS.

VI. ASSIGNMENTS.

VII. PRACTICE.

VIII. INTERFERENCE PROCEEDINGS.

1. Nature of Proceeding.
2. Parties.
3. Claims.
4. Questions in Issue.
5. Construction of Issues.
6. Effect on Subsequent Application.
7. Preliminary Statement.
8. Evidence.
9. Dissolution.
10. Trademarks Excluded.
11. In General.

IX. EVIDENCE.

1. Rules for Taking Testimony.
2. Admissibility and Competency.
3. Weight and Sufficiency.
4. Burden of Proof.
5. Presumptions.
6. Extrinsic Evidence.
7. Depositions.
8. Cross-examination.
9. Leading questions.
10. Exhibits.
11. *Ex parte* Affidavits as.
12. Variance.
13. Records of Patent Office.
14. Generally.

X. REISSUES.

1. Grounds for.
2. Applications.
3. Effect of.
4. Scope of Claim.
5. Generally.

XI. FOREIGN PATENTS.

XII. INTERNATIONAL CONVENTION.

XIII. INFRINGEMENT.

XIV. PARTICULAR PATENTS.

I. IN GENERAL.

1. In granting patents the interests of the public are the primary consideration, and to these the privileges granted to inventors are secondary and subordinate. *Warner v. Smith,* 13 App. D. C. 111; 84 O. G. 311; 1898 C. D. 517.

2. While Congress has prescribed the mode by which the exclusive right of an inventor in his invention may be secured, yet there is no property right in such invention until a patent is issued therefor. *Christensen v. Noyes,* 15 App. D. C. 94; 90 O. G. 227; 1900 C. D. 212.

2a. A patent for a composition should state and fully disclose the component parts of the composition claimed with clearness and precision, and not leave a person attempting to use the discovery to find it out by experiment. If the description be so vague and uncertain that no one can tell with certainty, except by independent experiment, how to apply the discovery and what exact result may be expected therefrom, the patent is void. *Stevens v. Seher,* 11 App. D. C. 245; 81 O. G. 1932; 1897 C. D. 761.

2b. The decision of the Supreme Court in the case of *Miller v. Eagle Manuf. Co.* interpreted and *Held* that it did not change the law. It simply declared a second patent void on the plain ground that it was for the same invention as the first, and the effect of it, if sustained, would be to prolong the monopoly beyond the period intended by the patent law. *Fenton Man. Co. v. Office Specialty Man. Co.,* 68 O. G. 1390; 1894 C. D. 474.

3. A patent constitutes a contract, but no vested right of which the applicant for patent cannot be deprived is acquired under the preliminary proceedings leading to its issuance, and a statute passed while an application is pending will apply to such a case as well as to cases filed after its passage unless it especially provides for the protection of pending cases. *De Ferranti v. Lindmark,* 30 App. D. C. 417; 134 O. G. 515.

4. A patentee whose patent issues while the application of another party for the same invention is pending in the Patent Office acquires as against that other party no rights by the issuance of the patent. *Ib.*

5. The sole and original inventor of a device cannot part with his right to a patent and give a valid claim to some one else as inventor by a surrender or concession in favor of that other party.

The patent must disclose the real inventor, and the issue thereof must be founded upon his right as such inventor. *Tyler v. Kelch*, 19 App. D. C. 180; 98 O. G. 1282; 1902 C. D. 506.

6. By a well-established rule of the patent law the inventor is entitled to all the uses to which his invention can clearly be put, no matter whether he had conceived the idea of the use or not. *Rossell v. Allen*, 16 App. D. C. 559; 92 O. G. 1036; 1900 C. D. 333.

7. By the grant of a patent a patentee is merely put in a position to assert his *prima facie* right against infringers who may in their defense raise the question of the validity of the patent and have the same finally adjudicated in the light of a full presentation and consideration of all the evidence attainable in respect of anticipation, prior knowledge, use and the like. *In re Thompson*, 26 App. D. C. 419; 1906 C. D. 566; 120 O. G. 2756.

8. An inventor cannot be deprived of the right to his invention where he has used due diligence in the assertion of his right except by express contract or by a course of conduct that fairly gives rise to an implication of an intention to part with or dispose of the right, and a presumption to that effect is not lightly to be made. *Sendelbach v. Gillette*, 22 App. D. C. 168; 109 O. G. 276; 1904 C. D. 597.

9. A subsisting patent, lawfully issued, cannot be invalidated or in any manner affected by any subsequent proceedings in the Patent Office, even to the extent of imposing the burden of proof upon its holder that it was lawfully issued, and it is the express provision of the statute that no person has a right to "obtain a patent for that which was in fact invented by another, who was using reasonable diligence in adapting and perfecting the same," or unless the latter has abandoned his invention. *Christensen v. Noyes*, 15 App. D. C. 94; 90 O. G. 227; 1900 C. D. 212.

10. The Office has no right, except where the right of the applicant is clearly shown, to create a necessity or make it incumbent upon a prior inventor and patentee to go into court to vindicate his patent as against a subsequent patentee for substantially the same invention, and therefore it should not allow claims merely because they contain apparent structural differences over those of the patentee upon the theory that no great harm could be done by such course. *In re Marshutz*, 13 App. D. C. 228; 85 O. G. 778; 1898 C. D. 578.

11. As Congress had the power to create a distinct special tribunal, proceeding after the manner of a court of law or equity, for the adjudication of claims to patents for inventions, there seems to be no convincing reason why it could not without violating the Constitution make it a branch or bureau of an executive department, subject to supervision in matters administrative only by the head of that department and subject to review in matters judicial in their nature by a court of competent jurisdiction. *Bernardin v. Seymour,* 10 App. D. C. 294; 79 O. G. 1190; 1897 C. D. 428.

12. P. filed an application and assigned it to V. Later he filed a second application for the same invention and assigned it to W. A patent was issued on the latter application. *Held* that this patent is a bar to the issuance of a patent on the earlier application. *In re Pearsall,* 135 O. G. 221; 31 App. D. C. 265.

12a. Although the issuance of a patent upon an invention which a party is manufacturing and which he says is not patentable might cast a cloud upon his right to manufacture it and expose him to litigation, *Held* that it does not injure him legally, since if he is sued for infringement of the patent he may set up its illegality as a complete defense. That is all the remedy needed. *National Phonograph Co. v. Commissioner of Patents,* 101 O. G. 1133; 1902 C. D. 571.

II. PATENTABILITY.

1. Invention Generally.

13. Invention must extend beyond the merely novel and useful and into the domain of original thought, though the extent of the mental process is immaterial. *In re Snyder,* 10 App. D. C. 140; 78 O. G. 485; 1897 C. D. 254.

14. Result considered in connection with references may indicate that degree of thought that rises to the dignity of invention. *Ib.*

15. In order to constitute a patentable invention, there must be more than mere progress to an end, however near that progress may have approximated to the end in view. The law requires not conjecture, but certainty, and where the question relates to a machine the conception must have been clothed in substantial form, which demonstrated at once its practical efficiency and

utility. *Funk v. Haines,* 20 App. D. C. 285; 100 O. G. 1764; 1902 C. D. 553.

16. It is not every improvement that will entitle a party to a patent therefor, since it must be shown to be the result of an act of invention as distinguished from an act of applied skill by those familiar with the state of the art. *In re Klemm,* 21 App. D. C. 186; 103 O. G. 1682; 1903 C. D. 540.

17. Not every change or improvement is patentable invention, and the merits of the exercise of the inventive faculty must be refused to such things as are plainly within the scope of mechanical ingenuity. *In re Draper,* 10 App. D. C. 545; 79 O. G. 864; 1897 C. D. 407.

18. It does not involve invention to make that permanent which in its inception was only temporary, since that is the work of the skilled mechanic. *In re Seabury,* 23 App. D. C. 377; 110 O. G. 2238; 1904 C. D. 655.

18a. Invention consists in the combination of old elements as well as in the discovery of an element entirely new, provided it produces a new and useful result. *Fenton Mfg. Co. v. Office* Specialty Mfg. Co., 26 W. L. R. 116.

19. To make the handle of a knife for cutting hay reversible on the head of the shank to which the blade is attached does not require anything more than ordinary mechanical ingenuity and does not involve invention. *In re Iwan,* 17 App. D. C. 566; 95 O. G. 441; 1901 C. D. 344.

20. The discovery of a new process in any art by the addition of heat as a material factor, where heat had never before been applied or suggested, would constitute invention; but the adoption of a discretionary temperature in treating coal, subject to increase or diminution, as experience, as well as the varying character of the material treated, may suggest, does not amount to invention. *In re Musgrave,* 10 App. D. C. 164; 78 O. G. 2047; 1897 C. D. 336.

21. It involves only the exercise of ordinary faculties to vary the temperature required in a certain process in which heat is essential, even when this variation is great. *Ib.*

22. If a process for the reduction of any and all metallic oxids is not patentable, the same process for one specific metal oxid—the oxid of zinc—cannot be patentable. *Mond v. Ducll,* 16 App. D. C. 351; 91 O. G. 1437; 1900 C. D. 298.

23. To change the form of a pin from a round shank with a button head to a square-shanked pin with an oblong head to overcome a defect in operation was simply a matter of variation in construction not affecting the substance of the invention claimed, and such change or variation in form could be made by mere mechanical skill, without the exercise of the faculty of invention, in order to render more perfect the operation of the original device. *Hein v. Buhoup,* 11 App. D. C. 293; 81 O. G. 2088; 1897 C. D. 772.

24. The mere enlargement of a covering box, shield, or plate of a holding-stud of a garment supporter, so as to allow greater space within said box, is not the result of an application of the inventive faculty. *In re Draper,* 10 App. D. C. 545; 79 O. G. 864; 1897 C. D. 407.

25. The mere idea that there ought to be an arrangement to strip a stocking from a board or form on which is was mounted and return the board to the one who placed the stockings thereon and the illustration of this idea by the originator thereof by stripping a stocking from a form by the passage thereof between his hand and the edge of a table does not amount to a conception of an invention. No mechanism was described by which the desired result could be obtained. Invention consists of the conception of the idea and of means for putting it in practice and producing the desired result. Until the latter conception is complete and ready to be put in some practical form there is no available conception of the invention within the meaning of the patent law. *Burson v. Vogel,* 29 App. D. C. 388, 404; 131 O. G. 942; 1907 C. D. 669.

26. Where the prior art disclosed a train of gearing positively connecting the hour, minute and second hands of a time mechanism, whereby the rotation of one would cause the proper relative movement of the others, and it also disclosed a winding and setting mechanism controlling the proper relative rotation of the minute and hour hands, it did not amount to invention to insert an additional gear and pinion in the latter merchanism to secure the proper position of the second hand with relation to the minute and hour hands upon operation of the setting mechanism. *In re Volkmann,* 28 App. D. C. 441; 126 O. G. 2593; 1907 C. D. 462.

27. The use of two closures upon the same powder-can, each

being separately old, *Held* not to constitute invention, since the mere duplication of closures does not involve even the ingenuity of the skilled mechanic. *In re Seabury,* 23 App. D. C. 377; 110 O. G. 2238; 1904 C. D. 655.

28. The use of a well-known perforated pivoted closure and an ordinary screw-cap on a powder-can *Held* a mere aggregation of independent and well-known elements and not invention. *Ib.*

29. Not even the ingenuity of a skilled mechanic, much less the inventive faculty, seems to have been required to devise an aggregation or combination consisting of a catalogue and desk-pad bound together. *In re Davenport,* 23 App. D. C. 370; 110 O. G. 2017; 1904 C. D. 653.

2. Novelty.

30. A novelty involving a state of art so universal and common as the making and adjustment of clothing must be of a radical character to overcome the presumption against its patentability. *In re Fay,* 15 App. D. C. 515; 90 O. G. 1157; 1900 C. D. 232.

31. Where it was old to provide spots in a bowling-alley to insure the accurate setting of the pins, claims covering two series of spots, one within the other, thereby to insure the correct setting of different kinds of pins having different-sized bases, not limited to any mechanical construction, set forth nothing which involves the exercise of the inventive faculty. *In re Milans,* 135 O. G. 1126; 31 App. D. C. 269.

32. Where it is old in the art of dyeing to fix anilin-black upon vegetable textile fabrics by a two-step process consisting in treating the fabric with salt of anilin alone and with an oxidizing salt mixed with a compound containing a catalytic agent and it was old to print textile fabrics in two-step processes, *Held* that to apply to the two-step printing process the selection of ingredients theretofore used in dyeing did not arise to the dignity of invention. *In re Chase and McKenzie,* 31 App. D. C. 154, 135 O. G. 895.

33. Where a claim covers a lathe structure comprising a pair of uprights and a bed consisting of two sections of shafting arranged one above the other, said sections having their ends cast or embedded in the uprights, *Held* that there is nothing patentable in the idea of *casting* the ends of the cross-bars into the uprights. *In re Sheldon,* 135 O. G. 1585; 31 App. D. C. 201.

34. The use in the same wire band of two features separately old in wire bands to effect the identical functions performed separately by each of them in the prior devices *Held* not to constitute patentable novelty. *In re Griswold*, 9 App. D. C. 496; 78 O. G. 482; 1897 C. D. 248.

35. Where a claim in an application for a striker-plate had been rejected by the Commissioner for want of patentable novelty, and such rejection acquiesced in, a claim by the same inventor in another application for the combination of a door or casing and the striker-plate *Held* not patentable, because the striker-plate must be held old in view of decision of the Commissioner, the combination broadly was old, and no invention was claimed for the manner of applying the old striker-plate to a door or casing. *In re Forg*, 2 App. D. C. 58; 66 O. G. 515; 1894 C. D. 138.

36. A process of rolling pills which differs from the old process merely in cutting the pill mass into sections of the proper size before feeding it to the rolling-machine *Held* lacking in patentable novelty. *In re Colton*, 21 App. D. C. 17; 104 O. G. 577; 1903 C. D. 566.

37. Where under the old process the pills were unequal in quantity and not regularly rounded because of overfeeding and irregular division of the pill mass, *Held* that the obvious remedy was to reduce the supply and that no invention was involved in so doing. *Ib.*

38. A pliable metallic capsule for bottles having applied to its inner surface a coating of material which becomes adhesive when moistened *Held* to be not patentable, as cemented appliances—such as envelopes, labels, and postage-stamps—requiring merely the application of moisture to put them into use are old. *In re Nimmy*, 13 App. D. C. 565; 86 O. G. 345; 1899 C. D. 265.

39. Although it may appear that a device is of superior utility over other devices, as it has gone into general use, the fact that it has gone into such use, even to the displacement of other devices, has no weight upon the question of patentable novelty except when it is otherwise in doubt. *In re Smith*, 14 App. D. C. 181; 87 O. G. 893; 1899 C. D. 313.

40. A system of ventilation the novel feature of which consists in supplying each of the branch pipes leading into a room or compartment to be ventilated with nozzles composed of articulated

sections of such construction that the current of air forced into the pipe may be discharged in any direction in the room by the adjustment of the nozzles, so that the incoming air may be more thoroughly agitated and commingled and drafts prevented, *Held* to be patentable over the systems of ventilation disclosed by patent to Brown, No. 182,746, and to Jennison, No. 177,847. *In re McCreery,* 12 App. D. C. 517; 83 O. G. 1210; 1898 C. D. 478.

41. A patent for a supporting rack or shelf for books, composed of metallic strips with a re-entrant bend or recess in its front edge for the insertion of the hand, with rollers projecting above and in front of each side or recess, is invalid for lack of invention. *Office Specialty Co. v. Fenton Co.,* 174 U. S. 492.

42. Appellant's design for a hose-supporter is lacking in patentable novelty in view of his own prior patent and also in view of patents granted to others upon devices differing from the appellant's only in mechanical details. *In re Freeman,* 23 App. D. C. 226; 109 O. G. 1339; 1904 C. D. 619.

43. The steps in a process of making a coil for electrical measuring instruments, which consist in securing the pivot pins in the axial line of the coil and simultaneously adjusting the needle-supporting pivot in such manner that the point of the needle is located in the central plane of the coil or in a plane at a definite angle thereto, *Held* to be more than mere mechanical steps and when added to a process which is merely mechanical to confer patentability on claims covering the combined steps. *In re Weston,* 17 App. D. C. 431; 94 O. G. 1786; 1901 C. D. 290.

44. Claims for the process of making a coil for electrical measuring instruments, which consists merely in drawing a section of sheet metal over a mandrel and subjecting it to pressure until a desired configuration is acquired and then turning down the lateral edges, *Held* to cover simple and well-known mechanical operations and to be without any element of patentable novelty. *Ib.*

45. It being old to secure together two shells or cups of a porcelain insulator by cement, there is no patentable novelty in securing them together by fusing. *In re Locke,* 17 App. D. C. 314; 94 O. G. 432; 1901 C. D. 267.

46. A hay-knife composed of several cutting-sections with serrated edge and set in a flanged back, the back tapering gradually

from base to point and the cutting-sections secured to said back and abutting against the flange thereof, *Held* in view of the state of the art to be lacking in patentable novelty. *In re Iwan,* 17 App. D. C. 566; 95 O. G. 441; 1901 C.D. 344.

47. An improvement in musical notation which consists in dividing the whole tone first by three and then successively by two, whereby the expression of whole tones and one-third, one-sixth, one-twelfth, one twenty-four tones, &c., are obtained, held to be not patentable. *In re Beswick's Appeal,* 16 App. D. C. 345; 91 O. G. 1436; 1900 C. D. 294.

48. A claim for a removable box-liner consisting of a sheet of paper cut in the shape of a cross, creased at the junction of the arms, and having lacework ornamentation attached to the arms is lacking in patentable novelty in view of the prior art, which discloses the use of one-piece removable liners and the use of non-removable liners bordered with lacework. *In re Warren,* 30 App. D. C. 308; 134 O. G. 258.

49. Where the want of patentable novelty is reasonably clear and not in doubt, *Held* that the fact, if established, that the apparatus claimed has displaced others generally by reason of its obvious superiority can have no weight. *In re Garrett,* 27 App. D. C. 19; 1906 C. D. 645; 122 O. G. 1047.

50. It amounts only to mechanical skill to provide an old electromagnet with an old non-magnetic metal covering for the purpose of rendering the electromagnet operative under water. Any one having ordinary skill in the art should know that such a covering should be made of non-magnetic material to avoid interfering with the electrical action of the magnet. *In re Hayes,* 27 App. D. C. 393; 1906 C. D. 697; 123 O. G. 1000.

51. In view of the state of the art relating to combined funnels and valves and the Baker patent, which shows a reversible funnel in combination with a valve, *Held* that using the neck of a funnel as part of a plug-valve to be opened by turning the funnel involves nothing more than the work of a skilled mechanic. *In re Baker,* 26 App. D. C. 363; 1906 C. D. 594; 121 O. G. 1352.

52. The novelty of a design must be judged by the test of ornament, and while the final merit of ornamentation may depend upon the harmonious blending of small details mechanical differences which may make a vast difference in the operativeness

of the devices may make no appreciable difference between the devices as designs. *In re Freeman*, 23 App. D. C. 226; 109 O. G. 1339; 1904 C. D. 619.

53. The change or omission or addition of a few minor details would not justify the multiplication of design patents even though the designs may readily be distinguished from each other by one or more features. Substantial differences are required to render one device patentable over another as a design. *Ib.*

54. Where small differences existed in the applicant's design over the references, which differences would appear greater to an expert than to the average observer, *Held*, nevertheless, that the design was not patentable, because the differences did not rise to the dignity of invention. *In re Schraubstadter*, 26 App. D. C. 331; 1906 C. D. 541; 120 O. G. 1167.

55. Where peculiarities in the applicant's design were such as to prevent that design from being regarded in the trade as a substitute for the design shown by the references, *Held* that the applicants' design was nevertheless not patentable, because such peculiarities did not rise to the dignity of invention. *Ib.*

56. The novelty of a design held to be determined and infringement decided by the comparative appearance of the designs in the eyes of average observers and not by such appearance to the eyes of experts. *Ib.*

57. Where the applicant's design was for a font of type in which the letters had a waved outline, *Held* that aside from the waved outline the letters seemed to be of a very ordinary style and that to add a waved outline, which was old, to common forms of letters did not involve invention. *Ib.*

3. Anticipation.

58. No patent should issue nor will it be valid if issued for an improvement which is merely a new application of knowledge already possessed by those skilled in the art—a mere modification, variation, or carrying forward of the principle involved in a previous invention or discovery. *In re Klemm*, 21 App. D. C. 186; 103 O. G. 1682; 1903 C. D. 540.

59. A patent is no less an anticipation because it does not claim the invention, since the failure to claim it simply implies either that he abandoned it to the public or that he regarded it as al-

ready well known to the art. *In re Millett,* 18 App D. C. 186; 96 O. G. 1241; 1901 C. D. 410.

60. Disclosure in a drawing alone if sufficiently plain and clear may be sufficient to show an anticipation of an invention. *Ib.*

61. A decision of the Commissioner of Patents allowing one and rejecting the five remaining claims of an application for a patent for improvements in flame-guards for burners held error in that the rejected claims were not substantially different from the allowed one. *In re Foster,* 19 App. D. C. 391.

62. While inventions, claimed as anticipations, might by modification have been made to perform the functions of another invention, if it appears that these functions were not in the mind of the inventors their inventions cannot be treated as anticipations. *Fenton Manuf. Co. v. Office Specialty Co.,* 12 App. D. C. 201.

63. Where the claim is distinguishable from the prior art by a mere arbitrary variation which amounts only to a change in mechanical design, *Held* that such a claim is unpatentable. *In re Williams,* 30 App. D. C. 117; 130 O. G. 1692; 1907 C. D. 664.

64. The claims in an application for a patent for a composition of matter consisting of a soluble alizarine coloring-matter, *Held* to have been anticipated and properly rejected by the Commissioner of Patents on the product described in Crookes' "Hand-Book of Dyeing and Calico Printing," London, 1874, 242 to 263. *In re Schaeffer, 2* App. D. C. 1; 66 O. G. 514; 1894 C. D. 134.

65. A process of pasteurizing beer which consists in continuously moving the bottles through the pasteurizing agent, *Held* not anticipated by a process in which the pasteurizing agent is continuously moved in reference to the stationary bottles of beer. *In re Wagner, 22* App. D. C. 267; 105 O. G. 1783; 1903 C. D. 629.

66. Where application is made for a patent upon an alleged method after a patent has been granted upon the apparatus and it appears that the substitution of the word "means" for the word "method" at two places would not change the sense and would make the disclosure in the application the same as that in the patent, *Held* that to grant the alleged method claims would re-

sult in two patents for substantially the same thing. *In re Crevcling*, 25 App. D. C. 530; 117 O. G. 1167; 1905 C. D. 684.

67. Where the only suggestion of a method as a distinctive part of an inventive concept in the specification is in the use of the word "method" at two places therein and it does not appear that there is any difference in the inventive concept underlying such disclosure from that underlying the disclosure in a patent to the applicant upon the apparatus, *Held* that the alleged method claims are not patentable. *Ib.*

68. The alleged process claims in this case *Held* not patentable in view of a prior patent to the same applicant upon the apparatus disclosed. *Ib.*

69. A claim for a process of forming metal rings which differs from the references merely by the statement that a bead is formed centerally of the blank *Held* unpatentable. *In re White*, 31 App. D. C. 607; 136 O. G. 1771.

70. A claim for a process *Held* unpatentable when it does not appear that said process can be carried out by any other means than that invented for such purpose by appellant and for which he has obtained a patent. *Ib.*

71. The mere combination of articles disclosed in two former patents will not constitute invention unless it results in producing a new and useful article not applied by those familiar with the state of the art. A patent should not be issued when the alleged invention is a mere modification of the principle involved in former inventions or discoveries. *In re Faber*, 136 O. G. 229; 31 App. D. C. 531.

72. An article of manufacture composed essentially of pieces of the pericarp of the cocoanut, dried and coated with waterproof substance, *Held* to be not patentable because of anticipation and lack of invention. *In re Chenean*, 5 App. D. C. 197; 70 O. G. 924; 1895 C. D. 188.

73. An improvement in a stocking-supporter, consisting in raised lugs on the side of the slot-plate to prevent the stud over which the upper end of the stocking is gripped from rising in the slot and becoming disengaged, does not rise to the dignity of invention in view of the fact that lugs for the same purpose have been used in suspender-clasps. *In re Smith*, 14 App. D. C. 181; 87 O. G. 893; 1899 C. D. 313.

74. An apparatus for producing ozone by the use of electrical

currents of high frequency *Held* not patentable in view of certain patents to Tesla cited. *In re Perley,* 19 App. D. C. 577; 99 O. G. 2323; 1902 C. D. 543.

75. Where the claim covers an ozone apparatus in combination with particular means for producing currents of high frequency, *Held* anticipated by two patents, one disclosing the high-frequency apparatus used with the electric lights and the other disclosing an ozone apparatus supplied by a different form of high-frequency apparatus. *Ib.*

76. There was no invention in using the Herzian exciter in an ozone apparatus when it had been used in other devices to obtain electric currents of high frequency and an ozone patent had described the use of devices of that class with an ozonizer. *Ib.*

77. A claim for a steam-gage comprising a "Bourbon tube and the part to which it is secured, the joint between the two being unsoldered and held by frictional contact" is not patentable over a steam-gage having a Bourdon tube attached to its socket by means of a flange on the tube and which is held in place by a jam-nut, making a steam-tight union-joint without the use of solder. *Millett v. Allen,* 27 App. D. C. 70; 1906 C. D. 752; 124 O. G. 1524.

78. Where the appellant claims a steam-gage having a tapering end, so that it may be secured in place without soldering, and the reference shows a similar gage, but contains no statement that solder is not used, the patent is an anticipation and there is no reason for assuming that the patentee intended to use solder when it is entirely unnecessary. *In re Millett,* 18 App. D. C. 186; 96 O. G. 1241; 1901 C. D. 410.

79. A lathe having a bed consisting of two horizontal bars arranged one above the other is not anticipated by a drill-frame having two vertically-arranged bars, the two devices having different functions and belonging to remote arts. *In re Sheldon,* 135 O. G. 1585; 31 App. D. C. 201.

80. A claim covering the use of a thermostat to cut off the supply to a gas-engine to prevent overheating, *Held* not patentable in view of the common use of thermostats to cut off the supply of heating medium to various devices when the temperature reaches a predetermined point. *In re Adams,* 24 App. D. C. 275; 114 O. G. 2093; 1905 C. D. 602.

81. A thermostat when used to cut off the supply to a gas-en-

gine, performs no unusual function and does not produce a new and useful result that rises to the dignity of invention. *Ib.*

82. A claim for a traveling carrier of a hog-hoisting machine the essential feature of which is chain-pendants permanently attached to the carrier, Held to be anticipated by an endless carrier for hoisting building material, having rod-pendants permanently attached thereto, the uses of the two devices being practically the same, as by substituting the chain for the rod attached to the carrier of the reference the latter would be available for drawing hogs from the pen to the hoisting-point in the manner described by appellant. *In re Lowry,* 14 App. D. C. 473; 88 O. G. 717; 1899 C. D. 410.

83. A claim for a compound bar for making cutting-tools, consisting of an inner bar of harder metal and an inclosed bar of softer metal pressed on the same, etc., contains nothing that is patentably new in view of a patent which shows a bar of hard steel surrounded or partly surrounded by a bar of softer steel and another patent which shows a bar for cutting-blades made by partly surrounding the hard steel by iron. *In re Bedford,* 14 App. D. C. 376; 87 O. G. 1611; 1899 C. D. 357.

84. If there be any invention, it is not to be found in the combination described in the claims, but by reference to the drawing and in the words "substantially as described." This would confine the plaintiff to a metallic frame divided longitudinally into three sections, each fitted with short rollers, two of which project above and forward of the front bar of the frame, which is bent inward in front of the middle section to form the "re-entrant bend or recess" for the insertion of the hand. *Office Specialty Mfg. Co. v. Fenton Metallic Mfg. Co.,* 174 U. S. 492; 87 O. G. 1608; 1899 C. D. 352.

85. Limiting the patent to the precise construction shown, none of the defendant's devices can be treated as infringements, since none of them shows a shelf divided into three sections, and none of them, except possibly one, the manufacture of which was stopped, indicates a bend in the front bar of the frame to form the recess for the insertion of the hand. *Ib.*

86. A material consisting of the comminuted cellular portion of corn-pith freed from sappy, deleterious, and adherent matters by subjecting the pith to the action of a blast of air, preferably heated, *Held* to be not anticipated by applicant's prior patent

disclosing corn-pith obtained by passing cornstalks through breakers and then separating the pith from the fiber and outside shell, as there is no description in the patent that the pith is subjected to air at a high temperature. *In re Marsden*, 14 App. D. C. 223; 87 O. G. 1239; 1899 C. D. 339.

87. The similitude in the invention relied on as matter of anticipation with the invention for which a patent is sought need not be exact in form or structure but if the information contained therein is full enough and sufficiently precise to enable any person skilled in the art to which it relates to perform the process or make the thing covered by the claim of invention sought to be patented it will be sufficient to establish the fact of anticipation and want of novelty in the alleged invention. *In re Bedford*, 14 App. D. C. 376; 87 O. G. 1611; 1899 C. D. 257.

88. Claims for improvements in which the applicant designates as an "adjustable single-loop wire bale-tie," consisting, substantially, in forming the eye or loop out of the tie, or, as expressed in the specification, "integral" therewith, and of peculiar shape, whereby the free end of the tie is gripped and wedged in the eye upon the expansion of the bale, *Held* anticipated by the prior art. *In re Griswold*, 9 App. D. C. 496; 78 O. G. 482; 1897 C. D. 248.

89. A claim for a guarantee credit book having certain designated columns for certain entries involves no invention over the prior art which disclosed the general scheme, the only difference being the addition of certain columns for the purpose of keeping an account of liquidated damages. *In re Taylor*, 31 App. D. C. 529; 136 O. G. 1767.

90. After the generic process of preparing printing-plates with projecting portions on the back thereof and pressing these to the face of the plates, giving a graduated surface, has been claimed and the specific mode of preparing the plates by the use of photolithographing and etching has also been claimed there is nothing left to claim in a separate application as a separate invention as a process of making-ready printing-plates. What remains would appear to be a mere carrying out of the purposes of the original invention, which ought to be obvious to skilled workers in the art. *In re Wickers and Furlong*, 29 App. D. C. 71; 129 O. G. 2074; 1907 C. D. 608.

91. A claim to a printing-press held unpatentable where it

amounts to a mere duplication of what is shown in the prior art and involves the production of no new result save, perhaps, greater convenience. *In re Scott,* 25 App. D. C. 307; 117 O. G. 278; 1905 C. D. 665.

92. A method of covering playing-balls consisting of knitting separately a wrapper leaving a slit therein, inserting a deflated rubber ball through said slit, closing the slit by meshes of the same material as that forming the cover, and finally inflating the ball, *Held* anticipated by certain patents showing the idea of covering inflated rubber balls with a crocheted or knitted cover and another patent which contains the idea of inserting a deflated ball in a cover, inflating the ball, and then closing the aperture. *In re Droop,* 30 App. D. C. 334; 133 O. G. 517.

93. The process for the manufacture of zinc which consists in lixiviating roasted zinc ores by a solution of caustic soda or potash, electrolyzing the solution of zinc oxid thus obtained with an anode of sodium or potassium amalgam, and causing deposit of zinc on a metallic cathode, *Held* to be not patentably new. *Mond v. Duell* 16 App. D. C. 351; 91 O. G. 1437; 1900 C. D. 298.

94. Where the Commissioner of Patents refused to applicant a claim for the process of reducing a metallic oxid by electrolysis and applicant acquiesced in that rejection, but prosecuted another claim which differed from the rejected claim, first in mentioning zinc specifically as the metal to be extracted from the metallic oxid, and, second, in the introduction into the claim of the preliminary step of producing the zincate solution by lixiviation of roasted zinc ores by caustic-alkali solutions, *Held* that the first modification does not add to the patentability of the alleged invention, that the second modification simply adds to the process which was rejected as unpatentable, a preliminary step which was already well known, and that the claim is not patentable. *Ib.*

95. A seam for sewed articles consisting of two crossed threads on the upper surface of the fabric and a single locking-thread crossing the seam below the fabric, *Held* not patentable in view of two patents, one showing two crossed threads above and two straight locking-threads below and the other showing two straight threads above and a single crossed locking-thread below.

In re Klemm, 21 App. D. C. 186; 103 O. G. 1682; 1903 C. D. 540.

96. Where it was old to vulcanize a rubber sole to the outer leather sole of a shoe and was old to vulcanize a rubber sole to the inner sole, there was no invention to vulcanize a rubber sole directly to an inner sole of a particular kind provided with a welt. *In re Butterfield*, 23 App. D. C. 84; 108 O. G. 1589; 1904 C. D. 585.

97. Where a prior patent shows a rubber sole vulcanized to the inner sole with an interposed layer of rubber-coated cloth, the omission of the cloth does not involve invention, but mere mechanical skill. *Ib.*

98. Means for fastening an initial flat upon a finger-ring, consisting of a stud on the initial having square shoulders engaging shoulders in a hole made in the ring, *Held* not anticipated by a construction in which the stud on the initial was provided with a rounded spring-head which did not engage the ring proper, but after extending through an onyx-setting engaged a box attached to the ring. *In re Weiss*, 21 App. D. C. 214; 103 G. 1918; 1903 C. D. 546.

99. A patent granted after the appellants' filing date, but upon an application filed before, is evidence of the state of the art at the time as shown by the drawings and specification of the application, and it is a state of the art and not the existence of a patent which determines a party's right to a patent. *In re Millett*, 18 App. D. C. 186; 96 O. G. 1241; 1901 C. D. 410.

100. Where a patent showing in the drawing but not describing or claiming the invention was granted to another three days after the appellants' case was filed on an application filed two years before that time, *Held* that the appellants' claims were properly rejected. *Ib.*

101. Claims appealed, *Held* anticipated by the prior art cited, and the decision of the Commissioner of Patents affirmed. *In re Carpenter*, 24 App. D. C. 110; 112 O. G. 503; 1904 C. D. 669.

102. In this case held that it is shown by the record patents that the applicant's claims were anticipated and that by recombining selected elements the appellant has not produced a combination which amounts to invention, and the details of construction specified in some of the claims are within the scope of the skill

of mechanics familiar with this art. *In re Clunies,* 28 App. D. C. 18; 1906 C. D. 740; 123 O. G. 2631.

103. An application substantially for the process of reducing refractory oxides by electrolysis without the aid of external heat, *Held* to be anticipated by patent No. 468,148, issued February 2, 1892, to Charles S. Bradley. *In re Heroult,* 5 App. D. C. 90; 70 O. G. 784; 1895 C. D. 177.

4. Operativeness.

104. Where a machine turned out satisfactory work, but it was not commercially successful, for the reason that it did not turn out the work with desirable rapidity, *Held* that such device was not so inoperative as to be deficient in patentability. *Beckman v. Wood,* 15 App. D. C. 484; 89 O. G. 2459; 1899 C. D. 453.

105. There is a great difference between inoperativeness and imperfection. It is well known that many inventions were extremely crude in their inception, and it is not always easy to recognize the original conception in the perfected device. *Fowler v. Dodge,* 14 App. D. C. 477; 87 O. G. 895; 1899 C. D. 316.

106. As it is not usual for courts to disturb the conclusions of the Patent Office on such a question as the operativeness of a device as shown and described by an application for patent without very cogent proof of error, and there being no such proof in this case, *Held* that the decision of the Patent Office that the Dodge application describes an operative device should be affirmed. *Ib.*

107. The appealed claims to an alleged process of regulating a generator *held* not patentable, since they do not include all of the steps necessary to effect the result stated or any useful result. *In re Creveling,* 25 App. D. C. 530; 117 O. G. 1167; 1905 C. D. 684.

108. A claim purporting to cover a method cannot be regarded as patentable where it is lacking in one of the steps which in accordance with the statement of invention, description, and drawings is essential to the carrying out of the alleged method. *Ib.*

109. Where an alleged process claim includes the step of rotating an armature and concludes "and by said motion in one direc- increasing the output of the generator and in the other direction decreasing the said output," but it appears that the result stated is not accomplished by the mere motion of the armature, but

by the interposition of other means, *Held* that there is no foundation in the case for the claim. *Ib.*

5. Substitution of Elements.

110. It is not every new and useful improvement produced by the adaptation or substitution of one well-known material for another that will entitle a party to a patent. The improvement must be the result of invention. *In re Chenean,* 5 App. D. C. 197; 70 O. G. 924; 1895 C. D. 188.

111. Where the article sought to be patented differs from prior like articles merely in the difference and superiority of the material of which it is composed, the material and its properties being old and known, *Held* that such article involves the mere substitution of one old material for another. *Ib.*

112. The substitution for an old element in a combination of an element performing a similar function but constructed in a different way, does not render the combination itself patentable where there is no resultant change in the operation. In such a case, although the substituted element may be superior, the invention lies in the element and not in the combination. *In re Hawley,* 26 App. D. C. 324; 1906 C. D. 576; 121 O. G. 691.

113. It being old to employ "depending" means for supporting the load in computing scales, there was no invention in substituting such means in an old combination. *Computing Scale Co. v. Automatic Scale Co.,* 26 App. D. C. 238; 119 O. G. 1586; 1905 C. D. 704.

114. Where the applicant claimed a combination of old elements and a reference shows a combination which is intended for a different use and which involves differences of operation, and one of the elements shown in the reference is different from the corresponding element in the applicant's device, *Held* that a patent should not necessarily be refused on account of such reference. *In re Thompson,* 26 App. D. C. 419; 1906 C. D. 566; 120 O. G. 2756.

115. Where a prior combination cited against the combination claimed includes elements in addition to those used by the applicant which result in differences in operation undesirable for the purpose of the applicant's device and one of the elements of the prior combination is different from the corresponding element of the applicant's combination, *Held* that a patent should

not necessarily be refused on account of the prior combination. *Ib.*

116. Where there was doubt as to the sufficiency of the references and the applicant demonstrated that he had produced an apparatus of great utility, *Held* that the doubt should be resolved in favor of the applicant's claim. *Ib.*

117. Where it was old in a time-recording mechanism to provide a revolving drum operated by clockwork, a record-sheet to be wound thereon as the drum revolved, and a marking-point which made a mark on the record-sheet when placed in contact therewith, and it was also old to make a record on a lamp-blacked surface by the removal of a portion of such surface by means of a coating stylus, it does not involve invention to use in a time-recording mechanism a record-sheet having a removable surface in combination with a stylus which removes a portion of said surface, although the record-sheet itself may be novel. *In re Hawley*, 26 App. D. C. 324; 1906 C. D. 576; 121 O. G. 691.

6. Substitution of Equivalents.

118. The substitution of one ingredient for another in a composition will not avoid infringement if the two ingredients were well known at the date of the patent as endowed with the same capacity. *Lane v. Levi*, 21 App. D. C. 168; 104 O. G. 1898; 1903 C. D. 601.

119. A mere carrying forward of an original conception patented, a new and more extended application of it involving change only of form, proportions, or degree, the substitution of equivalents doing the same thing as the original invention by substantially the same means with better effects, is not such invention as will sustain a patent. It is only the invention of what is new and of practical utility, and not the arrival at comparative superiority or greater excellence in that which was already known, which the law protects as exclusive property and which it secures by patent. *In re Marshutz*, 13 App. D. C. 228; 85 O. G. 778; 1898 C. D. 578. *In re Iwan*, 17 App. D. C. 566; 95 O. G. 441; 1901 C. D. 344.

120. Where it is old to heat exhaust-air as it passes from the high-pressure to the low-pressure cylinder of a compound air-engine by means of a liquid substance, and it is also old to use

atmospheric air to impart heat to air within a receptacle, it does not amount to invention to substitute the latter heating medium for the former. *In re Hodges,* 28 App. D. C. 525; 128 O. G. 887; 1907 C. D. 543.

7. Equivalents.

121. A device embodying two springs used to disrupt a telephone circuit is substantially equivalent to a device embodying one spring for the same purpose. *McBerty v. Cook,* 16 App. D. C. 133; 90 O. G. 2295; 1900 C. D. 248.

8. Combinations.

122. The addition of one well-known process to another well-known process does not constitute invention unless some different or better result is produced than that which had been previously obtained. *Mond v. Duell,* 16 App. D. C. 351; 91 O. G. 1437; 1900 C. D. 298.

123. A combination as claimed is an entirety and disappears with the removal of one of its elements, and therefore it is a settled principle of patent law that where an element of the combination claimed is omitted there is no infringement. *Lane v. Levi,* 21 App. D. C. 168; 104 O. G. 1898; 1903 C. D. 601.

124. Where the combination in a sewing-machine of a trimmer in advance of one form of stitch-forming mechanism is old, *Held* that the combination of that trimmer with another stitch-forming machanism is not patentable, whether that stitch-forming mechanism is new or old. *In re McNeil,* 20 App. D. C. 294; 100 O. G. 2178; 1902 C. D. 563.

125. An article consisting of a catalogue having a desk-pad bound to it as one of its covers, *Held* a mere aggregation of unrelated elements and not a patentable combination. *In re Davenport,* 23 App. D. C. 370; 110 O. G. 2017; 1904 C. D. 653.

126. Where the appellant urges that he has a permanent closure, whereas the references show detachable closures, but it appears that the claim is for a combination of two closures and not for the substitution of a permanent for a movable attachment the alleged difference does not make the claim patentable. *In re Seabury,* 23 App. D. C. 377; 110 O. G. 2238; 1904 C. D. 655.

9. Change in Location of Elements.

127. Claims which comprise merely a reversal of parts disclosed

in a prior machine are unpatentable. *In re McNeil,* 28 App. D. C. 461; 126 O. G. 3425; 1907 C. D. 478.

128. The change in the relative location of the various elements of an apparatus, *Held* nothing more than would suggest itself to a skilled mechanic having in view the conditions and conveniences of the different places in which the construction and use of the apparatus may be desired. *In re Garrett,* 27 App. D. C. 19; 1906 C. D. 645; 122 O. G. 1047.

129. The change in location of projections on the seat portion of a bed-couch from the upper to the lower side of the seat does not amount to invention. It is possible, but not apparent, that a better balance of the seat and back is secured by changing these projections. It is possible that a more attractive exterior is thereby presented. It is possible that a more salable article is thereby secured; but all this does not prove originality of invention. While courts deal liberally with inventors in sustaining patents having but slight distinction over prior structures, they do not and ought not to permit the real inventor to be deprived of the fruits of his genius and labor by a mere copyist. *In re Hoey,* 28 App. D. C. 416; 127 O. G. 2817; 1907 C. D. 516.

130. Where a given combination of elements is old in an automatic computing-scale of the horizontal type and the prior art also shows a computing-scale arranged vertically, although it was not entirely automatic, a claim covering a rearrangement of the elements of the automatic horizontal scale to provide a vertical construction can be sustained only to a limited extent. *Computing Scale Co. v. Automatic Co.,* 204 U. S. 609; 127 O. G. 849.

10. Analogous Use.

131. The application of an old device or process to a similar or analogous subject with no change in the manner of applying it and no result substantially distinct in its nature is not patentable, even if the new form of result has not before been contemplated. *Millett v. Allen,* 27 App. D. C. 70; 1906 C. D. 752; 124 O. G. 1524.

132. Where it appears that a tapered screw-joint had been used in steam-fittings of different kinds and that such a joint had been used in juxtaposition to a steam-gage comprising a Bourdon tube having a soldered joint, it did not involve invention to substitute for such soldered joint the old tapered screw-joint. *Ib.*

133. Where the Magee patent and the appellant's claims show the same arrangement of diving and discharge flues at the rear of the stove, though the return-flues connecting the last two mentioned in Magee's patent are located in the bottom of the stove, while the applicant locates them on the side, and the stoves of Hynes and Williams have horizontal flues on the side, and Varney's hot-air heater shows a similar arrangement, *Held* that there is no invention in these claims. *In re Clunies,* 28 App. D. C. 18; 1906 C. D. 740; 123 O. G. 2631.

134. The decision in *Potts vs. Creager* does not apply to the circumstances of the case, in which an old construction of cutter-head used in a wood-planing machine is applied to an ice-planing machine, since the uses are analogous. *In re Briggs,* 9 App. D. C. 478; 78 O. G. 169; 1897 C. D. 211.

135. Where applicant changed the size and mode of fastening of the tubes of the device shown in the reference and transferred the device for heating water into one for cooling it. *Held* that the use of the latter is too nearly analogous to the former to raise the transfer to the dignity of invention, notwithstanding the fact that the new device may possess great advantages over the others used to accomplish the same purpose. It evinces the skill of the mechanic informed in the art and not the exercise of the inventive faculty. *In re Welch,* 28 App. D. C. 362; 1906 C. D. 758; 125 O. G. 2767.

136. Where the invention relates to finger-rings, the expedient of forming shoulders within holes in the band with which shoulders on the stud engage would not be suggested to one skilled in the art by a similar construction in street-signs. Street-signs and finger-rings are not in analogous or correlated arts. *In re Weiss,* 21 App. D. C. 214; 103 O. G. 1918; 1903 C. D. 546.

137. The combination here claimed has not produced a new device differing in character and function from others in existence and common use, nor does it accomplish a novel result through the co-operative action of old agencies. The applicant has done nothing more than exercise mechanical skill in bringing old devices into juxtaposition, and thereby constituting an aggregation merely of separate elements. *In re Smith,* 14 App. D. C. 181; 87 O. G. 893; 1899 C. D. 313.

138. There is no such remoteness in the use of the slot-plate

with the lugs in the clasp of the suspender as is sufficient to raise its adaptation to use in a stocking-supporter from the plane of mechanical ingenuity to that of invention. The use is clearly analogous. *Ib.*

11. Double Use.

139. A patent will not be granted upon the discovery of a new and analogous function for an old machine. *In re McNeil,* 82 App. D. C. 461; 126 O. G. 3425; 1907 C. D. 478.

140. The substitution for the two locking-threads used in the old cross-thread seam of the single locking-thread before used in the parallel-stitch seam *Held* not invention, but double use. *In re Klemm,* 21 App. D. C. 186; 103 O. G. 1682; 1903 C. D. 540.

141. In denying patentability to a change in prior devices, *Held* that the change was not made by transferring an old device to use in an entirely different and unrelated art and that therefore the case of *Potts v. Creager,* 155 U. S. 597, does not apply. *In re Thurston,* 26 App. D. C. 315; 1906 C. D. 539; 120 O. G. 1166.

142. Where in a rock-crusher a mantle removably secured upon a conical core is concedely unpatentable, *Held* that the provision of old pin-and-slot fastening devices for retaining the mantle tightly upon the conical core is mere double use and in view of certain references, an obvious substitution of equivalents. *Ib.*

143. The mere combining of an ordinary calking tool or blade with an automatically-operating pneumatic hammer which is adapted to be controlled and adjusted by hand amounts to nothing more than an obvious double use that would naturally occur to one skilled in the art with mind directed to cheapening the cost of ship-calking and does not rise to the dignity of invention. *In re Mason,* 136 O. G. 441; 31 App. D. C. 539.

12. Compositions.

144. A patentable compound or composition of matter is one that is produced by the intermixture of two or more specific ingredients and possesses properties pertaining to none of those ingredients separately, thereby accomplishing a new and useful result. *Lane v. Levi,* 21 App. D. C. 168; 104 O. G. 1898; 1903 C. D. 601.

145. A patentee seeking protection for such a compound must

describe with clearness and precision the component parts thereof, the process of their admixture, and the result. *Ib.*

146. The addition to a composition of substances that do not by their interaction change the properties, effect, or usefulness of the composition does not destroy its identity. The composition is the same if its properties substantially remain. *Ib.*

147. The identity of two compositions depends in general upon the identity of their ingredients and of their co-operative law, as well as upon the identity of the properties and effect of the composition as a whole. *Ib.*

13. Processes.

148. From the authorities it may be deduced, first, that processes involving a chemical or other elemental action, if new and useful, are patentable; second, that a process which amounts to no more than the function of a machine is not patentable; third, that a process of method of a mechanical nature not absolutely dependent upon a machine, although perhaps best illustrated by mechanism, may, if new and useful, be the proper subject of a patent, even though it involves no chemical or other elemental action. *In re Weston,* 17 App. D. C. 431; 94 O. G. 1786; 1901 C. D. 290.

149. A process of coaling ships at sea consisting in making a flexible connection between them and creating a pressure between one ship and the water on the side toward the other ship, *Held* to cover merely the function of mechanism and not a true process. *In re Cunningham,* 21 App. D. C. 29; 102 O. G. 824; 1903 C. D. 524.

150. Where the applicant has been allowed a claim for means for effecting a certain purpose and he claims the process of effecting it, but that alleged process cannot be conceived as independent of the means and cannot be described without reference to the means, the alleged process is the function of the means and is not patentable. *Ib.*

151. As to whether a statement of the mode of construction of a shoe having a rubber sole vulcanized to it can be considered a process at all. See *In re Butterfield,* 23 App. D. C. 84; 108 O. G. 1589; 1904 C. D. 585.

14. Arts.

152. Where the alleged invention is nothing more than a form

of proposed contract to be entered into with individuals desiring the benefit of burial insurance or guaranty, with blanks attached and readily separable therefrom, which in addition to the ordinary draft for payment show the several certificates required in order to provide, as far as practicable, against the perpetration of frauds upon the insurer or guarantor, *Held* not an art, machine, manufacture, or composition of matter within the meaning of the patent laws of the United States. *In re Moeser,* 27 App. D. C. 307; 1906 C. D. 685; 123 O. G. 655.

153. Where each form of proposal is one for entry into and performance of a distinct contract and there is no physical construction or combination that can convert it from a mere contract into a tangible device or manufacture, *Held* not patentable. *Ib.*

154. The form of contracts or proposals for contracts devised or adopted as a method of transacting a particular class of indemnity or insurance business, *Held* not patentable as an art. *Ib.*

15. Functional Utility.

155. In addition to the mere esthetical or artistic effect of the design upon the senses of the spectator the element of functional utility may be considered in determining the question of patentability; but the functional utility is not to be regarded as a controlling or even as an essential element in a patent for a design. *In re Tournier,* 17 App. D. C. 481; 94 O. G. 2166; 1901 C. D. 306.

16. Superiority and Popularity.

156. The fact that a new device may have displaced others by reason of its manifest superiority is material only when the question of patentability is otherwise a matter of doubt. *Millett v. Allen,* 27 App. D. C. 70; 1906 C. D. 752; 124 O. G. 1524.

157. A patent should not be granted merely because a device or combination may possess great advantages, thereby bringing it into immediate use, as it is only when the question of novelty is in doubt that the fact that the device has gone into commercial use, displacing others employed for a like purpose or supplying the place of others whose intrinsic defects have prevented their general adoption and use, is sufficient to turn the scale in favor of invention. *In re Thomson,* 26 App. D. C. 419; 1906 C. D. 566; 120 O. G. 2756.

158. Where the assertion was made that the new machine had

met with instant favor and large sales, but there was nothing in the record to bear out the assertion, *Held* that no effect could be given thereto. *In re Thurston,* 26 App. D. C. 315; 1906 C. D. 539; 120 O. G. 1166.

159. Notwithstanding that appellant's device may be superior in finish, neater in its appearance, and generally better accommodated for the uses for which it is intended than the devices which it is said to have displaced, yet it is not a patentable device. *In re Draper,* 10 App. D. C. 545; 79 O. G. 864; 1897 C. D. 407.

17. Determination of Patentability.

160. Where contention was made that it is impracticable for the Patent Office to pass on esthetic values and that the proper estimation of the applicant's design required cultivated taste, *Held* that the statutes as construed by the courts intend that the patentability of designs shall be determined by their appeal to the eye of the ordinary man. *In re Schraubstadter,* 26 App. D. C. 331; 1906 C. D. 541; 120 O. G. 1167.

161. Where there is a serious doubt as the patentability that doubt should be resolved in favor of the one seeking a patent, for if his claim be denied he has nothing with which he can go into court and attempt to enforce a lawful monopoly; but in reversing the concurrent decisions of the Patent Office there should be conviction beyond a reasonable doubt that in the absence of anything but what is shown by the record a patent granted on the application would be held a valid one. *Ib.*

162. The test of patentable novelty in the case of mechanical inventions and in the case of designs is different, owing to the different nature of the two things. Detail is of little consequence in designs, and it may be all important in mechanical inventions. *In re Freeman,* 23 App. D. C. 226; 109 O. G. 1339; 1904 C. D. 619.

163. Until the patent is actually issued it is always competent for the Patent Office, with due regard to the rules of law, to vacate its favorable adjudication upon the question of patentability for good and sufficient cause. *Oliver v. Felbel,* 20 App. D. C. 255; 100 O. G. 2384; 1902 C. D. 565.

18. Particular Patents.

164. Bill in equity filed by Caleb W. Durham, for a patent for improvements in a drainage apparatus, dismissed, on the ground

of lack of patentability in the subject-matter of the bill. *Durham v. Commissioner of Patents,* 69 O. G. 507; 1894 C. D. 547.

165. Claims 6, 7, and 8 of patent No. 700,919, granted to Austin B. Hayden May 27, 1902, for an improvement in computing-scales, *Held* void for lack of patentable invention in view of the prior art and proceeding in the Patent Office. *Computing Scale Co. v. Automatic Scale Co.,* 26 App. D. C. 238; 119 O. G. 1586; 1905 C. D. 704.

166. The claims in the application of Chester McNeil for a sewing-machine, Serial No. 665,193, filed December 31, 1897, examined and *Held* to be not patentable in view of the prior art. *In re McNeil,* 20 App. D. C. 294; 100 O. G. 2178; 1902 C. D. 563.

19. Generally.

167. A claim which is inaccurate is not patentable. *In re Creveling,* 25 App. D. C. 530; 117 O. G. 1167; 1905 C. D. 684.

168. The presumption against the patentability of any claim is made very strong by the concurrent denial of all the tribunals of the Patent Office to whom in turn it has been presented. *In re Fay,* 15 App. D. C. 513; 90 O. G. 1157; 1900 C. D. 232.

169. A method of treating shells in the manufacture of pearl buttons held not patentable. *In re Weber,* 26 App. D. C. 29; 117 O. G. 1494; 1905 C. D. 693.

170. The decision of the Commissioner of Patents refusing a patent upon a grain-door construction for car-doors affirmed as to claims 1, 2, 3, 5, 8, 9, 10, 11, 12, 13, 17, 18, 19, and 20 and reversed as to 6 and 7. *In re Hill,* 26 App. D. C. 318; 1906 C. D. 572; 121 O. G. 340.

III. PERFECTING RIGHT TO PATENT.

1. Applications.

a. *Time for filing.*

171. The act of March, 1903, by which the limitation within which an application must be filed in this country after the filing of a foreign application for the same invention was extended from seven months to twelve months construed and *Held* not to apply to application pending at the date of its passage. *Gueniffet v. Victorsohn,* 30 App. D. C. 432; 134 O. G. 779.

172. Under the provisions of § 4887, Rev. Stat., as amended March 3, 1903, an applicant who filed an application in this coun-

try after the passage of the act is entitled to the benefit of a foreign application for the same invention filed less than twelve months prior to the domestic application, although such foreign application was filed prior to the passage of the act. *De Ferranti v. Lindmark,* 30 App. D. C. 417; 134 O. G. 515.

b. *Diligence in filing.*

173. The patent laws are founded in a large public policy to promote the progress of science and the useful arts. The public, therefore, is a most material party to and should be duly considered in the application for a patent securing to the individual a monopoly for a limited time in consideration of the exercise of his genius and skill. *In re Mower,* 15 App. D. C. 144; 88 O. G. 191; 1899 C. D. 395.

174. It is greatly to the interest of the public that long delay unexplained between the time of the alleged invention and the application for patent when other inventors have entered the same field and other rights have accrued should be held to bar stale claims of priority. *Fefel v. Stocker,* 17 App. D. C. 317; 94 O. G. 433; 1901 C. D. 269.

174½. The inventor is entitled to a reasonable time to perfect his invention before applying for a patent, and what is a reasonable time is dependent upon the circumstances of the particular case. *Mead v. Davis,* 31 App. D. C. 590; 136 O. G. 2001.

175. Long delay in filing an application for a patent after alleged conception of the invention casts a doubt upon the allegation of conception, but it may be shown by the circumstances to be not inconsistent with inventorship. *Hunt v. McCaslin,* 10 App. D. C. 527; 79 O. G. 861; 1897 C. D. 401.

176. Where for a period of more than two years L. knew that the device was being manufactured and sold by A., and that A. was involved in a controversy with another party in regard to the rights to the invention, but during all of that time L. failed to assert his right to the invention, *Held* that this course of inaction is not in accordance with the ordinary rules that govern human conduct. *Lloyd v. Antisdel,* 17 App. D. C. 490; 95 O. G. 1645; 1901 C. D. 371.

177. Inventors striving honestly, in good faith, and with due diligence to perfect their inventions, instead of engaging in a race of diligence to reach the Patent Office with crude and probably inoperative devices, should be commended for their delay rather

than be charged with laches; but there is sometimes a tendency to hold back applications for patents in order to circumvent rival claimants and to prolong the life of the monopolies previously granted, which tendency should be rebuked whenever it is possible to do so. *Fefel v. Stocker,* 17 App. D. C. 317; 94 O. G. 433; 1901 C. D. 269.

178. Where the appellant took out seven patents on other inventions after the alleged reduction to practice before he filed his present application, his delay and apparent indifference in regard to an application until after he saw the patent of the appellee are significant. *Kelly v. Fynn,* 16 App. D. C. 573; 92 O. G. 1237; 1900 C. D. 339.

179. The proof offered in this case to relieve appellants of the charge of negligence is the same as that offered in the case of *Jackson v. Knapp,* 91 O. G. 1034, and for the same reason that was held in that case—that the appellants had not by sufficient proof relieved themselves of the consequence of their delay and neglect—the decision of the Commissioner of Patents awarding priority to their opponents is affirmed. *Jackson v. Getz,* 16 App. D. C. 343; 91 O. G. 1036; 1900 C. D. 284.

180. The mere statement that a party was unable to pay the expenses of an application, without showing the special facts and circumstances that rendered him unable, will not do. The special facts should be shown and not mere general conclusions, which may have been wholly unjustified by the facts. *Jackson v. Knapp,* 16 App. D. C. 338; 91 O. G. 1034; 1900 C. D. 281.

181. It is an easy thing to allege that it was the want of financial means to pay the fees attending the application that produced the delay in making it, and it is sometimes a difficult thing to do to disprove the truth of such reason assigned; but where the delay and the circumstances attending it give rise to the presumption of negligence the onus of proof is upon the party charged with the delay, and it is incumbent upon him to repel such presumption by clear and definite proof. *Ib.*

182. The bare assertion of inability to pay the expense of an application for a patent will not suffice to excuse the party charged with negligence to prevent the effect of delay when the question of due diligence becomes important in determining the question of right as between such party and another who has been diligent and prior in point of time in coming into the Patent

Office for a patent, though he may be subsequent in conception and perfecting his invention. *Ib.*

183. Where two joint inventors executed an application on July 1, 1896, which was not filed until May 26, 1897, more than nine months after the application of the senior party was filed, and the excuse given for the delay was that one of the joint inventors went abroad the latter part of July and before he returned the company with which he was connected made an assignment; that the other joint inventor was not in a situation, financially, to go on with the case and to pay the attorney's fees until after the other joint inventor had returned from abroad, *Held* that it is not consistent with the general allegation of poverty that one of the joint inventors after the application had been prepared could afford to embark upon a long travel and to remain absent for several months in a foreign country, which required the expenditure of a considerable amount of money, and the excuse for the delay is not satisfactory, especially where there is no explanation why some small part of the money so expended could not have been applied in filing the application in the Patent Office. *Ib.*

184. Where a party claims to have been in possession of the invention and to have consulted his attorney in 1896 to see whether he was infringing upon any rights, his delay for nearly two years thereafter before filing his application is a remarkable circumstance and tends to throw discredit upon his whole story in regard to the date of his alleged invention. *Nielson v. Bradshaw,* 16 App. D. C. 92; 91 O. G. 644; 1900 C. D. 265.

185. It is a settled principle in practice as well as in reason that forbearance to apply for a patent during the progress of experiments and until the party has perfected his invention and tested its value by practical experiment affords no ground for presumption of abandonment, nor should such delay operate in any way to the prejudice of the inventor or to his right to obtain a patent for his invention, certainly not as against a subsequent or junior inventor. *Christensen v. Noyes,* 15 App. D. C. 94; 90 O. G. 227; 1900 C. D. 212.

186. Where during a delay of six years P. was poor but concealed his invention and failed to make efforts to interest others in it to assist him in securing a patent or in making practical use of it, *Held* that mere poverty cannot excuse an absence of all effort

for such a length of time. *Petrie v De Schweinitz,* 19 App. D. C. 386; 99 O. G. 1387; 1902 C. D. 534.

187. Unexplained delay in applying for a patent is a circumstance of considerable significance when considered in connection with other circumstances tending to discredit the applicant's claims. *Sendelbach v. Gillett,* 22 App. D. C. 168; 109 O. G. 276; 1904 C. D. 597.

188. Where an inventor after an alleged reduction to practice of his invention lays it aside for five years, during which times he files several domestic and foreign applications and develops another system to accomplish the same purpose which he regards as superior, and fails to file an application until after the grant of a patent to another for the same invention who was proceeding in good faith, he is guilty of inexcusable laches. *Bliss v. McElroy,* 29 App. D. C. 120; 128 O. G. 458; 1907 C. D. 537.

189. Where an inventor relies upon the constructive reduction to practice, established by his application, and upon diligence, coupling this with an earlier conception, and urges in excuse of delay in filing the application that he could not come to terms with the company at whose expense the invention had been made, *Held* this excuse is insufficient, as it does not attempt to explain why an understanding could not have been reached earlier either that the company file the application or allow the inventor to protect the invention himself. *Paul v. Hess,* 24 App. D. C. 562; 115 O. G. 251; 1905 C. D. 610.

c. *Second Application.*

190. When an application for patent is after due examination rejected and finally determined against the applicant after exhaustion of the right of appeal allowed to him, *Held* that it is not incumbent upon the Patent Office as a duty to entertain such second application, and that if the Commissioner refuses to entertain it he has a perfect legal right to do so. *In re Barratt,* 14 App. D. C. 255; 87 O. G. 1075; 1899 C. D. 320.

191. There is no provision of law for a second application where a previous application has been adjudicated and a patent denied. The absence of such a provision is sufficient evidence that the right to have a second application considered after the refusal of a patent upon a previous application does not exist. *Ib.*

d. *Continuations.*

192. An application filed within one year after the grant of a patent disclosing the subject-matter of such application is not a continuation of the application on which such patent was granted and is not entitled to the benefit of the date of such prior application. Although the claims of the second application were made in the prior application, on which the patent was granted, and could have been divided out therefrom, and the date of the prior application could have been thus secured, when the patent was granted the application was merged in the patent, the proceeding was closed, and there was nothing to be continued. *In re Spitteler,* 134 O. G. 1301; 31 App. D. C. 271.

193. The rule which permits a divisional application to relate back to the filing date of the original, which also discloses its subject-matter, as long as it remains open in the Patent Office is a very liberal one that sometimes works hardship upon intermediate inventors, and it ought not to be extended to cases not clearly within it. *Ib.*

e. *Joinder of Inventions in.*

194. The statute gives the right to join inventions in one application in cases where the inventions are related, and it cannot be denied by a hard and fixed rule which prevents such joinder in all cases. *Steinmetz v. Allen,* 192 U. S. 543; 109 O. G. 549; 1904 C. D. 703.

f. *Divisional.*

195. A divisional application filed while the original application is pending in the Office covering matter carved out of the original is a continuation of the latter and is entitled to its date as a constructive reduction to practice, even though such divisional application was filed more than two years after an action by the Office on claims which applicant elected to retain in response to a requirement of division. *Duryea v. Rice,* 28 App. D. C. 423; 126 O. G. 1357; 1907 C. D. 443.

196. A divisional application dates back to the original one and secures to the applicant the benefit of a constructive reduction to practice, whether the claims of the divisional application were in the original when filed or not. *Lotz v. Kenny,* 135 O. G. 1801; 31 App. D. C. 205.

197. Process and apparatus may be related and may approach

each other so nearly that it will be difficult to distinguish the process from the function of the apparatus. *Steinmetz v. Allen,* 192 U. S. 543; 109 O. G. 549; 1904 C. D. 703.

198. Where it is urged that the Commissioner had no valid authority to require division between process and apparatus claims, *Held* that the ruling of the Supreme Court in *Steinmetz v. Allen* is the guiding authority in determining this question. *In re Frasch,* 27 App. D. C. 25; 1906 C. D. 648; 122 O. G. 1048.

199. Where the constitutionality of § 4886, Rev. Stat., is attacked because it provides that inventions or discoveries may be either arts, machines, manufactures, or compositions of matter and because presumptively no two of these subjects are one invention, it is a sufficient answer to say that inventions have been thus distinguished continuously since 1793 and that the court of last resort has been called upon to consider, from one standpoint or another, this division of inventions and has frequently recognized the distinction between them without ever intimating that the legislative branch of the Government had exceeded its power in so classifying inventions. *Ib.*

200. The statute being constitutional and the Supreme Court having laid down the rule that not in all cases can claims for process and apparatus be joined in one application, it follows that the Commissioner in requiring division exercises a valid authority, and if correctly exercised no error is committed. *Ib.*

201. The application of the rule concerning the requirement of division to a given case involved an exercise of judgment and discretion in every case. The facts of each case must be considered, with the burden on the applicant who asserts that two statutory inventions are one unitary invention. *Ib.*

202. A process and an apparatus, while presumptively independent inventions when considered in the light of § 4886, Rev. Stat., they nevertheless may be so connected in their design and operation as to constitute a unitary invention; that when constituting independent inventions they may not be claimed in one and the same application; that when so dependent as to constitute a unitary invention they may be claimed in one and the same application. *Ib.*

g. *Division of Applications.*

203. There is no proper line of division between one application covering a specific rail and implying certain adiuncts and another

application by the same inventor for the combination of the rail and the adjuncts, and one application should not go to patent while the other is in interference. *Porter v. Loudon,* 7 App. D. C. 64; 73 O. G. 1551; 1895 C. D. 707.

203a. The requirement for division or that certain claims be presented in a separate application is not an adverse ruling upon the applicant's right, but is a mere preliminary requirement as to procedure. *Steinmetz v. Allen,* 22 App. D. C. 56; 104 O. G. 582; 1903 C. D. 578.

203b. The decision of the Commissioner that an application must be divided is final and conclusive, and the applicant is bound to make the division as required. *Ib.*

203c. The question of division being a matter of form and procedure, the power over it is vested in the Commissioner as the head of the Office, and his determination thereof is final and is not reviewable by any authority. *Ib.*

h. *Multiplication of applications.*

204. The law does not favor the multiplication of applications and of patents for devices closely related to each other when they can properly be included in one application and in one patent. *Norden v. Spaulding,* 24 App. D. C. 286; 114 O. G. 1828; 1905 C. D. 588.

i. *Amendment and alteration.*

205. It is a well-settled and long-established practice of the Patent Office to allow amendments to applications to be made under proper circumstances to supply omissions and defects in the original specifications and claims as filed which have occurred by mistake, oversight, or inadvertence, or want of the requisite skill in the preparation and presentation of cases to the Office, and the making of such amendments should not be allowed to operate to the prejudice of the claims of applicants, if made in due and reasonable time and in good faith. *Hulett v. Long,* 15 App. D. C. 284; 89 O. G. 1141; 1899 C. D. 446.

206. An applicant has a right to add claims by amendment to cover matter which is disclosed in his drawings, but not originally claimed, where the original specifications refer to such matter as an essential part of the construction sought to be patented. *Phillips v. Sensenich,* 134 O. G. 1806; 31 App. D. C. 159.

207. Where motion was made that an application be stricken

from the files of the Patent Office because contrary to Rules 30 and 31 of the Rules of Practice of that office and changes had been made in the application papers after the execution of the oath, but there is no evidence in the case tending to show that the changes were made without the knowledge and approval of the applicant, and it is alleged, on the contrary, that the changes were made at his direction, and there is no proof that the applicant did not make an oath as to inventorship at the time he executed the corrected papers, and where since the filing of his application the applicant has made other oaths to the effect that he is the inventor of the subject-matter disclosed in his application, and it appears that the motion, if sustained, would result in removing the applicant from the field of claimants to the invention, as public use has intervened as a bar to the filing of a new application, *Held* that the objection is purely technical and should not be sustained. *Davis v. Garrett,* 28 App. D. C. 9; 1906 C. D. 724; 123 O. G. 1991.

208. Although Tripler's application met with various objections on references and underwent frequent amendment to meet the same, *Held* that the circumstances do not bring the case within the doctrine of *Beckman v. Wood. Ostergren v. Tripler,* 17 App. D. C. 557; 95 O. G. 837; 1901 C. D. 350.

j. *New matter in.*

209. When new matter is introduced into an application, it cannot be allowed to dominate previous claims of another applicant; but when matter has been disclosed but not claimed it is proper to include it in claims, and they may take precedence over the previous claims of another applicant. *Luger v. Browning,* 21 App. D. C. 201; 104 O. G. 1123; 1903 C. D. 593.

210. An applicant in his endeavor to protect his invention may amend the specification and claims so long as he keeps within the requirements of the statutes and the rules of the Patent Office; but he cannot be permitted at any time to introduce new matter into his application and obtain therefor a date as of the date of the original application. *In re Dilg,* 25 App. D. C. 9; 115 O. G. 1067; 1905 C. D. 620.

211. Where the original case disclosed the top pieces of the standards with straight sides, an amendment stating that those top pieces are sector-shaped or flaring involves new matter. *Ib.*

212. Where the appellant originally disclosed standards spring-

ing from both edges of the annular base and according to the original disclosure both were necessary, an amendment claiming a base having standards springing from one edge *only* involves new matter. *Ib.*

213. The Commissioner *held* right in rejecting the appellant's claims to a ball-retaining ring, because they do not correctly describe his invention, but include new matter borrowed from a patent granted to another party. *Ib.*

214. The claims of the appellant copied from a patent granted to another upon a printing press, *Held* to have no proper foundation in the application as filed and to constitute new matter injected by amendment. Decision rejecting claims affirmed. *In re Scott,* 25 App. D. C. 307; 117 O. G. 278; 1905 C. D. 665.

215. Where a claim inserted by amendment includes matter not originally disclosed, *Held* that if the change from the original is an obvious one which would occur to any one it is not patentable, and if it is not obvious it involves new matter. *Ib.*

k. *Illustrations and descriptions.*

216. Any full and accurate description of the invention, either in words or drawings or by model, if it be of a machine, or even an unsuccessful effort to embody the conception, when the effort discloses that the idea was complete, will suffice, although the attempt to represent it may have failed. In the absence of all other proof the date of the application for a patent, if containing a complete description, is taken as the date of the conception. *Mergenthaler v. Scudder,* 11 App. D. C. 264; 81 O. G. 1417; 1897 C. D. 724.

217. Since the appellant's ball retaining ring is a simple invention, there is no warrant for introducing ambiguous terms, thereby failing to clearly and correctly describe it. *In re Dilg,* 25 App. D. C. 9; 115 O. G. 1067; 1905 C. D. 620.

218. Where criticism was made that the type were not shown, but only the kind of printed matter produced, *Held* that the answer thereto is that the conventional drawing accepted by the Patent Office for years has been furnished and that the absence of description is authorized by the Patent Office rules. *In re Schraubstadter,* 26 App. D. C. 331; 1906 C. D. 541; 120 O. G. 1167.

l. *Exhibits.*

219. In an application for a patent relating to machinery, the in-

vention may be exhibited as well in a drawing as in a model, so as to lay the foundation of a claim to priority, if such drawing be sufficiently plain to enable those skilled in the art to understand it. *Christensen v. Noyes,* 15 App. D. C. 94; 90 O. G. 227; 1900 C. D. 212.

m. *Abandonment.*

220. An application that has been allowed to lapse or become forfeited and before it is renewed, ceases to have vital or operative effect, except for a very limited and special purpose. *Christensen v. Noyes,* 15 App. D. C. 94; 90 O. G. 223; 1900 C. D. 201.

221. Under § 4897, Rev. Stat., relating to the renewal of forfeited applications, providing that "upon the hearing of renewed applications preferred under this section, abandonment shall be considered as a question of fact," the question of abandonment is one to be determined upon proof of the facts and circumstances and will not be presumed from laches in filing the renewal application, although it may be within the power of the Commissioner, whenever he entertains a doubt as to whether there has been abandonment, to require an explanation of the delay. *Cutler v. Leonard,* 31 App. D. C. 297; 136 O. G. 438.

222. Where after a case is allowed the applicant in order to embody other claims files a new case covering the invention without complying with or seeking to obtain the benefit of the statute relating to renewal of applications and files a written abandonment of the first case, specifically stating that the invention covered thereby is not abandoned, *Held* that the abandonment of the first case was as complete as provided for in § 4894 and the consequences must be the same. *Ostergren v. Tripler,* 17 App. D. C. 557; 95 O. G. 837; 1901 C. D. 350.

n. *As evidence.*

223. Where no profert is made of an application filed by one of the parties to an interference and no copy of the same is produced in evidence, no consideration can be given to that application, as it is not a record open to the public and is in no form before the court for consideration. *Robinson v. Seelinger,* 25 App. D. C. 237; 116 O. G. 1735; 1905 C. D. 640.

224. The case of *Cain v. Park,* 14 App. D. C. 42, where an application was in evidence and notice taken of certain Office records regarding that application, is to be distinguished from a case where no profert is made of an application and no copy is produced. *Ib.*

225. An application filed in February, 1902, cannot warrant a finding that what is therein disclosed was in the possession of the applicant in the preceding September. *Ib.*

o. *Affidavits.*

226. Where affidavits are filed containing general expressions of opinion in respect of the patentability of claims, *Held* that they are entitled to no weight. *In re Garrett,* 27 App. D. C. 19; 1906 C. D. 645; 122 O. G. 1047.

227. Affidavits going to show the practical success of applicant's device where the truth thereof is substantially conceded are entitled to material weight in view of the fact that the grant of a patent confers no absolute right of property and in view of the customary rule of resolving ordinary doubts in favor of applicants. *In re Thomson,* 26 App. D. C. 419; 1906 C. D. 566; 120 O. G. 2756.

p. *In general.*

228. In an application for a patent the onus of showing that all the conditions and provisions of the law have been fully complied with, making it appear that the inventor is justly entitled to a patent under the law, and showing that the invention is sufficiently useful and important to justify the issue of a patent is upon the applicant. *In re Drawbaugh,* 9 App. D. C. 219; 77 O. G. 313; 1896 C. D. 527.

229. An independent inventor ignorant of another's prior conception and diligent efforts in reducing to actual practice has the right to file an application without testing the practicability of his invention and to prosecute the same to the issue of a patent, and it could not be said that he had obtained the same surreptitiously or by unfair practices; but it does not follow that he can retain an advantage so obtained when it is made to appear intrinsically unjust. *Yates v. Huson,* 8 App. D. C. 93; 74 O. G. 1732; 1896 C. D. 278.

2. Diligence.

a. *In General.*

230. The question of diligence cannot be determined by any general rule applicable to all cases, but necessarily depends upon the special circumstances of each case as it arises. *McCormick v. Cleal,* 12 App. D. C. 335; 83 O. G. 1514; 1898 C. D. 492; *DeWallace v. Scott,* 15 App. D. C. 157; 88 O. G. 1704; 1899 C. D. 416;

Christensen v. Ellis, 17 App. D. C. 498; 94 O. G. 2561; 1901 C. D. 326. *O'Connell v. Schmidt*, 27 App. D. C. 77; 1906 C. D. 662; 122 O. G. 2065.

231. There is no arbitrary rule or standard by which diligence may be measured The sole object of the law being to mete out the fullest measure of justice, each case must be considered and decided in the light of the circumstances of that case. The nature of the invention, the situation of the inventor, the length of time intervening between conception and reduction to practice. the character and reasonableness, of the inventor's testimony and that of his witnesses, are all important factors in determining the question of diligence. *Woods v. Poor*, 29 App. D. C. 397; 130 O. G. 1313; 1907 C. D. 651.

232. There is no general rule of what constitutes due diligence. It is reasonable diligence, and that is to be determined by all the facts in the case. An inaction of eighteen months, in the absence of controlling adverse conditions, is not reasonable diligence in the case of an invention which required but one month for actual development. *Croskey v. Atterbury*, 9 App. D. C. 207; 76 O. G. 163; 1896 C. D. 437.

233. The diligence required of an inventor is diligence rather in the reduction of his invention to practice than in application to the Patent Office or in manufacturing his device for public use. *Oliver v. Felbel*, 20 App. D. C. 255; 100 O. G. 2384; 1902 C. D. 565.

234. The object of the patent laws is to foster and protect invention for the universal benefit of mankind, and while every presumption will be resolved in favor of the inventor who delays filing an application until he has perfected his invention the object of the law would be lost to view should we permit the displacement of an inventor who has given the world the benefit of his discovery by one who has permitted his invention to lie dormant for a decade. *Kinsman v. Kinter*, 31 App. D. C. 293; 136 O. G. 1532.

235. Neither the delay that is proper in one case nor the diligence that is due in the other can in the absence of any statutory limitation of time in this regard be measured by any arbitrary standard. It has been repeatedly held that the question of due diligence is one to be determined in each case by its own circumstances.

Griffin v. Stevenson, 15 App. D. C. 135; 89 O. G. 919; 1899 C. D. 440.

236. While less harm is done and the policy of the law better promoted by a rigid insistence upon the requirement of diligence than by laxity in the encouragement of delay, it does not seem that the rule of diligence should be pushed to a harsh and unreasonable extent. What the law requires is reasonable, not extraordinary, activity. *Ib.*

237. Under § 4893, Rev. Stat., an invention claimed must not only be shown to be new and useful, but it must also be made to appear that a claimant is justly emitled to a patent therefor, A claimant cannot be justly entitled if a patent when granted would or could operate a wrong either to the public or a rival inventor and that wrong be the result of the claimant's own laches or negligent delay in asserting his rights. *In re Moaer*, 15 App. D. C. 144; 88 O. G. 191; 1899 C. D. 395.

238. The proofs show that after Christensen's conception of the device, May, 1894, he disclosed it to others in the latter part of that year; that he tried to obtain money to enable him to apply for patent in December, 1894; that he sought to interest a party in the invention in the spring of 1895; that in June, 1895, he made another attempt to file an application; that in September, 1895, an oral agreement was made in regard to the matter; that in December, 1895, working drawings were made and that from that time on to the time he filed his application he was working on the invention; that patterns were finished in 1896 and the device tested in March, 1896, and that he applied for a patent in April, 1896. *Held* that it is difficult to conceive that greater perseverance and diligence could be in reason required, especially of one who for the greater part of the time was in a state of almost abject poverty and who was under the necessity of pursuing constantly employment to procure the means of subsistence for himself and family. *Christensen v. Noyes*, 15 App. D. C. 94; 90 O. G. 223; 1900 C. D. 201.

239. The following acts held to show due diligence throughout the period covered by the dates given: Opened correspondence with attorney in March, 1902; sent check for preliminary examination on 24th of same month; sent check for drawings on April 2, 1902; swore to the application for patent upon May 12, 1902,

and filed the same on June 11, 1902. *Jones v. Cooke,* 25 App. D. C. 524; 117 O. G. 1493; 1905 C. D. 689.

b. *Disclosure.*

240. One who has made an invention and who has locked it up in the secrets of his own exclusive knowledge and who produces it only when a rival inventor has entered the field cannot be held to have acted in accordance with the policy of the law or with the spirit and purpose of the Constitutional provision relating to promoting "the progress of science and useful arts." Such inaction not only contravenes the interests of the public, but also operates to injure a rival inventor who in the meantime enters the field of invention upon the faith of the conditions as they appear to exist and upon which he is entitled to rely. *Warner v. Smith,* 13 App. D. C. 111; 84 O. G. 311; 1898 C. D. 517.

c. *Delay after conception.*

241. Where an inventor interested a third party to co-operate with him in exploiting and testing an invention and procuring a patent therefor, but without any steps whatever being taken toward the object in view beyond the mere determination to have the invention tested at some time, *Held* that such undeveloped intentions unaccompanied by any action cannot be held to be due diligence on the part of the inventor. *Griffin v. Swenson,* 15 App. D. C. 135; 89 O. G. 919; 1899 C. D. 440.

242. Where G. and B. slept on their rights and for more than five years failed to bring their invention to a complete and operative form, *Held* that by their laches they lost rights which for a long time they little valued, and which they cannot now successfully assert. *Gilman v. Hinson,* 26 App. D. C. 409; 1906 C. D. 634; 122 O. G. 731.

243. One having the first complete conception of an invention cannot hold the field against all comers by diligent efforts merely to organize and procure sufficient capital to engage in the manufacture of his device or mechanism for commercial purposes. This is a different thing from diligence in actual reduction to practice. *Seeberger v. Dodge,* 24 App. D. C. 476; 114 O. G. 2382; 1905 C. D. 603.

244. Where L. and W. made and secretly tested a machine embodying the invention August 23, 1903, and at once dismantled the same, made and tested another machine October, 1903, but

did not use the same again until September, 1904, and where L. and W. consulted their attorneys in November, 1903, and had the application papers perpared in January, 1904, but did nothing further toward filing their application until June, 1904, after they had heard of C.'s patent, *Held* that L. and W. were lacking in diligence and cannot prevail over C., who reduced the invention to practice and filed his application in September, 1903. *Lewis v. Cronemeyer,* 29 App. D. C. 174; 130 O. G. 300; 1907 C. D. 638.

245. F. conceived the invention in September, 1900, and disclosed it in September, 1903, but did nothing toward reducing it to practice until April, 1904. C. conceived the invention in January, 1904, and reduced it to practice in the following March. The excuse offered by F. for his delay was that he was too busy earning his living to attend to it, and, moreover, he did not have the means to reduce it to practice unless he borrowed the money, which he did not want to do. *Held,* that F. was lacking in diligence, it being shown by the evidence that subsequent to his conception he borrowed $3, 10 with which to engage in a venturesome undertaking, while a small amount of money would have enabled him to construct the invention. *Feinberg v. Cowan,* 29 App. D. C. 80; 128 O. G. 889; 1907 C. D. 546.

246. Where it appears that Kinsman installed mechanism embracing part of the issue in 1890 which was experimental in its nature and found to be unsuccessful, and immediately thereafter unsuccessfully tested a second experimental device, and in 1892 and 1893 installed a system embodying the invention which after being used for several months was taken out and discarded, and no further evidence of activity on the part of Kinsman was shown prior to the filing of his application in December, 1903, which was subsequent to the time Kinter entered the field and reduced the invention to practice, and during this time Kinsman was active in experimenting with other forms of invention, *Held* that he was lacking in diligence. *Kinsman v. Kinter,* 31 App. D. C. 293; 136 O. G. 1532.

247. Where the junior party had disclosed the invention to several persons and had ordered tools to manufacture the same prior to the entry of the senior party into the field and in a few months thereafter actually sold a small number which was followed a few months later by the manufacture and sale of

large numbers of such devices, *Held* that he was diligent in reducing his invention to practice. *Davis v. Horton,* 31 App. D. C. 601; 136 O. G. 1768.

248. Where it appeared that W. I. Ohmer had a conception of the invention which he disclosed to Neth and Tamplin in 1902 and prior to January, 1903, had caused an embodiment of this invention in working plans and drawings, but did not reduce the invention to practice until February, 1903, and it is shown that John F. Ohmer reduced the invention to practice in January, 1903, *Held* that it cannot be successfully held that W. I. Ohmer was lacking in reasonable diligence in reducing his invention to practice, when it is considered that a complicated and difficult piece of mechanism was constructed in four months. *Neth v. Ohmer,* 30 App. D. C. 478; 135 O. G. 662.

249. Diligence in attempting to secure capital to engage in the manufacture of the device or to exploit the invention is not the diligence in reducing to practice required of the first to conceive, but the last to reduce to practice, in order to hold the field. *Laas v. Scott,* 26 App. D. C. 354; 1906 C. D. 621; 122 O. G. 352.

250. Where an inventor retained an attorney residing in another city to prepare a patent application covering a voting-machine, and after a large amount of correspondence the attorney requested the inventor to make and send to him a model for use in preparing the application, and the inventor decided to make a complete machine instead of a model and undertook its construction himself, being financially unable to bear the great expense of having it built by others, but when the machine was partially completed, realizing that its construction would involve great delay, discontinued work thereon and in response to his attorney's repeated request made a model, *Held* that the inventor's attempt to build a complete machine was a commendable effort to complete his invention and that the delay caused thereby did not constitute laches. *Davis v. Garrett,* 28 App. D. C. 9; 1906 C. D. 724; 123 O. G. 1991.

251. Where a machine embodying the invention was too expensive for W. to build and he did nothing with the invention for five years after his conception except make a few efforts to enlist the interest of men of capital, although he was able to file an application for a patent at any time, *Held* that he was lacking

in diligence. *Wyman v. Donnelly*, 21 App. D. C. 81; 104 O. G. 310; 1903 C. D. 556.

252. Where R. conceived the invention in November, 1898, completed drawings in April, 1899, and then commenced work on a machine which was completed in August, 1899, and it appears that he was a very busy man and devoted all of the time he could spare to work upon this invention, *Held* that he was not lacking in diligence. *Roe v. Hanson*, 19 App. D. C. 559; 99 O. G. 2550; 1902 C. D. 546.

253. Where the inventor who was first to conceive the invention produces no evidence whatever of any action on his part to reduce the invention to practice beyond the making of some working drawings and a blue-print from them, these acts cannot be held to be a manifestation of due diligence. *Watson v. Thomas*, 23 App. D. C. 65; 108 O. G. 1590; 1904 C. D. 587.

254. Where S. had a conception of an improved retaining device for rubber tires and could have applied it to practical use at any time by means then well known in the art, although such means was crude and imperfect, but instead of so doing he devoted his time for more than two years to devising a simple and economical machine for applying the retaining device, *Held* that he did not exercise diligence in regard to the retaining device. *Stapleton v. Kinney*, 18 App. D. C. 394; 96 O. G. 1432; 1901 C. D. 414.

255. Where it is shown that Michle had a conception of the invention in June, but did nothing in regard to it until after Read entered the field and filed his application in the following December, *Held* that Michle did not exercise diligence and that the decision of the Commissioner of Patents in favor of Read should be affirmed. *Michle v. Read*, 18 App. D. C. 128; 96 O. G. 426; 1901 C. D. 396.

256. Where A. claims to have conceived the invention in February, 1895, but laid it aside and was doing nothing when J. and F. entered the field in June, 1895, although he was able to reduce the invention to practice either actually by making the device or constructively by filing an application at any time he desired, *Held* that he was lacking in diligence. *Austin v. Johnson*, 18 App. D. C. 83; 95 O. G. 2685; 1901 C. D. 391.

257. Where P. had a conception of the invention so complete and definite in 1891 that he could have given the necessary information from which an application for patent could have been pre-

pared, there was no reason or necessity for delaying the application until 1896 and his delay shows a lack of diligence. *Paul v. Johnson*, 23 App. D. C. 187; 109 O. G. 807; 1904 C. D. 610.

258. Where L. did not reduce the invention to practice for nine months after his conception and during that time deliberately and intentionally put it aside while he worked upon other inventions in the same art, he was lacking in diligence. *Liberman v. Williams*, 23 App. D. C. 223; 109 O. G. 1610; 1904 C. D. 623.

259. To delay one invention for the sake of another projected invention to be used in connection with it and which might never be realized cannot be construed in the patent law as an exercise of due diligence. *Lotterhand v. Hanson*, 23 App. D. C. 372; 110 O. G. 861; 1904 C. D. 646.

d. *Filing and prosecution of application.*

260. Parties must be bound by the consequences of their own acts, and this principle is true in the patent laws as it is in all other departments of the law. A deliberate intentional delay and non-action in a matter of either a public or private concern is proof of a very cogent nature, and the party chargeable with such conduct must bear the consequences of it and will not be heard to excuse himself by simply declaring that he did not intend to prejudice the rights of others or to waive rights of his own that would have been available to him if they had been timely exercised. *In re Mower*, 15 App. D. C. 144; 88 O. G. 191; 1899 C. D. 395.

261. Where an applicant reduced an invention to practice, and delayed for about eleven years in filing an application, and during this delay subsequent and independent inventors of the same device came into the Office with their completed invention and applied for and obtained a patent at much cost and trouble, and put the invention into operation and gave the public the benefit of it, *Held* that to grant a patent to the first to reduce the invention to practice and thereby defeat the patent of three years' standing would neither be equitable nor just, nor would it be promotive of the great object of the patent laws. *Ib.*

262. Under such circumstances, to say the least of the matter, there was not much consideration given to the public in this scheme of delay, however much it may have inured to the benefit and advantage of the owner of the invention. *Ib.*

263. Where after a reduction to practice of an invention an ap-

plicant delayed for eleven years in filing an application because of the fixed and determined purpose on the part of the owner of the invention to keep it from the public and to prevent his partners from obtaining any benefit whatever therefrom until the expiration of certain patents and he could find it profitable to dispose of certain machines that he had on hand and in the meantime third parties had applied for and obtained a patent for the same invention, *Held* that there was no excuse or justification whatever for the want of diligence in making the application. *Ib.*

264. Where the reduction to practice of the invention was clearly established, a delay of two and a half years in filing the application therefor is not sufficient to destroy the weight of proof of actual reduction to practice, especially where it appears that drawings showing substantially the same construction as the original device were sent to applicant's attorneys more than a year before the application was filed and before any one else had entered the field. *Seeberger v. Russell,* 26 App. D. C. 344; 1906, C. D. 612; 121 O. G. 2328.

265. Granting that actual reduction to practice is preferable to that which is constructive merely, as more to the interest of the public, and that reasonable indulgence ought to be extended to one pursuing that course in good faith, yet when the construction of an experimental device involves so great cost and risk that an inventor, though possessed of sufficient means, may well hesitate to undertake the same entirely at his own expense, due diligence requires that he should then attempt to secure his right and promote the public interest by filing an application for patent. *Seeberger v. Dodge,* 24 App. D. C. 476; 114 O. G. 2382; 1905 C. D. 603.

266. Where S. conceived the invention in May, 1895, and had such complete drawings made in the summer of 1896 that he could have filed an application for patent at that time, but did not do so or reduce the invention to actual practice until after D. filed his application in January, 1898, *Held* that S. was lacking in diligence. *Ib.*

267. After reduction to practice of an invention a mere delay of the inventor in applying for a patent, in the absence of concealment, abandonment, or suppression, will not prevent the inventor from getting a patent based upon priority of invention. *Rose v. Clifford,* 135 O. G. 1361; 31 App. D. C. 195.

268. When reduction to practice by the first inventor is shown, his right to a patent is not barred by delay thereafter unless there be some circumstance of concealment, suppression, or abandonment of the invention. *Oliver v. Felbel,* 20 App. D. C. 255; 100 O. G. 2384; 1902 C. D. 565.

269. Where it was contended that a party was not diligent in the prosecution of his application in the Office, *Held* that this has no bearing on the question of priority, since his rights became fixed by the filing of his application, and they could not be lost and become vested in others by mere delay on his part in their prosecution. *Michle v. Read,* 18 App. D. C. 128; 96 O. G. 426; 1901 C. D. 396.

e. *In making drawings.*

270. Where during the time between his conception and his reduction to practice P. had drawings of the invention made, but put them to no use and locked them up in his desk, *Held* not to constitute diligence in adapting and perfecting the invention. *Paul v. Johnson,* 23 App. D. C. 187; 109 O. G. 807; 1904 C. D. 610.

f. *Excuses for inactivity.*

271. The fact that a party does not know that a rival has entered the field is no excuse for delay, since the risk that a rival may appear at any time is something which every inventor is bound to contemplate and to anticipate, and in this lies the fundamental reason for the requirement of due diligence. *Platt v. Shipley,* 11 App. D. C. 576; 82 O. G. 461; 1898 C. D. 407.

272. A person cannot be charged in law with any want of due diligence before the advent of a rival inventor upon the field; but at and after that time he becomes liable to lose the benefit of his previous conception unless he uses due diligence. Delay for the purpose of the elaboration and perfection of a crude conception may well be commended; but it will not be excused where no such end is in view. *Ib.*

273. A mistake by a party in supposing that the invention was covered by a prior patent granted to him cannot under any known principle of law be considered a good excuse for delay in perfecting the invention or filing an application covering the same. Under the circumstances of this case the applicant is, furthermore, chargeable with the knowledge possessed by his agent or attorney as to the scope of the former patent. *Ib.*

274. Where the testimony showed that F.'s delay was occasioned only by the fact that someone to whom he had made application refused or declined at the time to construct a machine for him, *Held* that if such a cause were allowed to excuse total inaction in regard to the invention and the discarding of it for the time for other and more immediately profitable enterprises it is difficult to see why inaction might not be justified forever and all rival inventors effectually barred out of the field of invention. *Dodge v. Fowler*, 11 App. D. C. 592; 82 O. G. 595; 1898 C. D. 320.

275. Where an inventor is very busy in other directions, *Held* to be no excuse for inactivity, which allows the intervention of others in the field of invention and the perfection of their enterprises. *Robinson v. Copeland*, 24 App. D. C. 68; 112 O. G. 501; 1904 C. D. 664.

276. Delay by an inventor in reducing his invention to practice and applying for a patent is not to be excused because of his supposition that a prior patent owned by him was sufficiently broad to include the invention. *Seeberger v. Dodge*, 24 App. D. C. 476; 114 O. G. 2382; 1905 C. D. 603.

277. Where the excuse given for delay in filing application for patent is impossibility of agreement with employers concerning the invention, *Held* that the excuse is insufficient to establish diligence, as it involves business considerations rather than circumstances of a compelling nature. *Paul v. Hess*, 24 App. D. C. 562; 115 O. G. 251; 1905 C. D. 610.

277a. Where during his more than three years of inaction T. applied for six patents for other inventions and, while poor, had the available means to make an application for this one, *Held* that his lack of diligence could not be excused on the ground of poverty. *Turnbull v. Curtis*, 27 App. D. C. 567; 1906 C. D. 732; 123 O. G. 2312.

277b. Where the real ground of delay, as disclosed by the evidence, was that the inventor thought it to his interest to withhold his application until he might be able to make an advantageous agreement with some person of large capital for the exploitation of the invention, *Held* that such an excuse for lack of diligence is insufficient. *Ib.*

278. Where the appellant established conception and disclosure of the invention in the summer of 1903, but took no steps toward reducing the invention to practice until April 21, 1904, when

he instructed his attorney to prepare an application for patent, which was not, however, filed until September 19, 1904, while his opponents entered the field on March 1, 1904, and in excuse of his lack of diligence urged that his financial condition was such that it was impossible for him to reduce the invention to practice earlier, but the testimony showed that in the meantime he had enlarged his business and that his gross income amounted to about two hundred dollars a month, *Held* that the showing is insufficient to excuse the appellant's lack of diligence. *McArthur v. Mygatt*, 31 App. D C. 514; 136 O. G. 661.

279. W. filed an application in April, 1896, disclosing a collar attached to the heel of a knitting-machine needle and inserted between its limbs and so bent around as to form the letter S. What he actually disclosed to his attorney, and that upon which his application was based was a collar in the shape of the figure 8. In February, 1897, N. filed an application in which he claimed both the S form and the 8 form indifferently. Two successive interferences were then declared, both of which were dissolved on N.'s motions. W.'s application became a patent in August, 1898. In June of the same year he filed the application which is now in interference with the application of N. N.'s earliest date of conception is October, 1896, and of reduction to practice January, 1897. *Held* that under the circumstances W. should not be charged with laches in filing the application involved, as the greater part of the delay was due not to his inaction, but to the course of action of the Patent Office, and being first to conceive and reasonably diligent in constructive reduction to practice he is entitled to priority. *Held,* further, that it was only when it was finally determined by the Patent Office that the S-shaped device and the 8-shaped device were distinct inventions and equally patentable that it became incumbent upon W. to take steps for the protection of his invention as he had actually made it. He is not chargeable with any want of due diligence when he acquiesced in the decisions of the Patent Office. *Newton v. Woodward,* 16 App. D. C. 568; 17 App. D. C. 34; 93 O. G. 2319; 1900 C. D. 406.

280. Although in some instances a device may be dependent for its practical use upon the invention of further or additional mechanical appliances, notwithstanding the fact that the two devices may be regarded as patentably distinct and separate in the Patent

Office and in such case a pause in the perfection of one would be excused by due diligence in the completion of the other, *Held* that this is not such a case. *Stapleton v. Kinney,* 18 App. D. C. 394; 96 O. G. 1432; 1901 C. D. 414.

281. Where the only excuse given for delay is that the party was engaged in other things which required his attention, and it appears that he might at any time have had an application for a patent filed by devoting two hours to a conference with his attorney, *Held* that he was lacking in diligence. *Michle v. Read,* 18 App. D. C. 128; 96 O. G. 426; 1901 C. D. 396.

282. Where E. first developed his general improvements, but in making his first machine added the separate card attachment instead of the autographic-roll mechanism of the issue, *Held* under the circumstances shown by the evidence that this was done with no intention to abandon the autographic-roll, but upon the suggestion of his backer to save expense. *Christensen v. Ellis,* 17 App. D. C. 498; 94 O. G. 2561; 1901 C. D. 326.

283. Where it appears that the machine was completed and in its original construction involved the expenditure of a considerable amount of money; that E. was without means and was compelled to seek aid for the exploitation of his ideas; that the doubtful commercial value of the invention rendered it difficult to obtain this aid, and that the parties furnishing the aid insisted upon development in the line of least expense, *Held* that the fact that E. first developed other specific features than those in controversy does not show a lack of diligence on his part. *Ib.*

284. Where sickness is alleged as the excuse for delay in reducing to a practice or filing an application, *Held* that it must constitute a continued disability such as would excuse diligence during the entire period when diligence was required to be exercised. *Paul v. Johnson,* 23 App. D. C. 187; 109 O. G. 807; 1904 C. D. 610.

285. Where during the period of delay when P. says he was unable to do anything it appears that he filed applications relating to other inventions, his claim that the delay was unavoidable is not sustained. *Ib.*

286. There is no requirement of law for the exercise of diligence on the part of the first to reduce to practice, and no lack of diligence can be imputed to him, since he was, in fact, the first to give the invention to the public by a reduction to practice. The comparative diligence of the parties is not material. *Ib.*

287. Where a complete conception is established and as an excuse for inactivity in perfecting an invention it is claimed that no one could be found who was qualified to construct the requisite parts of the device and willing to do the actual work, and it appears that the inventor could have obtained a constructive reduction to practice by filing his application in the Patent Office, and as the very fact of his inability to get any one to do the work for him should have dictated the propriety of diligence in making such application, *Held* that the inventor was not diligent. *Robinson v. Copeland,* 24 App. D. C. 68; 112 O. G. 501; 1904 C. D. 664.

g. *Failure to asserts rights to invention.*

288. Applicant does not lose his right to claim an invention disclosed in his application by the fact that he makes no specific claim thereto until after another party files his application for the same invention. *Lotz v. Kenny,* 135 O. G. 1801; 31 App. D. C. 205.

289. Where L. knew of a controversy between A. and another party in regard to the invention at issue and to assist A. in that controversy executed an affidavit as to when the invention was made, *Held* that it was then and there the duty of L. to assert his rights to the invention if he believed himself to be the inventor of it. *Lloyd v. Antisdel,* 17 App. D. C. 490; 95 O. G. 1645; 1901 C. D. 371.

h. *Proof of.*

290. Where the burden is upon a party to show diligence between his conception and reduction to practice and his proofs leave it in doubt whether the alleged steps taken by him were before or after his opponent entered the field, he has not proved diligence, and the decision must be against him. *Watson v. Thomas,* 23 App. D. C. 65; 108 O. G. 1590; 1904 C. D. 587.

291. Since S. was the first to conceive, but the last to reduce to practice, the burden is upon him to show that immediately before D. entered the field and upon that date he was exercising due diligence in perfecting his invention and attempting to reduce it to actual practice. *Seeberger v. Dodge,* 24 App. D. C. 476; 114 O. G. 2382; 1905 C. D. 603.

3. Reduction to Practice.

a. *What amounts to.*

292. As the primary and most essential requisite of the register-

ing mechanism of a voting-machine is that of unfailing accuracy, a voting-machine which admittedly fails to register as desired as often as "once in a hundred times" is not a reduction to practice. *McKenzie v. Cummings*, 24 App. D. C. 137; 112 O. G. 1481; 1904 C. D. 683.

293. The comparative crudeness of an original construction as contrasted with subsequent machines is no ground for the refusal of the merit of operative success. Few great inventions have been perfect in the first instance. *Smith v. Brooks*, 24 App. D. C. 75; 112 O. G. 953; 1904 C. D. 672.

294. A machine may be crude in construction, but if it contains all the essential elements of the invention of the issue and in its operation successfully demonstrates its practical efficacy and utility reduction to practice is accomplished. The mere fact that mechanical improvements may be suggested and made in the course of operation that tend to perfect the operation of the machine and increase its practical efficiency, while retaining the essential elements of the invention which it puts in practice, does not impair the effect of the original demonstration of utility, if established satisfactorily. *Burson v. Vogel*, 29 App. D. C. 388, 404; 131 O. G. 942; 1907 C. D. 669.

295. Reduction to practice must produce something of practical use, coupled with a knowledge, preferably by actual trial, that the thing will work practically for the intended purpose. The conception may give rational hopes of future fulfilment of the purpose at which it aims; but if as a mattter of practice it falls short of success it is not a sufficient reduction to practice. Complete invention amounts to demonstration. When, as in this case, it had not quite passed beyond experiment and had not quite attained certainty and had fallen short of demonstrating the capacity of the invention to produce the desired result, the invention itself was still inchoate. These parties sought certainty; but they had not attained certainty beyond all conjecture, which certainty the law requires. *Sherwood v. Drewsen*, 29 App. D. C. 161; 130 O. G. 657; 1907 C. D. 642.

296. Complete invention must amount to demonstration. The efforts of the inventor must have passed beyond experiment, beyond the reach of possible or probable failure, must have attained certainty by embodiment in the intended form, and must be capable of producing the desired result, for where experiments

have inspired hope of future achievement of the purpose for which they were designed, they still fall short of reduction to practice. *Wickers and Furlong v. McKee,* 29 App. D. C. 4; 129 O. G. 869.

297. Where the invention consists of a plate graduated in such manner as to obviate the necessity for "make-ready," *Held* that to establish a successful reduction to practice requires a printing test under actual working conditions on a power-press and without the use of a "cut-overlay." *Wickers and Furlong v. McKee,* 29 App. D. C. 4; 129 O. G. 869.

298. Where it was contended that a device was no more than a crude and experimental model, which was not fit for marketable use, the court found that it was a full-sized operative structure which, except for ornamentation and polish, was fit for commercial use and held the same to be a reduction to practice. *Hope v. Voight,* 25 App. D. C. 22; 115 O. G. 1585; 1905 C. D. 629.

299. Where a friction spring was tested in a vise and under a steam-hammer and broken under the last test and no measurements were taken to show the tensile strength of the spring or the pressure to which it was subjected and no facts appear of record upon which the court can have a conclusion that the device was adapted to perform the work for which it was built,*Held* that the device was a mere experimental device and not a reduction to practice. *Gallagher v. Hein,* 25 App. D. C. 77; 115 O. G. 1330; 1905 C. D. 624.

300. Where a device was actually used for the purposes for which it was intended and completely demonstrated its utility and practicability, such device was the equivalent of a reduction to practice, even though it was but half the size of the commercial machine. *Ib.*

301. Where a machine was made and was operated effectively as a camera for taking consecutive pictures and it was experimented with privately on one or more occasions as an apparatus for projecting pictures and was kept and satisfactorily operated as a camera for taking pictures, but was not again tried for their projection, such use cannot be regarded as reduction to practice of an apparatus for exhibiting pictures because of the patentable distinction between apparatus for taking pictures and that for their exhibition. *Latham v. Armat,* 17 App. D. C. 345; 95 O. G. 232; 1901 C. D. 337.

302. Where a machine embodying the invention of the issue was constructed and found to be operative to perform the function for which it was intended, but it appears that the machine was subsequently changed by another inventor, who had been placed in charge of the machine, by substituting a device of his own for a device originally placed on the machine, and it appears that the original device was never again restored to that machine or placed upon any other machine for practical use, and no machine with the original device has ever been manufactured for actual use or sale, and a period of nearly two years was allowed to elapse after the alleged reduction to practice before the application for a patent was filed, and in the meantime the inventor, so far as the record shows, seemed to have done nothing toward the practical development of the alleged invention, *Held* that all this, whether it be regarded as neglect or concealment, would tend to show that what was done by the inventor originally was rather an unsatisfactory experiment than a successful reduction to practice. *Hillard v. Brooks,* 23 App. D. C. 526; 111 O. G. 302; 1904 C. D. 658.

303. A garment-fastener which was used for two months in practical operation, Held to be a reduction to practice, although it appeared that it was not mechanically perfect, that it was not made of a material which would be used in a commercial article, that the hooks were not in size adapted to retain thick skirt-bands, and that it was not entirely satisfactory and successful, where it appeared that the defects were clearly mechanical imperfections which could easily be remedied. *Lowrie v. Taylor,* 27 App. D. C. 522; 1906 C. D. 713; 123 O. G. 1665.

304. Where after making and successfully testing one form of ejecting mechanism for match-machines D. made an improved form and showed the second form in his application, but made broad claims including the first form, the first machine was a reduction to practice. *Wyman v. Donnelly,* 21 App. D. C. 81; 104 O. G. 310; 1903 C. D. 556.

305. From the length of time taken for the tests of a hay-loader —three successive years in the hay-making seasons of the year— no inference can be deduced unfavorable to the inventor. On the contrary, considering the nature of the device and the purpose for which it was intended and that the best possible test was that which could be made in the outward operation of the

machine in the field in the work for which it was intended, his care and diligence are rather to be commended, in view of the fact that there were no rivals in the field so far as he knew and there being no testimony to show fraud, suppression, concealment, or improper action of any kind. *Trissell v. Thomas*, 23 App. D. C. 219; 109 O. G. 809; 1904 C. D. 616.

306. Where it appears that T. constructed a hay-loader and the testimony is ample and satisfactory to show that the device was successfully tested and operated during three successive hay-making seasons, *Held* that the device is a reduction to practice notwithstanding the fact that another device was subsequently constructed embodying an improvement not necessarily connected at all with the invention of the issue, even though it be admitted that the second device was a better one than the first. *Ib.*

307. What is successful construction is a matter the determination of which must largely depend upon the nature and purpose of the device in the particular case, as well as upon the special circumstances surrounding the alleged construction and use. Some devices are so simple and their purpose so obvious that the complete construction of one of a size and form capable of practical use might be regarded as a sufficient reduction to practice without actual use or test in an effort to demonstrate their complete success or probable commercial value. *Mason v. Hepburn*, 13 App. D. C. 86; 84 O. G. 147; 1898 C. D. 510.

308. Where a stamp-cancelling machine was completed and operated upon letter-mail in a post-office for several hours a day for from four to eight days early in 1883, but was then taken back to the shop, partly dismantled and then laid aside and never again operated or tested in public, *Held* that it was a mere abandoned experiment and not a reduction to practice. *Howard v. Hey*, 18 App. D. C. 142; 95 O. G. 1647; 1901 C. D. 375.

309. The presumption of such abandonment was not overcome by testimony of the inventor and his assignee that the operation of the machine in 1883 was successful, nor by the testimony of two employés of the postoffice to the same effect which was vague and indefinite and given sixteen years after the event. *Ib.*

310. Where it appears that L. and W. constructed a machine embodying the tin-plate catcher set forth in the issue and secretly tested the same August 23, 1902, but it is not clear that freshly-tinned plates were used in the test, and the machine was at once

dismantled, and that subsequently, in October, 1903, another machine was constructed which is said to have been operated until November 18, 1903, but was not again used until September, 1904, after L. and W. heard of C.'s patent, and no sheets which were run through this catcher are produced, and where another machine, which was made in February, 1905, in conformity with the first machine and tested in the presence of witnesses called in this case, required frequent adjustments of the catcher-disks to prevent the sheets from slipping and yet to place them far enough apart to avoid denting the sheets, *Held* that the experimental stage of the invention had not been passed and that such tests did not establish reduction to practice of the invention. *Lewis v. Cronemeyer,* 29 App. D. C. 174; 130 O. G. 300; 1907 C. D. 638.

311. Where both parties subject their inventions to tests, it is, in effect, admitted by both parties that the device belongs to that class of inventions which requires actual use or thorough tests to demonstrate its practicability. *Gallagher v. Hein,* 25 App. D. C. 77; 115 O. G. 1330; 1905 C. D. 624.

312. Where an invenion undoubtedly belongs to that class which requires either actual use or thorough tests to determine its practicability, there can be no actual reduction to practice until one or the other thing takes place and is proven. *Ib.*

313. Where it appears that an invention is a radical departure from previous methods, in order to establish the fact of reduction to practice thorough tests are necessary. *Ib.*

314. Where it was shown that a stamp-cancelling machine was completed and operated upon letter-mail in the postoffice at Boston for several hours a day for from four to eight days early in 1883, but was then taken back to the shop, partly dismantled, and then laid aside and never again operated or tested in public, *Held* that it was a mere abandoned experiment and not a reduction to practice. *Lloyd v. Antisdel,* 17 App. D. C. 490; 95 O. G. 1645; 1901 C. D. 371.

315. Where D. was not a match manufacturer, but a manufacturer of machines, his failure to test his device with real matches instead of dummy matches and his failure to use the machine commercially cannot be taken as discrediting his claim that the machine was successfully reduced to practice. *Wyman v. Donnelly,* 21 App. D. C. 81; 104 O. G. 310; 1903 C. D. 556.

316. Where Government officers subjected a gun embodying the invention to a preliminary test not under the conditions of actual service and found the result sufficiently satisfactory to warrant sending the gun to the proving-grounds for a complete test, *Held* not a reduction to practice, but a mere experiment. *Dashiell v. Tasker*, 21 App. D. C. 64; 103 O. G. 2174; 1903 C. D. 551.

317. A breech mechanism for a rapid firing gun belongs to that class of devices in which it must be shown that all of the parts were functioning properly under rigorous and exact requirements of actual service, before the mechanism can be said to be adapted and perfected for practical use. *Ib.*

318. Where mechanism for ejecting match-splints from the carrier was placed upon a full-sized match-machine and tested in the shop in ejecting dummy matches and was found to be successful, *Held* to be a reduction to practice. *Wyman v. Donnelly*, 21 App. D. C. 81; 104 O. G. 310; 1903 C. D. 556.

319. Where the Rolfe exhibits were made and tested, *Held* that it is considered that his work as an inventor was finished, physically as well as mentally, and that there was a complete reduction to practice. *Rolfe v. Hoffman*, 26 App. D. C. 336; 1906 C. D. 588; 121 O. G. 1350.

320. Where the evidence shows beyond question that F. made a full-sized blue-print machine embodying the invention in March, 1901, and the witnesses testify that it was operated to see how it would work and that blue-prints were actually made by it and distributed during April, *Held* that the machine must be regarded as a reduction to practice. *Herman v. Fullman*, 23 App. D. C. 259; 109 O. G. 1888; 1904 C. D. 625.

321. Where it is claimed that the roller-holder in issue was made and used in 1893, again used in 1895, and a third time in 1897, although the impressions were not satisfactory and the device was never again used, *Held* that this would be considered a reduction to practice if the construction of the roller-holder at that time is shown to be the same as it now exists. *Eastman v. Houston*, 18 App. D. C. 135; 95 O. G. 2064; 1901 C. D. 386.

322. Where a mowing-machine was constructed and practically operated under usual conditions and though crude found to be satisfactory and successful in its operation, *Held* to be a reduction to practice, notwithstanding the fact that the machine was after-

ward dismantled and some of the parts were used in building other machines, which differed in some respects from the old one. *Funk v. Whitely*, 25 App. D. C. 313; 117 O. G. 280; 1905 C. D. 670.

323. Where D. testifies on direct examination that he worked on a full-sized machine from 1896 to 1898 and completed it and successfully operated it in July, 1898, but on cross-examination admits that the machine was far from being complete and operative, and that it had only been used as an illustration and was nothing more than an experimental model, *Held* that it cannot be received as a reduction to practice. *Darnell v. Grant*, 16 App. D. C. 589; 92 O. G. 557; 1900 C. D. 329.

324. A drawing perfect in every detail and plainly demonstrating the principle and practical utility of an invention is not reduction to practice, nor is a model, designed, constructed, and intended merely as a model. *Mason v. Hepburn*, 13 App. D. C. 86; 84 O. G. 147; 1898 C. D. 510.

325. K. stood on his record date of July 25, 1892. G. claimed to have conceived the invention and reduced it to practice in November, 1891. *Held* that the exhibit offered by G. to show reduction to practice was at best nothing more than a mere experimental model abandoned or laid aside and recalled afterward by the publication of K.'s patent. The decision of the Commissioner awarding priority to K. affirmed. *Guilbert v. Killinger*, 13 App. D. C. 107; 84 O. G. 313; 1898 C. D. 522.

326. A small experimental model of a size not calculated to be of any practical value, never intended to be more than an illustration, put away after it was made and of which no use was attempted to be made until after the declaration of interference does not constitute a reduction to practice. *Hunter v. Stikeman*, 13 App. D. C. 214; 85 O. G. 610; 1898 C. D. 564.

327. Complete invention must amount to demonstration. It must be shown to have passed the region of experiment—of possible or probable failure—and to have arrived at certainty by being embodied in the form intended, capable of producing the desired result. A model alone, no matter how complete in detail of construction, does not come within the operation of such a rule. *Ib.*

328. Where it appears that a machine of full size was made for the purpose of study and with the expectation that it would be used as a model for others if it was decided to manufacture them

and that after it was tested several experimental changes were made in it, but there is no satisfactory evidence that it operated practically and successfully, *Held* that it was not a reduction to practice. *Kelly v. Fynn,* 16 App. D. C. 573; 92 O. G. 1237; 1900 C. D. 339.

329. The mere making of a model of a device does not amount to a reduction to practice, where such model represents a device intended to be used as a part of a complicated machine, a test in which is necessary to demonstrate the practical usefulness of the device. *Howell v. Hess,* 30 App. D. C. 194.

330. Such a model, so called, must be quite different from the ordinary model, which, while it may show the invention, is incapable of operation to effect its purpose, and the cases must be few, if any indeed, in which the construction and disclosure of a device intended as an illustrative model merely without some test of its capacity to perform the service intended could be accepted not only as evidence of conception, but of reduction to practice also. *Hammond v. Basch,* 24 App. D. C. 469; 115 O. G. 804; 1905 C. D. 615.

331. There is no doubt that the construction of a full-sized device capable of use to a sufficient extent to demonstrate the practical utility of the invention may often be regarded as a reduction to practice, notwithstanding it may have been called a model, as well as intended by the inventor to be used as a model for the construction of a like device of better and different materials, when there has been some test or application to use. *Ib.*

332. Where a model was constructed that clearly discloses the invention and would enable those skilled in the art to thoroughly understand it, in brief sufficient to enable the utilization of the invention so that had death removed the inventor before an application for patent had been filed the invention would have survived, *Held* that in the absence of any test it does not constitute an actual reduction to practice unless the invention belongs to that class of simple inventions which require no other proof of their practicability than the construction of a model. *O'Connell v. Schmidt, 27* App. D. C. 77; 1906 C. D. 662; 122 O. G. 2065.

333. Where the invention is the knuckle of a car-coupler and the evidence relied upon to establish reduction to practice showed the making of a knuckle consisting of a crude brass casting, which was broken when tested, and a knuckle consisting of a

gray-iron casting, which was never actually tested, *Held* that the knuckles were made of metals not suitable for practical use, but were models, and that they did not prove a satisfactory reduction to practice. *Gilman and Brown v. Hinson,* 26 App. D. C. 409; 1906 C. D. 634; 122 O. G. 731.

334. A device which differs from the terms of the issue in that particular feature which the Office once held in the same case was sufficient to constitute a patentable distinction is not a reduction to practice of the issue. *Breul v. Smith,* 10 App. D. C. 180; 78 O. G. 1906; 1897 C. D. 332.

335. Actual reduction to practice of a process consists in the actual performance of the process. Making a device by means of which the process can be carried out is not such a performance, and is not therefore a reduction to practice. *Croskey v. Atterbury,* 9 App. D. C. 207; 76 O. G. 163; 1896 C. D. 437.

336. A device which has all the essential parts and elements of completeness, and which was used in fact, is entitled to be considered a reduction to practice. *Hunter v. Stikeman,* 13 App. D. C. 214; 85 O. G. 610; 1899 C. D. 564.

337. A device that could be used and might to some extent serve the purpose for which it was designed *Held* to be not necessarily a reduction to practice. *Warner v. Smith,* 13 App. D. C. 111; 84 O. G. 311; 1898 C. D. 517.

338. Where the issue covers an oil-burner of novel construction and includes as an element a wick fitting in the burner in a certain way, *Held* that a device cannot be received as a reduction to practice of the invention unless it is shown that it contained a wick of the particular form specified. *Blackford v. Wilder,* 21 App. D. C. 1; 104 O. G. 578; 1903 C. D. 567.

339. Some devices are so simple and their purpose and efficiency so obvious that the complete construction of one of a size and form intended for and capable of practical use may well be regarded as a sufficient reduction to practice without actual use or test in an effort to demonstrate their complete success or probable commercial value. *Loomis v. Hauser,* 19 App. D. C. 401; 99 O. G. 1172; 1902 C. D. 530.

340. The ticket-holder in controversy is an exceedingly simple invention consisting mainly in the folding of a small piece of paper, and there can scarcely be any practical difference between what is designated as an illustrative model and the perfected device.

Held, therefore, that the making of such a holder was a reduction to practice. *Ib.*

341. Where R. in August, 1899, completed the shifting device for the saws of a gang-edger and embodied it in a full-sized machine adapted for practical use and then tested it, but did not place it in a sawmill and test it commercially until March, 1900, *Held* a reduction of the invention to practice in August, 1899. *Roe v. Hanson,* 19 App. D. C. 559; 99 O. G. 2550; 1902 C. D. 546.

342. Where the issue calls for a fuse "within the casing," a device having the fuse covered by an outer wrapping on the casing comes within the issue and is a reduction to practice of the invention. *Sachs v. Handhauser,* 21 App. D. C. 511; 105 O. G. 1534; 1903 C. D. 625.

343. A device which merely illustrates the mode of mechanical construction and operation of the conceived idea and which may be said to be an embodiment of the invention in visible form is not necessarily a reduction to practice, for though the device is operative as a mechanical movement there is no certainty that it will perform its function when put to use under full conditions of practical use. *Ocumpaugh v. Norton,* 25 App. D. C. 90; 115 O. G. 1850; 1905 C. D. 632.

344. Where an exhibit embodies an invention and is operative as a mechanical movement, yet various parts of the structure which are the essence of a practical working machine are so crude and even certain of derangement that no one would seriously consider building machines in accordance with the exhibit without further experiments, such device is not a reduction to practice. *Ib.*

345. Where the evidence is not convincing that the device under consideration is capable of being used for practical purposes and an examination of the device in connection with a consideration of the facts of record warrants the opinion that it is essentially an experimental device and never passed beyond that stage, such device is not a reduction to practice. *Ib.*

346. It is essential that a device to constitute a reduction to practice must show that the work of the inventor is finished, physically as well as mentally, and that nothing is left for the inventive genius of the public. *Gallagher v. Hein,* 25 App. D. C. 77; 115 O. G. 1330; 1905 C. D. 624.

347. While it is not always essential that actual tests of the inven-

tion be made in order to complete the invention, yet the device relied upon as a reduction to practice must, if it has not been worked, clearly, be capable of work and not have been a mere experiment. *Ib.*

348. Where new devices are of an old type and the novelty resides in specific construction, it may be that practical utility may be determined without use under conditions of industry; but where the device is of a new type there is need for demonstration of utility under the conditions of practical operation. *Paul v. Hess,* 24 App. D. C. 562; 115 O. G. 251; 1905 C. D. 610.

349. An improvement in type-bars of type-writers, upon the efficacy of which the successful operation of the whole machine depends, *Held* not of that simple character which requires no test or operation in order to establish reduction to practice. *Ib.*

350. Where the cap made was crude and the inventor himself testifies that he did not regard that particular cap as fit for practical use on a bottle, it cannot be regarded as a reduction to practice of the invention, although others made subsequently upon the same pattern were practical and successful. *Lindemeyr v. Hoffman,* 18 App. D. C. 1; 95 O. G. 838; 1901 C. D. 353.

351. A common cloth-cased horse-collar stuffed with cotton is one of those devices which are so simple and their purpose and efficiency so obvious that the complete construction of one of a size and form intended for and capable of practical use is to be regarded as a sufficient reduction to practice without actual use or test. *Couch v. Barnett,* 23 App. D. C. 446; 110 O. G. 1431; 1904 C. D. 650.

352. Where a motor was constructed as an experimental machine and was not intended to be used in filling an order, but was more than a mere model intended to illustrate the invention, *Held* that if it completely embodied the invention and was capable of testing its efficiency to the full extent of its power the mere fact that later manufactures to fill orders may have been on a larger scale cannot impair its effect as constituting reduction to practice. *Robinson v. Thrasher,* 28 App. D. C. 22; 1906 C. D. 743; 123 O. G. 2976.

353. An invention that is complete and that produced the result sought to be accomplished by the inventor to his satisfaction and that of competent witnesses and which was tried in connection with a working system is a satisfactory reduction to practice,

even though the device was never in fact incorporated into and made a part of the system, if the conditions of the trial were complete and satisfactory. *Wurts v. Harrington*, 10 App. D. C. 149; 79 O. G. 337; 1897 C. D. 359.

354. Where G. was the first to conceive and the first to reduce to operation, although the machine was far from perfect and never operated continuously for work in a commercial sense, *Held* that such machine was something more than an unsuccessful experiment—that it was a reasonably successful reduction to practice. *Coffee v. Guerrant*, 3 App. D. C. 497; 68 O. G. 279; 1894 C. D. 384.

355. It is not essential for a reduction to practice of an invention that the invention be mechanically perfect or that there are "possibilities of greater excellence in shape, location, arrangement, material, or adjustment." *Gallagher v. Hein*, 25 App. D. C. 77; 115 O. G. 1330; 1905 C. D. 624.

356. Where the device is made of wood, but is full-sized and was thoroughly tested, *Held* that it is a reduction to practice though the commercial article would be made of some more durable substance. *Norden v. Spaulding*, 24 App. D. C. 286; 114 O. G. 1828; 1905 C. D. 588.

357. Where a gun embodying the invention was tested by the Government with a view to its adoption as a type and after repeated tests disclosing many defects in the gun as a whole, no more guns like it were made and there was no recommendation by the officers that it be adopted, it cannot be regarded as a reduction to practice of the invention. *Dashiell v. Tasker*, 21 App. D. C. 64; 103 O. G. 2174; 1903 C. D. 551.

358. A material part of an apparatus may be separate from the apparatus and temporarily held up to its work, and yet constitute reduction to practice. *Andrews v. Nilson*, 27 App. D. C. 451; 1906 C. D. 717; 123 O. G. 1667.

359. Perfected drawings showing an invention cannot be regarded as a reduction to practice of the invention. *McCormick v. Cleal*, 12 App. D. C. 335; 83 O. G. 1514; 1898 C. D. 492.

360. If such written description, illustrated by drawings, will not be allowed to defeat or affect a subsequent patent issued to an independent inventor, a *fortiori* will not such description and illustrative drawings be allowed to defeat or affect a patent granted to the first or prior inventor after the forfeiture of an

application first filed, but on a subsequent conception of the invention. *Christensen v. Noyes,* 15 App. D. C. 94; 90 O. G. 223; 1900 C. D. 201.

361. The description and drawings filed in the Patent Office as part of an application, as against an existing patent issued to the first inventor, cannot be accepted as an actual reduction to practice. *Ib.*

362. A leather hinge exhibiting the shape is a reduction to practice of a design for a hinge. The material of which an article is made and its size are immaterial in design cases, since a design made of glass and used as a paper-weight or an ornament would be the same design as and constitute a reference for an article of the same shape made of metal and used in a machine to perform a mechanical function. *Tyler v. St. Amand,* 17 App. D. C. 464; 94 O. G. 1969; 1901 C. D. 301.

363. The production of an article embodying the design is a completion of the invention and corresponds to the reduction to practice of a mechanical invention, since a design relates merely to shape, and if an article embodying it has been produced it is immaterial whether or not it has been used practically in a mechanical sense. *Ib.*

364. A fodder-shredder in which a cutter-bar was taken out of an old machine, leaving an inch of open space between the edges of the cutter-teeth and the periphery of the lower feed-role at the point of nearest approach, is not a reduction to practice of an issue which calls for cutters arranged in immediate relation to the lower feed-role, whereby the points of the teeth of the cutter are brought close to the said feed-roll. *Tracy v. Leslie,* 14 App. D. C. 126; 87 O. G. 891; 1899 C. D. 306.

365. What amounts to reduction to practice of a machine as contradistinguished from unsatisfactory and abandoned experiments depends chiefly upon the special circumstances of each case in which it is sought to be established, and a rule cannot be laid down in one case to govern all others. *Latham v. Arnat,* 17 App. D. C. 345; 95 O. G. 232; 1901 C. D. 337.

365a. A device for supporting hose for fire-protection purposes embodying a telescoping arm which was fully operative to carry out the object for which it was designed constitutes an actual reduction to practice, although it was found desirable to add a set-screw to prevent the complete withdrawal of such

telescoping arm. *Howard v. Bowes,* 31 App. D. C. 619; 137 O. G. 733.

366. The importance of mere delay while the inventor is engaged in the prosecution of other improvements in the same art is of more or less weight, according to circumstances, in determining whether the attempted reduction to practice amounted to an actual reduction or an abandoned experiment. *Esty v. Newton,* 14 App. D. C. 50; 86 O. G. 799; 1899 C. D. 284.

367. The rules of law as to what constitutes a "prior use" and what constitutes a "reduction to practice" are the same, and as there is not sufficient proof of reduction to practice so also there is not sufficient proof of "prior use." *Gilman v. Hinson,* 26 App. D. C. 409; 1906 C. D. 634; 122 O. G. 731.

b. *Constructive reduction.*

368. The filing of a completed allowable application for a patent for the invention is a constructive reduction to practice and is as effectual in a contest of priority as actual reduction to practice. *Croskey v. Atterbury,* 9 App. D. C. 207; 76 O. G. 163; 1896 C. D. 437. *Porter v. Louden,* 7 App. D. C. 64; 73 O. G. 1551; 1895 C. D. 707.

369. The filing of a complete application is a constructive reduction to practice, even though such application be subsequently amended, provided such amendment is made to secure conformity between parts of the application. *Croskey v. Atterbury,* 9 App. D. C. 207; 76 O. G. 163; 1896 C. D. 437.

370. Where H. filed an application for a patent on the invention in controversy on June 9, 1897, and at a later date filed the application here involved as a substitute for that earlier one, *Held* that he is, under the well-settled rule, entitled to June 9, 1897, for a constructive reduction to practice. *Silverman v. Hendrickson,* 19 App. D. C. 381; 99 O. G. 1171.

371. Generally in the case of a forfeited application and the filing of a second or renewed application within two years, the inventor may, under proper circumstances, become entitled to the original or forfeited application as a constructive reduction to practice. *Christensen v. Noyes,* 15 App. D. C. 94; 90 O. G. 223; 1900 C. D. 201.

372. The Court of Appeals will not disturb the long-established doctrine that the filing of an allowable application for a patent

is to be regarded as equivalent to a reduction to practice. *Davis v. Garrett,* 28 App. D. C. 9; 1906 C. D. 724; 123 O. G. 1991.

373. An application was filed on June 8, 1895, covering an igniter and an engine. The claims to the engine were erroneously rejected, were canceled, the application was allowed, and subsequently became forfeited. On July 16, 1898, the application was renewed, and additional claims to the engine were included. Division was required between the claims to the igniter and the engine. On March 28, 1899, applicant canceled the claims to the engine, and on April 25, 1899, the Office acted on the remaining claims to the igniter. Subsequently applicant reinstated the claims to the engine, and the Office again permitted him to elect which of the inventions he would prosecute in the application, but afterward informed him that he was bound by the previous cancellation of the claims to the engine, and applicant thereupon, on October 30, 1900, canceled the engine claims, and after several communications between the Office and applicant the application matured into a patent, dated January 12, 1904. On April 16, 1903, applicant filed a divisional application covering the engine. *Held* that the divisional application is entitled to the date of the original application of June 8, 1895, as a constructive reduction to practice. *Duryea v. Rice,* 28 App. D. C. 423; 126 O. G. 1357; 1907 C. D. 443.

c. *Diligence in.*

374. When an inventor in any manner and for any reason refuses to give to the public the benefit of his invention, the public are entitled to withdraw from him the special protection accorded to him for his invention. On this principle an inventor is required to be diligent in reducing his conception or invention to practice. *Warner v. Smith,* 13 App. D. C. 111; 84 O. G. 311; 1898 C. D. 517.

375. Long delay in making use of an invention claimed to have been reduced to practice or in applying for patent, tend to show that the alleged reduction to practice was nothing more than an unsatisfactory or abandoned experiment, and this is especially the case where in the meantime the inventor has been engaged in prosecuting similar inventions, or others, without reasonable explanations, have been adopted for manufacture and use. *Paul v. Hess,* 24 App. D. C. 562; 115 O. G. 251; 1905 C. D. 610.

376. Where O'C. conceived and embodied the invention in a

model which was almost a reduction to practice, and had it been connected up and tested would have been a reduction to practice, prior to the date when his rival conceived and constructively reduced to practice by filing his application, and where at the time his rival entered the field O'C. was urging that the invention be accepted and patented, and although his application was not filed until a few days over five months after that of his rival the application was prepared and executed a month before filing, and where although O'C. might have had his working model tested in the intervening time it would not, according to his witnesses, expert in the art, have given them any more knowledge of the invention, *Held* that there is no rule which under these circumstances requires an inventor to rush to the Patent Office in order to preserve his rights as the first inventor. *O'Connell v. Schmidt*, 27 App. D. C. 77; 1906 C. D. 662; 122 O. G. 2065.

376½. Where the inventor of an apparatus for supporting insulating overhead-trolley conductors which are utilized for supplying high-voltage energy to high-speed alternating-currrent electric railways is not in a position to make an actual test of his invention, and the company which employs him is likewise not in a position to make such a test, he cannot be held lacking in diligence in reducing his invention to practice between March and December, 1904, where he approached a railway company in March and endeavored to have his invention tried out, ordered an insulator which was one of the essential features of the apparatus and received the same in October, procured a visit from the officers of another electric railway company in September, and early in December attached a crude apparatus to the fence in the factory-yard to see how it would appear and operate. *Mead v. Davis*, 31 App. D. C. 590; 136 O. G. 2001.

d. *Agency in.*

377. It is a manifest inconsistency that parties should under oath set up claim to an invention themselves if they were in fact acting for and in behalf of another party to the interference in merely perfecting his invention and placing him in position to assert his rights. *Hunter v. Stikeman*, 13 App. D. C. 214; 85 O. G. 610; 1898 C. D. 564.

378. Where a manufacturing company declined to purchase an invention and returned a model to the inventor, and thereafter adapted the invention to and constructed a machine embodying

it and obtained an assignment of the invention, *Held* that the company was not the agent of the inventor, in reducing the invention to practice. *Howell v. Hess*, 30 App. D. C. 194.

379. An inventor conceived an invention and embodied it in a model which was submitted to the company that controlled the sale of the machine for which the improvement was designed, but the company refused to purchase the invention and returned the model to the inventor. An officer of such company disclosed it to the foreman of the factory of a subsidiary corporation, who set about adapting it to the machine made by them for the parent company, and a completed machine was built embodying such invention. *Held* that such reduction to practice does not inure to the inventor, as such companies were not acting as the inventor's agents, and the fact that they subsequently purchased and procured an assignment of the invention does not affect the question. *Howell v. Hess*, 28 App. D. C. 167; 132 O. G. 1074.

380. The reduction to practice of an invention by an original inventor cannot be taken as a reduction to practice by another merely because the ownership of the claims of both may afterward become vested in the same person or persons. It is not enough to entitle an applicant to a patent that some one else, not his agent, has shown the practicability of the invention by reducing it to practice. *Robinson v. McCormick*, 29 App. D. C. 98; 128 O. G. 3289; 1907 C. D. 574.

e. *Priority in.*

381. Where it is admitted that G. actually reduced the invention to practice in June, 1897, and he is entitled to constructive reduction to practice by filing his application in August, 1897, he is entitled to the decision on priority, even if it be conceded that D. had a conception of the invention prior to that time, since D. has not shown an actual reduction to practice at any time or diligence up to the time when he filed his application a year later. *Darnell v. Grant*, 16 App. D. C. 589; 92 O. G. 557; 1900 C. D. 329.

382. Where G. testifies to the construction and successful use of certain machines embodying the invention in June and July, 1897, and in order to shorten the matter of taking testimony counsel for the opposing party admitted on the record that the machines were made and used substantially at the time and in

the manner testified, *Held* that G. is entitled to the date of June or July for a reduction to practice of the invention. *Ib.*

383. By actual reduction to practice the right to the invention becomes perfect and can only become subordinate to the claim of a subsequent *bona fide* inventor by some such course of conduct as that shown in *Mason v. Hepburn*. *Esty v. Newton*, 14 App. D. C. 50; 86 O. G. 799; 1899 C. D. 284.

384. It is an elementary principle in patent law that he who first reduces to practice is to be regarded as the true inventor of the idea or device so reduced from a mere abstraction to a concrete form in the absence of proof that he has only elaborated the ideas of others or of proof that there has been prior conception of the invention by another, with a showing of due diligence in the way of effort to reduce it to practice. *Bader v. Fajen*, 14 App. D. C. 241; 87 O. G. 1235; 1899 C. D. 329.

f. *Resolving doubt as to.*

385. Where this court is not without doubt as to the proper conclusion to be drawn from a second test, *Held* that under the burden of proof that doubt must be resolved in favor of the holder of the patent, and aside from this the decision of the Commissioner ought to stand when there is doubt whether it is founded in error. *Robinson v. Thresher*, 28 App. D. C. 22; 1906 C. D. 743; 123 O. G. 2976.

386. A reasonable doubt as to what constitutes a reduction to practice will be resolved against the inventor, and special circumstances—as, for example, unreasonably delay in making practical or commercial use of the invention or in applying for a patent or the like—would have a tendency to raise this doubt in a particular case. *Ruete v. Elwell*, 15 App D. C. 21; 87 O. G. 2119; 1899 C. D. 379.

387. Delay is often a potent circumstance in aid of the determination in a case not otherwise clear of the question whether an invention has been successfully reduced to practice or has resulted in nothing more than an abandoned experiment. *McBerty v. Cook*, 16 App. D. C. 133; 90 O. G. 2295; 1900 C. D. 248.

g. *Excuse for delay.*

388. While circumstances such as poverty, sickness, etc., tend to excuse delay in reducing an invention to practice, they will not justify indefinite postponement of action for a period of years,

for to allow them to have that effect would be in many cases to close entirely the field of invention against competition and to nullify the purposes of the patent law. *Griffin v. Swenson,* 15 App. D. C. 135; 89 O. G. 919; 1899 C. D. 440.

389. Where the party first to conceive but the last to reduce to practice did nothing for nine years between his conception and reduction to practice except to make drawings and talk about the invention occasionally and to urge one or two persons "to take it up," and in the meantime had taken out patents on the same subject-matter, *Held* that there is no sufficient excuse offered for delay in reducing to practice. *Marvel v. Decker et al.,* 13 App. D. C. 562; 86 O. G. 348; 1899 C. D. 271.

h. *By whom to be made.*

390. It is well settled that while the law accords the right to a patent to the later applicant who connects by due diligence a prior conception, the reduction to practice must be by the applicant himself or by his authorized agent and not by some other third party. It is enough to entitle the applicant to a patent that some one else has shown the practicability of the invention by reducing it to practice. *Hunter v. Stikeman,* 13 App. D. C. 214; 85 O. G. 610; 1898 C. D. 564.

i. *Evidence to establish.*

391. A device which was experimented with and afterward laid aside and partly dismantled and which when produced in evidence did not have all of the original parts, some of the important parts being replacements, *Held* not to constitute a reduction to practice, the evidence tending to show the identity of the parts replaced and the original parts not being satisfactory. *Burson v. Vogel,* 29 App. D. C. 388, 404; 131 O. G. 942; 1907 C. D. 669.

392. Where the inventor and a witness skilled in the art testify that the operation of the machine was successful in 1896, and the machine in its present condition, although partly dismantled by the removal of parts, supports their allegations as to it, *Held* that it must be regarded as a reduction to practice. *Smith v. Brooks,* 24 App. D. C. 75; 112 O. G. 953; 1904 C. D. 672.

393. A delay of two years and eight months after an alleged reduction to practice of the invention raises a strong presumption that what was done amounted to a mere abandoned experiment;

but such presumption may be overcome by satisfactory proof that the machine was successfully operated. *Ib.*

394. Where a party's testimony as to the operative character of a machine which he built is not satisfactory and no witnesses are called to corroborate him, although it appears that others must have been familiar with the tests of the machine, *Held* that the almost unavoidable inference, both from the testimony itself and from the omissions in the testimony, is that the machine was experimental and was not a reduction to practice. *Kelley v. Fynn,* 16 App. D. C. 573; 92 O. G. 1237; 1900 C. D. 339.

395. Probably one who makes an invention and keeps it within his knowledge and fails to lay claim to it until a rival has entered the field is not barred by any statute from making his claim, and if he proves his case he and not his rival will be entitled to a patent; but such conditions make it imperative upon him that he should prove his case beyond all reasonable doubt, and the Patent Office and the courts are justified in presuming in such cases that what is claimed to be reduction to practice is no more than mere experiment until the contrary is clearly shown. *Warner v. Smith,* 13 App. D. C. 111; 84 O. G. 311; 1898 C. D. 517.

396. Where Smith claims to have reduced the invention to practice in January, 1892, and thereafter did nothing and remained silent for three years and nine months, although there were several occasions when he might and should have spoken if his invention was such as he now claims it to have been, and he made no movement, either through the Patent Office or otherwise, to give the public the benefit of it in any way, and during this time there was a demand for the invention, and there is no explanation of the delay in filing an application, *Held* that under these circumstances the presumption is in favor of the theory that he did not have a completed invention in January, 1892, or at any time prior to the filing of his application in the Patent Office. *Ib.*

397. An exhibit which does not show the identical thing in issue, and which was manifestly designed and intended as a mere working model and nothing more, may be evidence to lay the foundation of a claim to priority, but is not of itself sufficient evidence of reduction to practice of the alleged invention. *Porter v. Louden,* 7 App. D. C. 64; 73 O. G. 1551; 1895 C. D. 707.

398. The question whether a certain exhibit was a reduction to practice depends upon its condition at the time it is claimed to have been reduced to practice and not at the time that it was introduced in evidence, and this can be shown only by testimony. *Blackford v. Wilder,* 21 App. D. C. 1; 104 O. G. 580; 1903 C. D. 573.

399. Evidence of reduction to practice must embrace all of the elements of the issue, leaving nothing to inference merely, since no element can be said to be subordinate and immaterial. *Ib.*

400. Where the evidence satisfactorily shows that Hallwood constructed a machine embodying the invention in issue and successfully operated it more than five years prior to the filing of his application and that several machines were afterward constructed and sent to various parts of the United States, *Held* that these acts should not be considered merely as evidence of an abandoned experiment, but as evidence of a reduction to practice, although other machines were built embodying an older form of device for performing the same function, where it appears that the old devices satisfactorily performed the desired function in ordinary use and that they were so made in order to dispose of old materials then on hand. *McCormick v. Hallwood,* 30 App. D. C. 106; 130 O. G. 1487; 1907 C. D. 656.

401. While the destruction or dismantling of a first construction and the loss of some of its parts or their use in making other machines are sometimes important in determining the question of reduction to practice, they are only important when depending upon other circumstances tending to cast doubt upon the claims of the earlier reduction to practice, notably that of long and unreasonable delay in the exploitation of the invention. *Funk v. Whitely,* 25 App. D. C. 313; 117 O. G. 280; 1905 C. D. 670.

402. The proofs tending to establish a reduction to practice must be considered as a whole and the attendant circumstances of the case must be borne in mind, and the action of the inventor with respect to the exhibit prior to the necessity for its use in the interference proceeding, his failure to construct other machines or promptly file an application, and the fact that the application when filed discloses different features from those in the exhibit all tend to show the device was not a reduction

to practtice, but merely an experimental device. *Ocumpaugh v. Norton*, 25 App. D. C. 90; 115 O. G. 1850; 1905 C. D. 632.

403. Where the invention in controversy is a friction-spring and it appears that a device embodying the invention was first put in a vise and subjected to pressure, but there are no facts appearing of record which show what the pressure was, nor are any facts stated which enable the court to determine whether the inventor's conclusion is justified that the result of the test was satisfactory, *Held* that the fact of reduction to practice is not proved. *Gallagher v. Hein*, 25 App. D. C. 77; 115 O. G. 1330; 1905 C. D. 624.

404. Where the machine claimed as a reduction to practice was submitted to the inventor's employers, but they adopted another machine, and this proving unsatisfactory was withdrawn and still another machine put on the market, *Held* that the circumstances point to the conclusion that the machine did not represent a complete and practical invention. *Paul v. Hess*, 24 App. D. C. 562; 115 O. G. 251; 1905 C. D. 610.

405. Where the claim to reduction to practice is founded on a type-writing machine having six type-bars embodying the issue and the inventor testifies that he manipulated these bars, and thereby satisfied himself of the practical mechanism of the invention, but no paper was used and his satisfaction was derived from the operation of the bars singly, *Held* that this is not sufficient to show actual reduction to practice. *Ib.*

406. The fact that a machine operated satisfactorily after it was filed as an exhibit in the Patent Office is not proof that it so operated and was a reduction to practice some years prior to that time, when it is claimed to have been made. *Fefel v. Stocker*, 17 App. D. C. 317; 94 O. G. 433; 1901 C. D. 269.

407. Where the assignee of Howard, who furnished the money for making the machine in 1883, which was afterwards dismantled, claims to have subsequently employed another party merely to devise a new feeding device for the machine, but he caused applications for patents covering the entire machine, and not merely the feeding device, to be filed in the name of the second party, *Held* that his conduct was inconsistent with the claim that he regarded Howard as the successful inventor of the machine. *Lloyd v. Antisdel*, 17 App. D. C. 490; 95 O. G. 1645; 1901 C. D. 371.

408. Where the first test was made with an incomplete machine and several essential parts of the invention were lacking, *Held* not to show successful reduction to practice of the invention. *Robinson v. Thresher,* 28 App. D. C. 22; 1906 C. D. 743; 123 O. G. 2976.

409. Where engineers, draftsmen, and keepers of records and files were called to sertify, and yet the engineer who personally made the test which is the crucial point of the case, and subsequently made the entries in the report, was neither called nor his absence accounted for, and it was this report which the supervising engineer made his indorsement upon and referred to as the basis of his evidence, *Held* that this indorsement of the supervising engineer that the machine operated successfully is not a satisfactory substitute for specific information as to the details of the test upon which his general conclusion was based. *Ib.*

410. Where a device embodying the invention in issue is shown to have been constructed and the question is whether or not such device operated successfully and satisfactorily, the testimony of the inventor and of two witnesses who showed that they were thoroughly familiar with the construction, that the device operated successfully, and that they used it a number of times is sufficient to warrant the conclusion that such device was an actual reduction to practice, and it is unnecessary that the facts on which they base their conclusion appear in the record. *Seeberger v. Russel,* 26 App. D. C. 344; 1906 C. D. 612; 121 O. G. 2328.

j. Generally.

411. While the general policy of the law (sec. 4920, R. S.) is to require diligence in adapting and perfecting inventions on the part of those who wait and work to that end, yet it is to at the same time encourage those efforts to such a degree as that their merits and value might be practically tested before application for patent. *Yates v. Huson,* 8 App. D. C. 93; 74 O. G. 1732; 1896 C. D. 278.

412. The fact that the construction has been called in the testimony a *model* is of no consequence if it is, in fact, a reduction to practice. *Norden v. Spaulding,* 24 App. D. C. 286; 114 O. G. 1828; 1905 C. D. 588.

413. Where an application is allowed and is forfeited by a failure to pay the final fee and before the case is abandoned a second

application is filed for the same invention, the applicant is intitled to his first filing date for a constructive reduction to practice of the invention. *Lotterhand v. Hanson,* 23 App. D. C. 372; 110 O. G. 861; 1904 C. D. 646.

4. Abandoned Experiments.

414. D. constructed a model pulley embodying the invention in issue in 1895, but made no attempt to introduce the invention into commercial use or patent it, but passed it over in favor of another construction until 1904. *Held* that this model was nothing more than an abandoned experiment, which was unavailing as against a later conception by L. *Duff v. Latshaw,* 136 O. G. 658; 31 App. D. C. 255.

415. Where a device was tested by the assignee of the inventor for half a day in regular work, after which no further interest was taken in it, and it was discarded until after the opposing party filed his application, and another device for doing the same work, invented by another party, who was the employee of the assignee, was made and tested, and a number of such devices were built and put on the market, and no application was filed until knowledge was gained of the invention of the opposing party, *Held* that such device was merely an abandoned experiment. *Gordon v. Wentworth,* 135 O. G. 1125; 31 App. D. C. 150.

416. A delay of seven years by an inventor after an alleged reduction to practice, during which time he was active in developing a large number of other inventions, constitutes convincing evidence that the alleged reduction to practice amounted only to an abandoned experiment. *Moore v. Hewitt,* 31 App. D. C. 577; 136 O. G. 1535.

417. Where it appears that a device was made by L. of the nature of the invention defined in the issue, but after a few trials was discarded and relegated to the scrap-heap and never again used, and subsequently a larger device was made, but also discarded and relegated to the scrap-heap and never again used, that nothing whatever was done to utilize either until L. filed his application ten months after the grant of a patent to M., and that only on reading the patent did L. recall the fact that he thought he previously had the same device, *Held* that the devices which were discarded constituted nothing more than unsuccessful

and abandoned experiments. *Lemp v. Mudge,* 24 App. D. C. 283; 114 O. G. 763; 1905 C. D. 571.

418. A total abandonment of a device, notwithstanding that there was constant and incessant need for some such device, is proof positive that the contrivance which was discarded was not a reduction to practice, but no more than an unsuccessful and abandoned experiment. *Ib.*

419. The apparent abandonment of a machine by the inventor and the long and wholly-unexplained delay of more than four years in the application for a patent are strongly indicative of the fact that the machine was not a successful reduction to practice and was not more than an abandoned experiment. *Fefel v. Stocker,* 17 App. D. C. 317; 94 O. G. 433; 1901 C. D. 269.

420. Where a machine was constructed by K., and a single test was made, and it was shipped to England, and there is no evidence respecting its use or operation there, and the parties interested in the machine failed to make another to supply the growing demand in this country for the product, and there was a failure to apply for a patent until after the publication of the patent issued to R., *Held* that these circumstances tend to show not a wilful abandonment of a completed invention, but rather the failure of an attempt to reduce the invention to practice and the abandonment of further experiment in that direction, and priority awarded to R.. *Reichenbach v. Kelley,* 17 App. D. C. 333; 94 O. G. 1185; 1901 C. D. 282.

421. Where the efficiency of a machine depended upon the making of perfect joints in the belt of the machine and the applicant failed to disclose the manner of making these joints, claiming that it was the subject of an independent and patentable invention, but failed to file an application for that invention, *Held* that the failure to disclose the manner of making the invention or file an application is evidence that what was done amounted to no more than an abandoned experiment. *Ib.*

422. Where the device was tested and broken during the test and the parts were destroyed or lost and nothing more was done on the invention until more than five years later, when an application was filed, but in the meantime an earlier device for the same purpose, patented by the same party, was placed on the market in large quantities, and it appears that an application for the later device was only filed after learning that his opponent was

selling a similar device, *Held* that the conduct of the party indicates that the device was unsatisfactory and that what was done amounted to nothing more than an abandoned experiment. *Gilman v. Hinson*, 26 App. D. C. 409; 1906 C. D. 634; 122 O. G. 731.

423. Where from the date of the first application until the date of the application for the invention in its final form the machine on which both applications were based was preserved and in use, either partly or wholly dismantled or entirely assembled for the purpose of obtaining a patent, and with a view to its mechanical perfection for actual commercial use, *Held* that such machine does not present the case of a dismantled and abandoned experiment recalled to memory by the successful effort of a later inventor. *Coffee v. Guerrant*, 3 App. D. C. 497; 68 O. G. 279; 1894 C. D. 384.

424. Where Traver constructed and tried an apparatus embodying the issue in February, 1889, which proved unsatisfactory and disappointing to him, and which he boxed up and laid away in his shop until the latter part of 1892, when he shipped it to his attorney upon hearing that Brown had appeared with a successful device of the same general character, *Held* that what Traver did in 1889 amounted to no more than an experiment, which was abandoned and revived only after Brown's appearance in the field, and priority of invention awarded to Brown. *Traver v. Brown*, 14 App. D. C. 34; 1899 C. D. 296.

425. The action of Finkenbiner in failing to manufacture the device for two years after his alleged reduction to practice, during which time there was a general demand in the trade for the device and specific demand was made upon him for a device performing its functions, and the attempt on his part to meet the demand by devising some other form of device, raise the presumption that what was done amounted to no more than an abandoned experiment, and this presumption is not overcome by the statement of several witnesses that the test of the device was satisfactory. *Beals v. Finkenbiner*, 12 App. D. C. 23; 82 O. G. 598; 1898 C. D. 326.

426. The fact that the construction of a device has not been followed within a reasonable time by practical use or application for patent affords a strong inference that what had been done was regarded by the inventor as experimental only and not a completion

of the invention, and this would be reinforced if in the meantime the machine had been dismantled or destroyed. *Mason v. Hepburn,* 13 App. D. C. 86; 84 O. G. 147; 1898 C. D. 510.

427. Where the attachment in controversy is said to have been made by Q. and successfully tested in 1894, but it was then removed from the machine, put away in a drawer, and nothing was done in the way of putting it on the market or applying for a patent for four years, although it is said that there was a demand for that very thing, *Held* that the making of the device must be regarded as an unsuccessful and abandoned experiment. *Quist v. Ostrom,* 23 App. D. C. 69; 108 O. G. 2147; 1904 C. D. 594.

5. Experimental Use.

428. Even if it is conceded that experimental use could be set up to answer the objection of a public use of more than two years prior to the application in design cases, the proof in this case falls far short of establishing that the use was experimental. *In re Tournier,* 17 App. D. C. 481; 94 O. G. 2166; 1901 C. D. 306.

6. Public Use and Sale.

429. It is well settled that the statutory bar of public use applies as well to applications for patents for designs as to applications for patents for mechanical inventions; but there is very great doubt whether time for experimental use of more than two years prior to the application for the purpose of perfecting the invention should be allowed in design cases, as in the case of mechanical inventions, without affecting the validity of the claim. *In re Tournier,* 17 App. D. C. 481; 94 O. G. 2166; 1901 C. D. 306.

430. Where a design for an attaching plug for electric circuits was invented and produced as a complete article of manufacture and as such was put in use openly in the shops of the company more than two years prior to the filing of the application without the slightest injunction of secrecy upon any one, *Held* that such use was a public use in the fullest sense of the patent law. *Ib.*

431. Where a clear case of "on sale" is established, the burden is on the inventor to prove that the sale was for the purpose of having proper tests made and that the sale was at least to that extent a restricted sale. *In re Mills,* 25 App. D. C. 377; 117 O. G. 904; 1905 C. D. 677.

432. A single sale of the invention by the inventor for experi-

mental purposes where he is unable otherwise to make proper tests does not put the invention "on sale" within the meaning of the statute. *Ib.*

433. A single unrestricted sale by the inventor of his invention is a public sale or puts it "on sale" within the meaning and intent of section 4886 of the Revised Statutes. *Ib.*

434. Where an inventor secures an order for and induces the company by which he is employed to build a machine embodying his invention without any royalty or profit to himself and it is understood that the purchaser was at liberty to return the machine if unsatisfactory, *Held* that the inventor has not placed his invention "on sale" within the meaning of the statute. *Ib.*

435. Where the inventor was employed by a company engaged in building machines, but not using them, and he was unable to make and test the machine under working conditions at his own expense, he was justified in selling a machine for purposes of tests and is not to be regarded as having forfeited his right to a patent because the sale was more than two years before his filing date. *Ib.*

436. Where the applicant whose application was filed April 23, 1901, secured an order for a machine embodying his invention in December, 1898, and the machine was made and delivered by his company before April 23, 1899, but was not put in use until afterward, and where a catalogue illustrating the invention was published by the inventor's company in March, 1899, *Held* not to constitute placing the invention on sale within the meaning of the statute, in view of evidence that the sale was for purposes of experiment. *Ib.*

437. Where R. completed his machine in August, 1899, and wished to place it in the sawmill which he was then building for his company, but was not permitted to do so, and where he placed it in the next mill built in March 1900, *Held* that there was no unreasonable delay by him in making commercial use of his invention. *Roe v. Hanson*, 19 App. D. C. 559; 99 O. G. 2550; 1902 C. D. 546.

438. The plain import of the words "not in public use or on sale for more than two years prior to his application" is the creation of a limitation of two years within which a patent for an invention must be applied for after it has gone into public use, either with or without the knowledge, consent, or allowance of the

applicant for the patent. *In re Drawbaugh,* 3 App. D. C. 236; 67 O. G. 929; 1894 C. D. 297.

438½. Whilst wide extended sales and speedy general use are not themselves sufficient to prove invention, they have considerable weight where the existence of patentable novelty is otherwise a matter of doubt. *Fenton Mfg. Co. v. Office Specialty Mfg. Co.,* 12 App. D. C. 201; 26 W. L. R. 116.

439. Where the device is a simple one easily made and attached to machines then in use and its commercial value is apparent, the failure of the inventor to make use of it for four years, during which time he puts substitutes on the market, is sufficient to discredit his claim that he regarded it as perfected. *Quist v. Ostrom,* 23 App. D. C. 69; 108 O. G. 2147; 1904 C. D. 594.

7. Tests.

440. No actual test of the practicability of a device is needed where the device is itself complete and capable of practicable use. *Lindemeyr v. Hoffman,* 18 App. D. C. 1; 95 O. G. 838; 1901 C. D. 353.

441. On the proof, *Held* that the claim of Seher is not sufficiently and definitely established to maintain his patent, it having, as it can have, only *prima facie* effect; that he has failed to show that he has fully and completely established by experimental tests so as to enable persons reasonably skilled in the science of chemistry to determine whether or not the composition made and claimed by him as new and valuable in the arts really possesses those properties which he claims as the essential character as an operative means, for no invention or discovery in such case as the present can be regarded as complete until such tests have been applied and have been successfully maintained. *Stevens v. Seher,* 11 App. D. C. 245; 81 O. G. 1932; 1897 C. D. 761.

442. Where the invention in issue related to an auxiliary traveling platform in combination with an escalator and it appears that after an alleged successful operation the platform was removed from the escalator and never replaced and some of the parts disappeared and twelve escalators were built without the platform, *Held* that these circumstances when unexplained tend strongly to create the inference that the alleged test was not regarded as successful; but when a reasonable and satisfactory explanation thereof is given such an inference is unwarranted.

Seeberger v. Russel, 26 App. D. C. 344; 1906 C. D. 612; 121 O. G. 2328.

442½. The circumstances of private and partial test accompanied by long delay thereafter have justly been given great weight as indicating, with certainty, that the device was experimental merely and not satisfactory. *Thompson v. Weston,* 19 App. D. C. 373; 99 O. G. 864; 1902 C. D. 521.

8. Disclosure of Invention.

443. Disclosure in the sense of the patent law must be made ordinarily to persons competent to understand and appreciate the alleged invention. Merely showing a device and a drawing to witnesses who do not understand the invention cannot be considered a disclosure. *Eastman v. Houston,* 18 App. D. C. 135; 95 O. G. 2064; 1901 C. D. 386.

9. Concealment or Suppression of Invention.

444. If there be concealment or suppression of the invention, the field lies open to be occupied by a more diligent, though later, inventor, who when he has not only put the invention into public use, but has also obtained a patent for it, cannot be divested of his right to hold the field except upon proof beyond a reasonable doubt that the earlier and more negligent inventor has not gone back to an abandoned device or a device suppressed or concealed in order to establish a prior right. *Richards v. Burkholder,* 29 App. D. C. 485; 128 O. G. 2533; 1907 C. D. 563.

445. The concealment and suppression of an invention after a reduction to practice for a period of more than two years, until definite knowledge was obtained of the invention of another party, who in the meantime had made the invention and placed it upon the market, is sufficient to defeat the right to a patent. *Gordon v. Wentworth,* 135 O. G. 1125; 31 App. D. C. 150.

445½. Where after reduction to practice an inventor puts aside his invention for more than a year until he discovers that his rival has placed the invention upon the market, *Held* that he must be charged with concealment or suppression of the invention and as not entitled to an award of priority over his more diligent rival. *Howard v. Bowes,* 31 App. D. C. 619; 137 O. G. 733.

446. In withholding the invention after its completion, when a patent could be obtained therefor, for an undue and unreasonable time until after other inventors have by their skill and ingenuity

perfected a similar invention and obtained a patent therefor the first or original inventor shows himself to be unmindful of both the public and individual rights, and one of the reasons why the statute has confided such large powers to the Commissioner of Patents in refusing a patent is to prevent such abuse. *In re Mower,* 15 App. D. C. 144; 88 O. G. 191; 1899 C. D. 395.

447. The arts and sciences will not be promoted by giving encouragement to inventors to withhold and conceal their inventions for an indefinite time or to a time when they may use and apply their inventions to their own exclusive advantage irrespective of the public benefit, and certainly not if the inventor is allowed to conceal his invention to be brought forward in some after time to thwart and defeat a more diligent and active inventor who has placed the benefit of his invention within the reach and knowledge of the public. *Ib.*

448. A subsequent inventor of a new and useful manufacture or improvement who had diligently pursued his labors to the procurement of the patent in good faith and without any knowledge of the preceding discoveries of another shall as against that other who has deliberately concealed the knowledge of the invention from the public be regarded as the real inventor and as such entitled to his reward. *Mason v. Hepburn,* 13 App. D. C. 86; 84 O. G. 147; 1898 C. D. 510.

449. Where after reducing the invention to practice Blood did not manufacture it or put it on the market for a period of more than two years, but it is shown that he was poor and did not have the facilities for doing the work and made ineffectual efforts to obtain assistance from others, *Held* that there was no such concealment of the invention as would work a forfeiture of his rights. *Brown v. Blood,* 22 App. D. C. 216; 105 O. G. 976; 1903 C. D. 617.

450. Where Blood did not manufacture the invention for two years, but during that time obtained a patent on the machine for making it, *Held* that he did not conceal the invention from the public and is not deprived of his right to a patent. *Ib.*

451. The rule of *Mason v. Hepburn* as to a forfeiture of the right to a patent by deliberate concealment and suppression of the invention is a strict one and will not be extended to any case not clearly falling within it. *Ib.*

452. Where a party deliberately conceals his invention after

completion without reasonable excuse and is stimulated to make application for a patent only by the publication of a patent to another and later inventor, *Held* that he has forfeited his rights in favor of the later and more diligent inventor and that the length of the concealment is not material. *Thompson v. Wesston*, 19 App. D. C. 373; 99 O. G. 864; 1902 C. D. 521.

453. By deliberate concealment or suppression of the knowledge of his invention the inventor subordinates his claim, in accordance with the general policy of the law in the promotion of the public interest, to that of another and *bona fide* inventor who during the period of inaction and concealment shall have given the benefit of the discovery to the public. *Ib.*

454. Where S. concealed his invention in stock-singeing machines for a short time, but gave to the public the result of its operation and showed it to his opponent, M., *Held* that his conduct is inconsistent with the theory of suppression of the invention which would deprive him of his rights. *Meyer v. Sarfert*, 21 App. D. C. 26; 102 O. G 1555; 1903 C. D. 529.

455. Where C. reduced the invention to practice in 1891 and 1892, but did not put it into commercial use or apply for a patent until 1896, the delay in applying for a patent or making commercial use of his invention was not such as to indicate an intention to suppress or conceal his invention from the public that would subordinate his right to that of McB., who promptly applied for and obtained a patent. *McBerty v. Cook*, 16 App. D. C. 133; 90 O. G. 2295; 1900 C. D. 248.

456. The failure to file an application for more than two years after reduction to practice where the machine was put into actual use in a factory the policy of the management of which was not to patent machines used for their own work is not such a concealment or suppression of the invention as will subordinate the inventor's rights to one who, claiming conception in July, 1900, reduced it to practice in April, 1901, but did not file an application until May, 1902, and did not arrange to manufacture the same until June, 1903. *Burson v. Vogel*, 29 App. D. C. 388, 404; 131 O. G. 942; 1907 C. D. 669.

10. Claims.

457. As a general proposition an inventor making any generic invention necessarily produces some species of it, and the fact that he has never thought of other specific forms can not deprive him

of his right to a broad claim. The inventor may not regard his invention at the time it is produced as any broader than his specific form; but the question for consideration is not as to his opinion, but is one of fact. *Hill v. Hodge,* 12 App. D. C. 528; 83 O. G. 1211; 1898 C. D. 480.

458. If an inventor comes to the Patent Office with an application in which he first restricts himself to a narrow claim for a specific device, but which he is entitled by the process of amendment to broaden into a generic claim, and if he does in fact so broaden it, he may entitle himself to a patent for the broad claim, unless in the meantime the right of some other person has accrued to some other narrow claim for a similar device to effect the same purpose which would be dominated by the broader claim of the first applicant. It is not just that rights which have previously accrued should be overthrown by amendments subsequently made. *Bechman v. Wood,* 15 App. D. C. 484; O. G. 1899 C. D. 459.

459. *Held,* further, that by making the narrow claim for a specific device in the first instance the first applicant left the field open for all who would make other different devices to accomplish the same purpose, and it would not be right or just that he should after the invention of such another device by another person be permitted to go back and broaden his claim so as to sweep this second device within the scope of his own original application, even though the broad claim might properly have been advanced in the beginning, and even though under other circumstances he might have effectively broadened his claim in the course of the prosecution of the application and procured or entitled himself to a patent for such broad claim. *Ib.*

460. Where an applicant for a patent has restricted himself in the first instance to narrow claim for a specific device to effect a certain result, and subsequently another applicant comes into the Office with another narrow claim for another specific device to effect the same result, and thereafter the first applicant broadens his claim into a generic one, so as to cover and dominate all specific devices to effect such result, assuming that their specific devices have actually been invented in the order of their application to the Office, the utmost liberality of amendment will not justify the destruction of the right of the second applicant to his own specific device, and the fact that the second applicant

may have been the first to make the broad generic claim and that the first applicant then broadened his claim into generic proportions cannot affect this conclusion. *Ib.*

461. The original specification of N.'s application relating to combined typewriting and adding machines did not describe the adding machines, but stated that the invention was illustrated "in connection with an adding machine of the class known as 'registering accountants,'" and only the case and a few minor elements thereof were shown in the drawings. *Held,* that in view of the evidence showing that such term referred to a well-known construction, and that such construction was the only one on the market which had the distinctive appearance illustrated in the drawing, N. had the right to make claims to a combination including specific elements of such adding machine. *Hopkins v. Newman,* 30 App. D. C. 402; 134 O. G. 2028.

462. The reasonable presumption is that an inventor intends to protect his invention broadly, and consequently the courts have often said that the scope of a claim should not be restricted beyond the fair and ordinary meaning of the words except for the purpose of saving it from invalidity. *Andrews v. Nilson,* 27 App. D. C. 451; 1906 C. D. 717; 123 O. G. 1667.

463. Where the claim read in the light of the specification of one party means one thing and the same claim read in the light of the specification of another party means another thing, *Held* that the same phraseology should not be employed. *Podlesak v. McInnerney,* 26 App. D. C. 399; 1906 C. D. 558; 120 O. G. 2127.

464. General terms may be used which apply equally to two structures which are not the same, as may be shown when those terms are read and construed in the light of the specifications behind them; but in most cases where two structures are not specifically the same and the art does not warrant a generic claim the language of the claims can be made precise and to fittingly describe each structure so that the use of identical language be avoided. *Ib.*

465. Where a party makes application for a patent upon one invention and claims to have had at that time a superior invention of the same precise nature and does not file an application for that other invention until long afterward, *Held* that his claim is not to be credited unless sustained by very clear and convincing

testimony. *Sachs v. Hundhausen,* 21 App. D. C. 511; 105 O. G. 1534; 1903 C. D. 625.

11. Drawings.

466. While many if not a large majority of designs can be sufficiently disclosed by a drawing and a claim for the ornamental design as shown is in general the better form of claim, *Held* that the design in this case relates to that class where a description is not only proper, but necessary, and that the claim should carry a description of the salient features of the design. *In re Mygatt,* 26 App. D. C. 366; 1906 C. D. 596; 121 O. G. 1676.

467. A picture of the design serves to convey a greatly more adequate idea of the design than any verbal description could possibly do, and in the presence of the picture a superadded verbal description is generally useless and oftentimes confusing. *In re Freeman,* 23 App. D. C. 226; 109 O. G. 1339; 1904 C. D. 619.

468. While the failure to produce the original sketches, specimens of the device made, or the machine upon which it was made is always the subject of adverse criticism, yet it may be so explained that priority may be awarded to the party who does not produce such evidence to show reduction to practice. *Shellaberger v. Sommer,* 8 App. D. C. 3; 74 O. G. 1897; 1896 C. D. 292.

469. If drawings be exhibited and relied on as evidence of the conception of the invention, they must show a complete conception, free from ambiguity or doubt, and such as would enable the inventor or others skilled in the art to reduce the conception to practice without any further exercise of inventive skill. *Mergenthaler v. Scudder,* 11 App. D. C. 264; 81 O. G. 1417; 1897 C. D. 724.

470. Where drawings are in many essential particulars defective and wanting in completeness as means of showing and illustrating an invention involved in interference, such defects and want of completeness in the drawings cannot be aided and the defective drawings made effective by construction or by reference to the prior state of the art. *Ib.*

471. Where an inventor has undertaken to invent and construct a machine essentially different from pre-existing machines and not simply a mere improvement upon previous inventions, it is necessary for him to furnish such full, clear, and definite drawings of his invention to prove conception as will enable any person

skilled in the art of construction of such machines to reduce the invention to practical form. *Ib.*

472. The ruling that the descriptive material in the specification of design cases should be reduced to a minimum or omitted, is a dictate of reason, common sense, and common experience. *In re Freeman,* 23 App. D. C. 226; 109 O. G. 1339; 1904 C. D. 619.

12. Abandonment of Right.

473. Mere forbearance to apply for a patent during the progress of experiments and until the party has perfected his invention and tested its value affords no ground for presuming abandonment. *Christensen v. Noyes,* 15 App. D. C. 94; 90 O. G. 227; 1900 C. D. 212.

474. Where two years elapsed between a party's alleged reduction to practice and the filing of his application for a patent, during which interval his rival entered the field and secured a patent, *Held* that such delay standing by itself does not constitute an abandonment of his rights to a patent based on priority of invention. *Rolfe v. Hoffman,* 26 App. D. C. 336; 1906 C. D. 588; 121 O. G. 1350.

475. Where two years elapsed between an alleged reduction to practice and the filing of an application for patent, *Held* that neither abandonment nor forfeiture of a right to receive a patent can be presumed, but must be proved. *Ib.*

476. An abandonment after completion of an inventive act applies in a case where the right of the public to the use is involved and not in one where the contention is between rival claimants merely of a monopoly. The ground for this doctrine lies in the spirit and policy of the patent laws and in the nature of the equity that arises in favor of him who gives the public the benefit of the knowledge of his invention, who expends his time, labor, and money in discovering, perfecting, and patenting in perfect good faith that which he and all others have been led to believe has never been discovered by reason of the indifference, supineness, or wilful act of one who may, in fact, have discovered it long before. *Mason v. Hepburn,* 13 App. D. C. 86; 84 O. G. 147; 1898 C. D. 510.

477. If Chase had the germ of the idea in 1883 and did not reduce to practice until 1891 and did nothing during the intervening years, *Held* that the idea had been forgotten and abandoned. *La Flare v. Chase,* 8 App. D. C. 83; 74 O. G. 1732; 1896 C. D. 285.

478. Hepburn's date of invention is his record date, April 3, 1894. Mason conceived of the invention and made a complete drawing June 28, 1887. He reduced the invention to practice soon after. The device was then stored away in the model-room of his company and it was not produced until the institution of the interference proceedings. No devices of the kind were manufactured for any purpose, and no exhibit of the device was made to the public, and no one saw it, except Mason and one or two other employés of his company. *Held* that Mason had abandoned the invention, and priority was awarded to Hepburn. *Mason v. Hepburn,* 13 App. D. C. 86; 84 O. G. 147; 1898 C. D. 510.

479. Where it was urged that under § 4886, Rev. Stat., there can be no abandonment of a right to a patent unless such abandonment be affirmatively proved, *Held* that affirmative facts may be proved by negative evidence, and where the acts and conduct of a party are of such nature as to give rise to a rational presumption of a fact, that presumption, after the rights of other parties have intervened and attached, cannot be removed or gotten rid of by simply denying the intention to produce the result. *In re Mower,* 15 App. D. C. 144; 88 O. G. 191; 1899 C. D. 395.

13. Generally.

480. It is a well-settled principle in patent law that as between rival inventors the date of invention may be fixed and will take precedence from the time at which a complete and intelligible embodiment of the subject of invention is produced, by which those skilled in the art could readily understand it. *Hulett v. Long,* 15 App. D. C. 284; 89 O. G. 1141; 1899 C. D. 446.

481. After reviewing the testimony, *Held* that while Schmertz may have come very near to developing the process of the issue prior to the date of Appert's constructive reduction to practice he lacked at least the final step that would have demonstrated the thoroughness of his conception and crowned his labors with success, and priority awarded to Appert. *Appert v. Schmertz,* 13 App. D. C. 117; 84 O. G. 508; 1898 C. D. 524.

482. In an affidavit under Rule 75 total omission of a statement of facts as to the time and circumstances of the conception of the invention and its development to completion prior to the filing date of the reference is fatal. *In re Drawbaugh,* 9 App. D. C. 219; 77 O. G. 313; 1896 C. D. 527.

IV. PRIORITY AND ORIGINALITY.

1. Conception and Reduction to Practice.

483. It is a fundamental principle of patent law that the first to reduce to practice is *prima facie* the first inventor and entitled to a patent, and he can be deprived of that right only by showing that some one else was first to conceive the invention and exercised diligence thereafter in perfecting it. *Paul v. Johnson,* 23 App. D. C. 187; 109 O. G. 807; 1904 C. D. 610.

484. Whoever first perfects a machine is entitled to the patent therefor and is the real inventor, although others may have previously had the idea and made some experiments toward putting it in practice, subject, however, to this qualification, that if the party who conceives the invention was at the time of a second invention by another party using reasonable diligence in perfecting the same he is entitled to be recognized as the first inventor, although the second to conceive may have been the first to reduce to practice, either actual or constructive. *Funk v. Haines,* 20 App. D. C. 285; 100 O. G. 1764; 1902 C. D. 553.

485. A delay of six years, unexcused by sickness or poverty, is fatal to a claim of priority depending upon connecting an earlier conception to a later reduction. *Porter v. Louden,* 7 App. D. C. 64; 73 O. G. 1551; 1895 C. D. 707.

486. While it is required that the first conceiver shall prosecute his labors in reducing to practice with reasonable diligence, that diligence, however, is a matter to be determined by the special circumstances of the particular case. *Yates v. Huson,* 8 App. D. C. 93; 74 O. G. 1732; 1896 C. D. 278.

487. The words of the law "was using reasonable diligence" refer to the very time of the second conception. The prior conceiver to show that his diligence only began with the time of the second conception would not be sufficient; but all that is necessary is that the first conceiver shall have begun and prosecuted with diligence the work of adapting and perfecting his invention before the date of his rival's conception. *Ib.*

488. A complete conception as defined in an issue of priority of invention is matter of fact and must be clearly established by proof. The conception of the invention consists in the complete performance of the mental part of the inventive act. All that remains to be accomplished in order to perfect the act or instru-

ment belongs to the department of construction, not invention. It is therefore the formation in the mind of the inventor of a definite and permanent idea of the complete and operative invention as it is thereafter to be applied in practice that constitutes an available conception within the meaning of the patent law. *Mergenthaler v. Scudder,* 11 App. D. C. 264; 81 O. G. 1417; 1897 C. D. 724.

489. The date of conception is the date when the idea of means, including all the essential attributes of the invention, becomes so clearly defined in the mind of the inventor as to be capable of exterior expression, and it is settled both by practice and express decision that such exterior expression of the mind of the inventor when relating to machinery may be by exhibits either in the form of drawings or by model, so as to lay the foundation of a claim to priority, if thereby the invention be made sufficiently plain to enable those skilled in the art to understand it. *Mergenthaler v. Scudder,* 11 App. D. C. 264; 81 O. G. 1417; 1897 C. D. 724.

490. A claimant who did not abandon his invention or conceal it from the public, and who was the first to conceive, the first to disclose to others, and the first to reduce to practice, *held* the first inventor and entitled to award of priority. *Rolfe v. Hoffman,* 26 App. D. C. 336; 1906 C. D. 588; 121 O. G. 1350.

491. Where an inventor who has actually reduced an invention to practice and whose right to a patent because of undue concealment and suppression of the invention has become subordinate to another inventor who is first to invent in accordance with "the true policy and ends of the patent laws," *Held* that such cases present no question of diligence in respect of adapting and perfecting the invention as between rival claimants, or of reasonable excuse for delay on other grounds relieving that delay of the imputation of deliberate concealment, or where delay is a potent circumstance in determining whether the tests made at a remote period amounted to a complete reduction to practice. *Matthes v. Burt,* 24 App. D. C. 265; 114 O. G. 764; 1905 C. D. 574.

492. Where neither party actually reduced the invention to practice, *Held* that the senior party, being the first to conceive, is entitled to the award of priority of invention. *Furman v. Dean,* 24 App. D. C. 277; 114 O. G. 1552; 1905 C. D. 582.

493. Where neither party actually reduces an invention to prac-

tice and all that each has done is to conceive of an invention and file an application, *Held* that while weeks and months and perhaps even year may not count for much in the race of diligence between rival inventors when the time is to be applied to the actual reduction to practice of a complicated invention, whose operativeness it is required to prove by laborious experiment, yet an unexplained delay by the first conceiver in merely filing an application for a patent warrants the granting of the patent to a more diligent opponent. *Ritter v. Krakau,* 24 App. D. C. 271; 114 O. G. 1553; 1905 C. D. 585.

494. Where one, although the first to conceive an invention, was the last to constructively reduce it to practice and was not exercising diligence in perfecting it when another entered the field, held that the latter was to be regarded as the first inventor. *Laas v. Scott,* 26 App. D. C. 354; 1906 C. D. 621; 122 O. G. 352.

496. Prior conception without prior reduction to practice will not avail unless there has been diligence in the elaboration of the idea looking toward reduction to practice. *Silverman v. Hendrickson,* 19 App. D. C. 381; 99 O. G. 1171; 1902 C. D. 527.

497. An appellant *held* not to have discharged the burden upon him of satisfactorily establishing conception of his invention prior to the filing of the appellee's application and that the decision appealed from should be affirmed. *Ball v. Flora,* 26 App. D. C. 394; 1906 C. D. 618; 121 O. G. 2668.

498. Where neither the testimony presented by S. nor that offered in behalf of D. satisfactorily establishes conception of the invention in issue, *Held* that each party must be restricted to the date of filing of his application for conception and constructive reduction to practice, and since D. was the first to file, priority of invention must be awarded to him. *Sherwood v. Drewsen,* 29 App. D. C. 161; 130 O. G. 657; 1907 C. D. 642.

499. Where Dickinson made and used his machine before Thibodeau's date of conception and that machine operated successfully, although it was not so perfect as Thibodeau's machine, *Held* that Dickinson is the first inventor. *Jenner v. Dickinson,* 25 App. D. C. 316; 117 O. G. 600; 1905 C. D. 672.

500. Voight *held* to have conceived and disclosed the invention and reduced it to practice by May 6, 1902, and that there was no satisfactory proof in the record that at any time before May 26, 1902, Hope had a conception of the invention. The decision ap-

pealed from awarding priority of invention to Voight affirmed. *Hope v. Voight,* 25 App. D. C. 22; 115 O. G. 1585; 1905 C. D. 629.

501. Where it appears that for at least a year the only efforts of G. toward completing his invention consisted in more or less desultory talk about his invention, indecisive efforts to get his invention adopted by a corporation, and in a leisurely manner making drawings of the device, and where it is shown that it would have cost but little to have actually reduced the invention to practice and to have made proper tests and that he was free to take up this work if he so desired, and he had ample means to have at least filed an application, *Held* that G. was not in the exercise of reasonable diligence in completing his invention. *Gallagher v. Hein,* 25 App. D. C. 77; 115 O. G. 1330; 1905 C. D. 624.

502. Where M. made a device, used it to some extent, apparently to his own satisfaction, and then practically concealed the device, suppressed its use, and withheld it from the public for a period of three and one-half years, and the record shows that M. indicated no substantial intention of change of policy until he had obtained definite knowledge of B.'s exploitation of the same invention, B. having no knowledge of M.'s discovery, and encouraged and induced by the apparently unoccupied field, went diligently to work to perfect his invention and put his product upon the market, *Held* that M.'s right had become subordinate to that of B., who was the first to invent in accordance with the true policy and ends of the patent laws. *Matthes v. Burt,* 24 App. D. C. 265; 114 O. G. 764; 1905 C. D. 574.

503. The fact that B.'s application had not ripened into a patent before M. filed his application does not substantially affect the application of the doctrine of equitable estoppel to M. Whilst the possession of a patent makes, ordinarily, a stronger case in favor of the holder, the doctrine in respect of concealment by one earlier to invent does not necessarily depend upon that fact. *Ib.*

504. Where it is a conceded fact that the original machine on which M.'s claim of priority is founded was constructed prior to the filing of E.'s application, which resulted in a patent, and E. took no testimony, *Held* that inasmuch as the invention is not a simple one in order for M. to succeed it was necessary for him to prove

that his machine as constructed was actually capable of successfully performing the work for which it was intended. *Macdonald v. Edison,* 21 App. D. C. 527; 105 O. G. 1263; 1903 C. D. 622.

505. Where H. claims to have conceived the invention in July, 1899, and did nothing further with the invention for one year and nine months later, during which time his opponent made the invention, *Held* that he was lacking in diligence and priority must be awarded to his opponent. *Harris v. Stern,* 22 App. D. C. 164; 105 O. G. 746; 1903 C. D. 612.

506. Where R. is the first to conceive and the last to reduce to practice and is lacking in diligence and C. during R.'s inactivity enters the field and reduces to practice, *Held* that C. is the first inventor and entitled to the award of priority of invention. *Robinson v. Copeland,* 24 App. D. C. 68; 112 O. G. 501; 1904 C. D. 664.

507. Where the appellees were the first to conceive the invention and were the first by three days to file their application, *Held* that they are entitled to the award of priority of invention. *Ostergren v. Tripler,* 17 App. D. C. 557; 95 O. G. 837; 1901 C. D. 350.

508. Priority of invention awarded to L. because she was the first to reduce to practice and because the invention was disclosed in a desgn patent granted to her prior to the earliest date of conception which can be found for T. and T. *Taylor v. Lowric,* 27 App. D. C. 527; 1906 C. D. 722; 123 O. G. 1991.

509. One who is the first to conceive and disclose, but is the later to reduce to practice, *held* to have failed to show diligence so as to entitled him to priority. *Fowler v. Dyson,* 27 App. D. C. 52; 1906 C. D. 583; 121 O. G. 1015.

510. Where F. conceived and disclosed in August and was the last to reduce to practice, *Held* that McB., who was the first to conceive and who reduced to practice in the following January, was reasonably diligent. *Fowler v. McBerty,* 27 App. D. C. 41; 1906 C. D. 585; 121 O. G. 1015.

511. Where's L.'s original application was filed two years prior to P.'s application and nearly a year prior to his reduction to practice and P. was making no effort to reduce the invention to practice at the date of L.'s application, or until some months thereafter, although he had ample means and actually built many machines and filed a large number of applications in the same art,

but none of which included the invention of the issue, *Held* that P. was lacking in diligence and that L. is entitled to the award of priority of invention. *Parkes v. Lewis,* 28 App. D. C. 1; 1906 C. D. 735; 123 O. G. 2313.

512. A. conceived the invention in July, 1902, and endeavored to make the same in his own shop and to have the same made by another in the latter part of the year, but failed on account of lack of proper machinery. In the early part of January, 1903, he applied to a company by which W., the opposing party, was employed and unsuccessfully endeavored to make some arrangements with them to manufacture the device. In April or May, 1903, he applied to another company, who made the device some months later. He filed his application December 14, 1903. W. entered the field in the latter part of January, 1903, after A.'s visit to his company, and filed his application March 27, 1903, on which a patent was granted May 26, 1903. *Held* that W. is entitled to the award of priority, as A. was not diligent. *Anderson v. Wells,* 27 App. D. C. 115; 1906 C. D. 667; 122 O. G. 3014.

513. Where it appears that Buhoup was the first to conceive the invention of a round-shanked gravity-pin and button-head and reduced the invention to practice after he had seen the model of the conception of the device in issue by Hien, *Held* that the subsequent modification of the pin from a round shank to a square shank with an oblong head and the substitution of this modification or form for that previously put into use was not such a departure from the original invention as to disentitle him to the right of priority against Hien, who had conceived subsequently to Buhoup, but not put into practical operation, a device of similar principle but of different form and operation from that of the original conception. *Hein v. Buhoup;* 11 App. D. C. 293; 81 O. G. 2088; 1897 C. D. 772.

514. Carty filed an application April 20, 1885, which became abandoned October 21, 1887. He filed another original application November 17, 1887. Kellogg filed an original application July 30, 1887. *Held* that Carty's abandoned application is only evidence of conception; that, his excuse for want of diligence in prosecuting his claim being weak, Kellogg, who first constructively reduced to practice by filing an application, is entitled to

award of priority. *Carty v. Kellogg*, 7 App. D. C. 542; 74 O. G. 657; 1896 C. D. 188.

515. Huson, being the first to conceive the invention, and was using reasonable diligence in adapting and perfecting the same at the time of Yates's conception, must prevail as against Yates, although Huson failed to reduce to practice until after Yates had filed his application for patent. *Yates v. Huson*, 8 App. D. C. 93; 74 O. G. 1732; 1896 C. D. 278.

516. Shailaberger having proved reduction to practice in the spring of 1888 is awarded priority of invention over Sommer, whose earliest conception is September, 1888, and reduction to practice in 1890. *Shellaberger v. Sommer*, 8 App. D. C. 3; 74 O. G. 1897; 1896 C. D. 292.

517. Appert, having patented the invention in France before Parker's first proved conception, is held to be the prior inventor. *Parker v. Appert*, 8 App. D. C. 270; 75 O. G. 1201; 1896 C. D. 371.

518. Croskey conceived the invention in December, 1890, and reduced it to practice October 3, 1892. Atterbury conceived the invention in July, 1892, and filed an allowable application October 1, 1892. *Held* that Atterbury is the prior inventor in the absence of a showing of reasonable diligence on Croskey's part. *Croskey v. Atterbury*, 9 App. D. C. 207; 76 O. G. 163; 1896 C. D. 437.

519. When at any time within two years Croskey could have completed his process and failed to do so, he has not established a case of reasonable diligence against Atterbury, who conceived later than Croskey, but filed an application before Croskey reduced to practice. *Croskey v. Atterbury*, 9 App. D. C. 207; 76 O. G. 163; 1896 C. D. 437.

520. De Wallace had a complete conception of the invention on December 1, 1896, when he employed a skilled mechanic to embody his ideas in a working machine. Scott proved conception on December 8, 1896, and reduced the invention to practice prior to reduction to practice by De Wallace. *Held* that as De Wallace was actually engaged in his efforts to reduce the invention to practice when Scott entered the field, and as his delay in reducing to practice was not unreasonable under all the circumstances disclosed by the evidence, priority should be awarded to De Wal-

lace over Scott. *De Wallace v. Scott,* 15 App. D. C. 157; 88 O. G. 1704; 1899 C. D. 416.

521. Cleal's conception and reduction to practice is the date of his application, July 6, 1894. McCormick prepared two applications for patent in February, 1894. One he filed on March 5, 1894, for what is called "machine No. 4." The other application, the one involved in this interference, under which "machine No. 3" had been begun but laid aside for No. 4, was not filed until October 6, 1894. On April 8, 1894, he began "machine No. 5," which contained the locking mechanism of No. 4 and differs from the mechanism of the issue merely in the time of the operation of the two sets of keys, in the issue the department-key being first pressed and the cash-key thereby unlocked, while in machines Nos. 4 and 5 the cash-keys are first pressed and the department-keys thereby unlocked. *Held* that machine No. 3 fell short of being a reduction to practice; but as, judging by McCormick's actions, he neither saw the superiority of one mode of operation over the other at the time he was working on the machines nor apprehended that there was a substantial difference between the functions of the mechanism in merely reversing the time of the locking action upon the distinct sets of keys, the locking device being the important improvement, and he appreciating its value, though he may have been mistaken as to the most advantageous mode of its operation and may also for a time have supposed that it was the same invention when operated reversely, also *Held* that under such circumstances what McCormick was doing during the eight months from the date of preparing his application to the filing of it in the Patent Office was not unreasonable delay, and priority awarded to him over Cleal. *McCormick v. Cleal,* 12 App. D. C. 335; 83 O. G. 1514; 1898 C. D. 492.

522. The decision awarding priority of invention to Shipley and Hyde affirmed for the reason that although Platt was the first to conceive he was the last to reduce the invention to practice and did not use due diligence in such reduction to practice. *Platt v. Shipley,* 11 App. D. C. 576; 82 O. G. 461; 1898 C. D. 307.

523. Where H. is the first to conceive and first to reduce to practice the invention of some of the counts and though first to conceive and last to reduce to practice the invention of the remaining counts was diligent in reducing that invention to practice,

Held that H. is the prior inventor as to all the counts. *Hillard v. Brooks*, 23 App. D. C. 526; 111 O. G. 302; 1904 C. D. 658.

524. C. held to have reduced the invention to practice by the construction of a full-sized horse-collar before B.'s date of conception and that therefore C. is the first inventor. *Couch v. Barnett*, 23 App. D. C. 446; 110 O. G. 1431; 1904 C. D. 650.

525. Where A., who was not skilled in the art, claims to have conceived the invention in feeding pulverized fuel in 1896 and to have then disclosed it to his agent, N., who was attempting to make improvements in that art, but they made no progress toward reducing it to practice until they met R., who was an expert in the art, claiming prior conception of the invention, and who proceeded to reduce it to practice, and the evidence indicates that R. furnished the ideas and N. the money, *Held* that R. is the real inventor. *Asencio v. Russell*, 24 App. D. C. 105; 112 O. G. 955; 1904 C. D. 676.

526. Where P. was the last to reduce to practice and the last to file his application, he cannot be awarded priority of invention over his opponent, B., upon the suggestion or even upon proof that B. derived his knowledge from P., who was once involved in the interference. *Prindle v. Brown*, 24 App. D. C. 114; 112 O. G. 957; 1904 C. D. 680.

527. E. conceived the invention of the issue in March, 1897. It was to be an attachment to a complicated machine. He began to build the full-sized machine, but put on it another and cheaper attachment having the same general purpose instead of the one of the issue. Finding the machine worked as a whole, he then, in March, 1898, put on the preferred and more expensive form—that of the issue. *Held* that E. used reasonable diligence in perfecting his invention and is entitled to priority over C., who conceived in August, 1897, and completed his machine in February, 1898. *Christensen v. Ellis*, 17 App. D. C. 498; 94 O. G. 2561; 1901 C. D. 326.

528. The evidence held to establish the fact that F. reduced the invention to practice before H.'s date of conception and reduction to practice, and therefore the decision awarding priority of invention to F. affirmed. *Herman v. Fullman*, 23 App. D. C. 259; 109 O. G. 1888; 1904 C. D. 625.

529. L. although first to conceive the invention, was the last to reduce it to practice and did not exercise diligence in perfecting

it, and therefore the decision in favor of W. as the first inventor is right. *Liberman v. Williams*, 23 App. D. C. 223; 109 O. G. 1610; 1904 C. D. 623.

530. Held that Thomas was the last to conceive the invention, but the first to reduce to practice, and that Trissell was not exercising diligence when Thomas entered the field, and that therefore Thomas is to be regarded as the first inventor. *Trissell v. Thomas*, 23 App. D. C. 219; 109 O. G. 809; 1904 C. D. 616.

531. The evidence held to show that G. disclosed the invention to D. but fails to show that D. had a conception of it before the date of conception proved by G. and that therefore G. must be regarded as the first inventor. *Greenwood v. Dover*, 23 App. D. C. 251; 109 O. G. 2172; 1904 C. D. 630.

532. Assuming that L. was the first to conceive, he was the last to reduce to practice and gives no satisfactory reason for a delay of more than a year in reducing to practice, or at least filing his application for patent, and therefore it is *Held* that H. is to be regarded as the first inventor. *Lotterhand v. Hanson*, 23 App. D. C. 372; 110 O. G. 861; 1904 C. D. 646.

533. Paul held to have been the first to conceive the invention, but the last to reduce to practice, and was not exercising diligence when Johnson entered the field and filed his application, and that therefore Johnson is to be regarded as the inventor. *Paul v. Johnson*, 23 App. D. C. 187; 109 O. G. 807; 1904 C. D. 610.

534. Where D. may have been the first to conceive the invention, but G. was the first by a year to reduce it to practice and D. did not show diligence during his delay, *Held* that the decision of the Commissioner of Patents in favor of G. was correct. *Darnell v. Grant*, 16 App. D. C. 589; 92 O. G. 557; 1900 C. D. 329.

535. Where S. conceived the invention in April, 1897, but did not reduce it to practice until November, 1899, and in the meantime devoted his energies to perfecting a machine for easily and economically applying the invention, whereas K. conceived in October, 1898, and reduce the invention to practice in April, 1899, *Held* that K. is to be regarded as the first inventor, and therefore the decision of the Commissioner of Patents is affirmed. *Stapleton v. Kinney*, 18 App. D. C. 394; 96 O. G. 1432; 1901 C. D. 414.

536. Where the testimony of one of the parties is that he conceived of the invention and used it in his business at a date prior

to the date of conception by the other party, which testimony is corroborated by his caveat filed before the date of conception of the other party, *Held* that he is the first inventor. *Colhoun v. Hodgson*, 5 App. D. C. 21; 70 O. G. 276; 1895 C. D. 122.

537. Where one of the parties has reduced the invention to practice, he will be regarded as the *prima facie* original and first inventor. *Soley v. Hebbard*, 5 App. D. C. 99; 70 O. G. 921; 1895 C. D. 182.

538. Where it is admitted by the parties that a machine had been built from patterns designed by H., one of the contestants, but where S., the other contestant, claims that H. derived the invention from him, consequently that the reduction to practice ought to inure to his benefit, *Held* that the burden of proof is upon S. to prove his claim, and, failing to do so, priority of invention must be awarded to H. *Soley v. Hebbard*, 5 App. D. C. 99; 70 O. G. 921; 1895 C. D. 182.

539. Although M. was the first to conceive, he did not show reasonable diligence in reducing his invention to practice, and D. having conceived and reduced to practice in the meantime, priority awarded to D. *Marvel v. Decker*, 13 App. D. C. 562; 86 O. G. 348; 1899 C. D. 271.

540. Where although C. was the first to conceive the invention P. was the first to reduce to practice, and C. was not reasonably diligent in reducing to practice, priority should be awarded to P. *Cross v. Phillips*, 14 App. D. C. 228; 87 O. G. 1399; 1899 C. D. 342.

541. Although F. was the first to conceive, D. was the first to reduce to practice, and as F. did not use due diligence in perfecting the invention, *Held* that D. should be awarded priority. *Dodge v. Fowler*, 11 App. D. C. 592; 82 O. G. 595; 1898 C. D. 320.

542. Where H. conceived the invention in January, 1897, and did nothing with it until May, 1898, although possessed of ample means and facilities, and L. reduced the invention to practice in 1897, L. must be regarded as the first inventor whether or not he was first to conceive. *Hallwood v. Lalor*, 21 App. D. C. 61; 103 O. G. 2173; 1903 C. D. 549.

543. S. held to have reduced his invention in singeing-machines to practice before M. claims to have conceived it, and that therefore S. is the first inventor. *Meyer v. Sarfert*, 21 App. D. C. 26; 102 O. G. 1555; 1903 C. D. 529.

544. Where D. was first to conceive but the last to reduce to practice and delayed filing his application for a period of two years, during which time T. obtained his patent, *Held* that T. is to be regarded as the inventor. *Dashiell v. Tasker,* 21 App. D. C. 64; 103 O. G. 2174; 1903 C. D. 551.

545. Where W. conceived the invention in 1894, constructively reduced it to practice by filing his application in 1899, and in the meantime did nothing with it save to try to get a few persons with means interested in it, and where D. conceived in May, 1898, and reduced to practice a few months thereafter, *Held* that D. is the first inventor. *Wyman v. Donnelly,* 21 App. D. C. 81; 104 O. G. 310; 1903 C. D. 556.

546. W. held to have been the first to conceive the invention and the last to reduce to practice and he has not shown that he was exercising diligence. The decision of the Commissioner of Patents awarding priority of invention to T. affirmed. *Watson v. Thomas,* 23 App. D. C. 65; 108 O. G. 1590; 1904 C. D. 587.

547. Where T. made an electric measuring instrument embodying the invention in controversy in 1894 and placed it in his private experimental room, where it was seen only by employés, but where it was used frequently in making measurements, and T. did not manufacture it or apply for a patent until 1898, after he knew of W.'s patent upon it, *Held* that W. is entitled to the decision on priority. *Thomson v. Weston,* 19 App. D. C. 373; 99 O. G. 864; 1092 C. D. 521.

548. Where R. conceived the invention in November, 1898, made a machine embodying it in August, 1899, and operated it at that time in such manner as to show its practicability, and in March, 1900, first used it in a mill and made the first commercial test of it, *Held* that he is entitled to the decision on priority as against H., who conceived in April, 1899, and reduced to practice in July, 1899. *Roe v. Hanson,* 19 App. D. C. 559; 99 O. G. 2550; 1902 C. D. 546.

2. Discredited Claims.

549. If one party has appropriated the invention of another and claims it as his own, there can properly be no question of priority of invention or of prior inventor. There is but one invention and one inventor, and the other is simply a claimant without right. Yet it is not to be supposed that rival claims of such parties do not constitute a proper subject for interference proceedings in the

Patent Office. *Milton v. Kingsley*, 7 App. D. C. 531; 75 O. G. 2195; 1896 C. D. 426.

550. Where T. claims to have been in possession of the invention for ten years, but made no effort to patent it, although he patented other processes, and where he ridiculed M.'s process as impractical and after the grant of M.'s patent he copied it and secured an interference, *Held* that his claim as the prior inventor is discredited. *Talbot v. Monell*, 23 App. D. C. 108; 109 O. G. 280; 1904 C. D. 606.

3. Junior and Senior Applicant.

551. Where the case is one of originality as distinguished from priority of invention and it appears that the junior party filed his application only because the senior party refused to assign his invention to the company which employed him and the senior party's application was filed at the solicitation of said company, *Held* that these circumstances show quite conclusively that the senior party is the inventor. *Murphy v. Meissner*, 24 App. D. C. 305; 114 O. G. 1830; 1905 C. D. 592.

552. A junior claimant of an invention cannot overcome the prior date of his adversary by proof that some third person was in fact the inventor, even where that third person was once a party to the interference. *Brindle v. Brown*, 24 App. D. C. 114; 112 O. G. 957; 1904 C. D. 680.

553. The question whether the senior applicant may be entitled to priority of invention as against all persons is not the issue in an interference case between two claimants of the invention; but the question is whether the junior applicant has sustained the burden of establishing his own priority over that of his opponent. *Ib.*

554. Where neither party proves actual reduction to practice of the invention, but the junior party, was the first to conceive the invention and disclosed it to the senior party before his application was filed, *Held* that the junior party must be regarded as the first inventor. *Greenwood v. Dover*, 23 App. D. C. 251; 109 O. G. 2172; 1904 C. D. 630.

555. H. being the senior party, the first to apply to the Patent Office, has *prima facie* the priority of right, and the *onus* of proof is upon any junior applicant to show not only priority of invention, but he must also show that he has used reasonable

diligence in adopting and perfecting his invention, for in such a case the mere conception without actual reduction to practice within a reasonable time does not avail a junior party making the claim. *Funk v. Haines,* 20 App. D. C. 285; 100 O. G. 1764; 1902 C. D. 553.

4. Patentee and Applicant.

556. Where a party files his application after the issue of his opponent's patent and he copies the claims of that patent, the burden is on him to prove his case beyond a reasonable doubt. *Chorney v. Clauss,* 25 App. D. C. 15; 116 O. G. 597; 1905 C. D. 635.

557. Where the applicant who was the first to conceive fails to establish that he was the first to reduce to practice or to account for his long delay in applying for the patent, *Held* that he failed to overcome the *prima facie* evidence afforded by the grant of the patent that the patentee was the first inventor. *Burr v. Ford,* 5 App. D. C. 26; 70 O. G. 275; 1895 C. D. 120.

558. Where the invention has been reduced to practice in a positive form under the patent and the applicant has simply filed his application, without doing anything to adapt and render the invention practical, and where he knew of the issue of the patent within a few days after its issue, and made no suggestion that the invention was his, but recommended it to purchasers, both orally and in writing, as the invention of the patentee, and where he did not assert any title to it until six months after the issue of the patent and after he had left the employ of the company who owned the patent to do service for a rival company, *Held* that priority must be awarded to the patentee. *Wells v. Reynolds,* 4 App. D. C. 43; 69 O. G. 121; 1894 C. D. 510.

559. Where a plaintiff claims to be an original inventor and the defense is that the defendant is a prior inventor, thus conceding the invention of the plaintiff, but challenging his claim to priority of invention, it is imperative that the invention or discovery relied upon as a defense must have been complete and capable of producing the result sought to be accomplished, and this fact must be shown by the defendant. Progress, as such, no matter how near it may have approximated the end in view, cannot avail to defeat a patent. *In re Drawbaugh,* 9 App. D. C. 219; 77 O. G. 313; 1896 C. D. 527.

560. The conduct of the appellant Hill and of his assignee, the Sheldon Axle Company, toward the appellee for four months after their alleged discovery of the issue of a patent to the latter is wholly irreconcilable with any other theory than that they recognized the appellee as the true inventor of the device in controversy. *Hill v. Parmelee,* 9 App. D. C. 503; 78 O. G. 170; 1897 C. D. 214.

561. In trying the question of priority and of invention in an interference case between an applicant and a patentee the principle to be applied is substantially analogous to that which is applicable in a case of infringement where the defense is that the patentee is not the original and first inventor. In all such cases it is a fundamental principle of patent law that to invalidate or supersede a patent by prior invention the proof must establish the fact beyond reasonable doubt. *Locke v. Boch,* 17 App. D. C. 75; 93 O. G. 1722; 1900 C. D. 399.

562. Where the applicant alleged that he made the invention in 1892, yet he did not apply for a patent until 1898, after his opponent had obtained a patent, and in the interim he had filed several other applications, it is reasonable to suppose that if applicant had in his possession the invention at the time alleged he would have applied for a patent earlier and not have held the invention unprotected for more than five years and until after another had applied for and obtained a patent for the same thing. *Ib.*

563. Upon a review of the testimony, *Held* that the presumption founded upon the patent of the senior party more than counterbalances all the evidence produced for the junior party and applicant, and the decision of the Commissioner awarding priority to the patentee affirmed. *Ib.*

564. Mere constructive reduction to practice cannot be set up to defeat an existing patent granted to the first inventor. A patent stands for something more than a mere written description of an invention, and against a pending application for the same invention resting upon no better foundation than a constructive reduction to practice the patent must prevail. *Christensen v. Noyes,* 15 App. D. C. 94; 90 O. G. 223; 1900 C. D. 201.

565. As between an applicant resting on a mere constructive reduction to practice, especially where his application is a renewal of a forfeited application and a party who is really the first in-

ventor and to whom a patent has been issued for the invention, *Held* that priority must be found for the patentee. *Ib.*

566. N. filed his application on May 13, 1895, which was allowed Nov. 26, 1895, and became forfeited on May 26, 1896, by failure to pay the final fee. On April 30, 1896, C. filed his application, upon which a patent issued April 20, 1897. N. filed a renewal of his application on June 28, 1897, after the patent had issued to C. C. proved that he was the first to conceive the invention. N. did not reduce to practice in any form prior to the filing of his application. *Held* that priority of invention should be awarded to C. *Ib.*

567. Because N. the second party to conceive, was the first to file an allowable application, which application was passed and allowed, though it became forfeited, he does not obtain a superior right to priority over C. upon the renewal or second application filed within the time authorized by the statutes, notwithstanding that C. was the first inventor and that within the time that the application of N. stood as forfeited a patent had been issued to C. *Ib.*

568. The forfeited application of Noyes conferred no right except that of renewal in the manner and within the time prescribed, and the renewed application conferred no right in addition to that of the first application. It certainly conferred no right as against a prior inventor who happened to file his application subsequent to that of the second inventor. *Ib.*

569. The first applicant could only acquire an inchoate right as against a prior inventor, dependent upon it being made to appear that the first inventor had either abandoned his invention or lost the right to it by the want of reasonable diligence in perfecting it and making application for a patent. *Ib.*

570. Whether the first application was forfeited or not, or supposing it had been renewed before the patent was issued to the first inventor, or even if the patent had been issued on the first application, the first inventor upon showing a compliance with the requirement of the statute would be entitled to a patent for his invention, and he could not be deprived of his right of priority by any mere technical rule of procedure adopted in the Patent Office. *Ib.*

571. Where C. is a patentee and is restricted to his application date for a conception and a reduction to practice and there is ample

testimony in behalf of K. to establish the fact that he actually reduced the invention to practice and caused the invention to be used a few months prior to C.'s application date and that C. was employed by K. at that time and had ample opportunity to become acquainted with the process and work of K., *Held* that K. should be awarded priority of invention, notwithstanding the fact that no sufficient cause is shown for K.'s delay in making application for a patent until after he has seen C.'s patent. *Corner v. Kyle,* 24 App. D. C. 291; 114 O. G. 2092; 1905 C. D. 599.

572. Where A. secured his patent while R.'s application was forfeited, but that forfeiture was due to the fault of A.'s agent, and it appears from the evidence that R. was the first to conceive the invention and took part in the single reduction to practice claimed by both parties, *Held* that R. is the first inventor. *Asencio v. Russell,* 24 App. D. C. 105; 112 O. G. 955; 1904 C. D. 676.

573. Chase having failed to prove conception and reduction to practice, although he has a patent granted prior to La Flare's filing date, cannot prevail over La Flare, who conceived and reduced to practice prior to the filing of Chase's application. *La Flare v. Chase,* 8 App. D. C. 83; 74 O. G. 1735; 1896 C. D. 285.

574. To the heavy burden imposed by the established rule of law upon one who seeks to overcome the right of an adversary founded on a patent issued before the filing of his own application is superadded the necessity of making out a very clear case of error by reason of the concurrence of all of the tribunals of the Patent Office in deciding against the sufficiency of his evidence to prove this reduction to practice. *Macdonald v. Edison,* 21 App. D. C. 527; 105 O. G. 1263; 1903 C. D. 622.

5. Employer and Employee.

575. When one conceives the principle or plan of an invention and employs another to perfect the details and realize his conception, though the latter may make valuable improvements therein, such improved results belong to the employer. *Kreag v. Geen,* 28 App. D. C. 437; 127 O. G. 1581; 1907 C. D. 502. *Braunstein v. Holmes,* 30 App. D. C. 328; 133 O. G. 1937.

576. The same rule of law applies to principal and assistant,

though they may be fellow employees. *Braunstein v. Holmes,* 30 App. D. C. 328; 133 O. G. 1937.

577. An inventor who employs a mechanic to embody his conception in practical form retains his exclusive right to the perfected improvement notwithstanding the perfection is partly due to the exercise of the mechanical skill of the employee. The latter must invent something, not merely improve by the exercise of his mechanical skill upon a conception which he has been employed to work out. *Huebel v. Bernard,* 15 App. D. C. 510; 90 O. G. 751; 1900 C. D. 223.

578. As between an employer and a party employed for a special purpose matters merely auxiliary or tributary to the main invention can give to the employee no claim as an inventor, and in regard to such features as amount to independent inventions a presumption exists in favor of the employer as the author of the same which can only be overcome by conclusive and unequivocal proof. *Miller v. Kelley,* 18 App. D. C. 163; 96 O. G. 1038; 1901 C. D. 405.

579. Although an employee is to be protected form the rapacity of the employer as much as the employer from the dishonesty of the employee, and if the employee makes an invention wholly independent of the employer it belongs to him and does not inure to the benefit of the employer, *Held* that in case of dispute as to a particular improvement the presumption is in favor of the employer. *Ib.*

580. Where a person has discovered an improved principle in a manufacture and employs others in assisting him to carry out that principle, and those in that employment make valuable additions to the preconceived design of the employer, such suggested improvements are in general to be regarded as the property of the party who discovered the original improved principle and may be embodied in his patent as part of his invention. *Larkin v. Richardson,* 28 App. D. C. 471; 127 O. G. 2394; 1907 C. D. 508.

581. One who conceives the plan of an invention and is engaged in experiments to perfect it and who employs another to realize his conception is not to be deprived of the exclusive property in the perfected improvement by any suggestions of the employee which do not amount in themselves to a complete invention. The suggested features are to be regarded as ancillary

to the main invention and belong to the employer. *Orcutt v. McDonald,* 27 App. D. C. 228; 1906 C. D. 705; 123 O. G. 1287.

582. It is well settled that if one conveys to his employees information and instructions to proceed and manufacture a piece of mechanism which, with the instruction imparted, can be constructed by the application of ordinary mechanical skill, such employer is entitled to the benefit of the skill and ingenuity of the employee in successfully completing the device. *Neth v. Olmer,* 30 App. D. C. 478; 135 O. G. 662.

583. Inventors are often compelled to have their conceptions embodied in construction by skilled mechanics and manufacturers, whose practical knowledge often enables them to suggest and make valuable improvements in simplifying and perfecting machines or devices, and the inventor is entitled to protection from their efforts to claim his invention. At the same time an employee is to be protected from the rapacity of his employer also, and if in doing the work assigned him the employee goes farther than mechanical skill enables him to do and makes an actual invention he is equally entitled to the benefit of his invention. *Robinson v. McCormick,* 29 App. D. C. 98; 128 O. G. 3289; 1907 C. D. 574.

584. Where an employee claims protection for an improvement which he devised while working upon a general conception of his employer, the burden is generally upon him to show that he made an invention in fact. *Ib.*

585. To claim the benefit of the employee's skill and achievement, it is not sufficient that the employer had in mind a desired result and employed one to devise means for its accomplishment. He must show that he had an idea of the means to accomplish the particular result, which he communicated to the employee, in such detail as to enable the latter to embody the same in some practical form. *Ib.*

586. Where the question is one of originality and the relation of employer and employee exists between the parties, the fact that the junior party, who was the employee, did not file his application till nearly a year after he knew of the issuance of the senior party's patent and has given no excuse for such delay justifies resolving any doubt as to who was the originator of the invention against him. *McKillop v. Fetzer,* 31 App. D. C. 586; 136 O. G. 1770.

587. That an employer may assume that he may allot the brain-work of his employees as he pleases and take out in the name of one a patent for an invention which he knows to have been made by another, because it may in some way suit his convenience, is an assumption that may be repudiated by the common sense of mankind. *Soley v. Hebbard*, 5 App. D. C. 99; 70 O. G. 921; 1895 C. D. 182.

588. The rule is that one who by way of partnership or contract, or in any other, empowers another person to make experiments upon his own conception for the purpose of perfecting it in its details is entitled to the ownership of such improvements in the conception as may be suggested by such other person. The second person is not in law to be regarded as an independent and original inventor. *Gedge v. Cromwell*, 19 App. D. C. 192; 98 O. G. 1486; 1902 C. D. 514.

589. Where an employee was assigned to the duty of producing a new telephone-transmitter and during the time he was experimenting on such devices constructed six or seven different transmitters, but did not construct any embodying the invention in issue, the presumption is strong that he did not construct such device because he was not possessed of the inventive idea. *Hansen v. Dean*, 29 App. D. C. 112; 129 O. G. 483; 1907 C. D. 583.

590. Where an employee is assigned to the duty of producing a new telephone-transmitter, but after experiments to this end fails to produce an acceptable device and is assigned to the work of testing electrical instruments and while so employed he tests a transmitter invented by a co-employee containing the invention in issue and continues in his employment for several months thereafter without making claim to the one who had charge of the experimental work and who assigned him to such work that the invention was his, although the claim was made to others, and fails to construct a device or file an application until after he had left his employer and about seven months after he had tested the invention claimed by his co-employee, a claim that he invented the device during his experimental work can be given little weight. *Ib.*

591. Where H. employed W. to build a machine and each party claims to have invented the improvements embodied therein and it appears that H. filed his application through the attorneys for

W.'s company and the company paid the expenses and W. with a full knowledge of that application made affidavits for use by H. therein referring to the making of the invention, *Held*, that H. must be regarded as the inventor. *Whitney v. Howard*, 21 App. D. C. 218; 104 O. G. 1659; 1903 C. D. 597.

592. Where T. was employed by H. and was admittedly instructed to improve a particular machine and each party claims the machine made as his invention, the decision must be in favor of H. in the absence of any satisfactory evidence as to who suggested the improvements, particularly since T. allowed H. to make application without protest. *Thibodeau v. Hildreth*, 25 App. D. C. 320; 117 O. G. 601; 1905 C. D. 675.

593. Corry and Barker, who built a device under the directions of McDermott, *Held* not to have sustained the burden of proving that the device embodied an independent invention made by them and not disclosed by McDermott. Decision in favor of McDermott affirmed. *Corry v. McDermott*, 25 App. D. C. 305; 117 O. G. 279; 1905 C. D. 668.

594. Where it is shown that T. constructed the first machine embodying the invention and delivered it to K. when finished and it is alleged on behalf of K. that T. was merely employed to embody K.'s idea and the evidence shows that K. had a conception of the invention before T.'s alleged date of conception, *Held* that K. is the prior inventor. *Tyler v. Kelch*, 19 App. D. C. 180; 98 O. G. 1282; 1902 C. D. 506.

595. B. was assigned to assist H. in making investigation and actually did the work which resulted in reducing the invention to practice. *Held* that the presumption is that what he accomplished was done under H.'s direction, and the burden is on him to overcome that presumption. *Braunstein v. Holmes*, 30 App. D. C. 328; 133 O. G. 1937.

596. Reduction to practice by Bader would not avail him as against Vajen if it were shown that Bader was merely obeying the instructions of Vajen and giving effect to the conceptions of the latter. *Bader v. Vajen*, 14 App. D. C. 241; 87 O. G. 1235; 1899 C. D. 329.

597. Where on October 24, 1903, twenty-three days after his conception of the invention, Woods left the company by which he had been employed to embark in business on his own account, and during this period had made a blackboard drawing of the

invention and frequently discussed with one Jacob, who was skilled in the art, the possibility of overcoming certain criticisms, and where after establishing his own business he employed said Jacob and resumed the consideration of these defects and while he did not eventually modify his device, but filed his application January 27, 1904, *Held* he was not lacking in diligence, and priority was awarded to him over Poor, who reduced his invention to practice by filing his application December 17, 1903. *Woods v. Poor*, 29 App. D. C. 397; 130 O. G. 1313; 1907 C. D. 651.

598. Where K. was an expert machinist engaged in perfecting and improving match-making machinery upon which he had obtained a patent and he employed M. as a mechanic, who knew nothing of such machinery, to assist him in his work, and they produced the machine embodying the invention in controversy and each claimed it as his invention, *Held* that the probabilities are in favor of K. *Miller v. Kelley*, 18 App. D. C. 163; 96 O. G. 1038; 1901 C. D. 405.

599. Where it is conceded that W. was the mover and instigator of the whole effort to produce the invention, that all experiments made after F. became interested were in the presence and with the co-operation of W., and that the experiments were made in W.'s shed with no other witness present to say what was done, *Held* that W. must be regarded as the inventor. *Flather v. Weber*, 21 App. D. C. 179; 104 O. G. 312; 1903 C. D. 561.

600. Where Bernard employed Huebel to make the device and pointed out the distinctive and dominating feature of his improvement, but did not make anything resembling a perfect drawing for his guidance or describe the proposed construction in detail, *Held* that Huebel is not entitled to claim the invention, although by reason of his mechanical skill he may have made a neater and more perfect device than was in the mind of Bernard. *Huebel v. Bernard*, 15 App. D. C. 510; 90 O. G. 751; 1900 C. D. 223.

601. Where G. had a patent upon wire-reels, granted in 1891, and in 1897 C. by contract undertook in subordination to G. and for the benefit of his invention to make improvements upon that reel and perfect its details, the profits to be equally divided between them, *Held* that whatever improvements were made are

to be regarded as the invention of G. *Gedge v. Cromwell,* 19 App. D. C. 192; 98 O. G. 1486; 1902 C. D. 514.

6. Joint Inventors.

602. Where W. signed the application of F. as a witness, but it appears from the evidence that it was through a misunderstanding and upon the supposition that the application was for their joint benefit, *Held* that the circumstance cannot be construed against W.'s claim as inventor and in favor of F. *Flather v. Weber,* 21 App. D. C. 179; 104 O. G. 312; 1903 C. D. 561.

603. Where A. employed L. as a pattern-maker to embody his ideas in a model and L. suggested the introduction of a headed rivet as one of the features, *Held* that where the invention in controversy consisted of a combination of parts only one of which was a headed rivet, A. and not L. was to be regarded as the inventor. *Lloyd v. Antisdel,* 17 App. D. C. 490; 95 O. G. 1645; 1901 C. D. 371.

7. Partnership.

604. Whether the appellee, who is the original assignee, made the invention in question is not decided; but if he did, he made it for the benefit of the partnership, and therefore the appellant, who is the original inventor, should receive the patent. *Milton v. Kingsley,* 7 App. D. C. 531; 75 O. G. 2193; 1896 C. D. 420.

8. Disclosure.

605. The communication of an idea of the desirability of accomplishing a certain result, without a disclosure of the means to be employed, cannot be regarded as a communication of an invention. *Fenner v. Blake,* 30 App. D. C. 507; 134 O. G. 2244.

606. Where a party claims to have conceived the invention and disclosed it to another, who reduced it to practice, the disclosure in order to be effectual must be shown to have been full and clear as to all the essential elements of the invention and such as was sufficient in itself to enable the party to whom the disclosure was made to give the invention practical form and effect without the exercise of invention on his part. *Sendelbach v. Gillette,* 22 App. D. C. 168; 109 O. G. 276; 1904 C. D. 597.

607. When a party claims an invention and also to have com-

municated that invention to another, who has applied mechanical work thereto and put such invention into practice, claiming the same as his own, the communication in order to be effectual must be shown to have been full and clear as to all the essential elements of the invention and such as was sufficient in itself to enable the party to whom the disclosure was made to give the invention practical form and effect without the exercise of invention on his part. *Anderson v. Wells*, 27 App. D. C. 115; 1906 C. D. 667; 122 O. G. 3014.

608. Where each party claims to have disclosed the invention to the other and there were constant disputes between them in regard to the matter, but it is admitted by one party and his financial backer that the other party suggested many improvements and they permitted him to file an application without protest and actually paid the expenses of it, *Held* that he must be regarded as the first inventor. *Whitney v. Howard*, 21 App. D. C. 218; 104 O. G. 1659; 1903 C. D. 597.

609. Where a party contended that he communicated the invention to his opponent, but did not claim to have made complete disclosure, and the circumstances did not support the theory of derivation, *Held* that the rule that the failure of a party to rebut the sworn statement of his adversary that he had fully disclosed the invention to him furnished strong evidence that the latter was not the prior inventor did not apply. *Podlesak v. McInerney*, 26 App. D. C. 399; 1906 C. D. 558; 120 O. G. 2127.

610. The Commissioner of Patents having found there was an interference in fact and that McI. had the right to make the claim, *Held* that he could have come to no other conclusion upon the proofs and the law applicable thereto than the one he did, and consequently his award of priority is correct if the remaining questions be decided in McI.'s favor. *Ib.*

611. Evidence considered and held to show that the application on which the patent involved in interference was granted did not, as originally filed, disclose the invention in issue, and priority therefore awarded to the junior party. *McKnight v. Pohle*, 30 App. D. C. 92; 130 O. G. 2069; 1907 C. D. 666.

612. Where the applicant Cherney proves that he made patterns embodying certain counts of the issue before any date proved by Clauss, and Clauss asserts that they were made from disclosures by him, but this is denied by Cherney, *Held* that Cherney

must be regarded as the inventor of these counts. The burden was on Clauss to prove the disclosure, and he failed to sustain it. *Cherney v. Clauss,* 25 App. D. C. 15; 116 O. G. 597; 1905 C. D. 635.

613. Where C.'s company agreed to improved G.'s reels and it appears that G. made disclosures to one member of C.'s company, *Held* that it was not necessary to show disclosures to C. in person, since he was chargeable with the notice to his firm. *Gedge v. Cromwell,* 19 App. D. C. 192; 98 O. G. 1486; 1902 C. D. 514.

614. W., who was a manufacturer of cluster-sockets, entered into a contract with D., whereby he was to furnish such sockets to D. and to no other manufacturer, and D. was to push the sale of the same. There was a demand for an improved form of socket, and W. constructed such a device embodying the issue in August, 1902, which he testified he showed to D. *Held* that this testimony in view of the relation between the parties and in the absence of an unequivocal denial by D. is sufficient to establish such disclosure. *Weeks v. Dale,* 30 App. D. C. 498; 135 O. G. 218.

615. Where S. obtained patents before B.'s applications were filed but credible and competent witnesses testify to disclosure of the invention to them by B. before the date of conception claimed by S. and to disclosure by B. to the brother-in-law and business associate of S. before that date and circumstances support the conclusion that B. and not S. is the inventor and the delay of B. in applying for patents and his failure to reduce to practice are satisfactorily explained, *Held* that S. derived the invention from B. *Shuman v. Beall,* 27 App. D. C. 324; 1906 C. D. 710; 123 O. G. 1664.

616. Where B. conceived the invention and S. appropriated B.'s conception and reduced the same to practice and took out patents upon the same as his own invention, *Held* that the work of S. upon the invention inured to the benefit of B. *Ib.*

617. Reduction to practice by S. in the course of work for the company employing B. under circumstances which naturally led B. to suppose the reduction was recognized as that of his own invention satisfactorily accounts for B.'s long inaction and other conduct tending to bear against the justice of his claim for patents. *Ib.*

618. Where plans and specifications submitted to the construction

company with which H. was connected disclosed the invention and H. prepared a proposal to meet said requirements, *Held* that H. is not an original inventor. *Henry v. Doble,* 27 App. D. C. 33; 1906 C. D. 654; 122 O. G. 1398.

619. Where G. claims to have disclosed the invention to S., but it does not appear that the disclosure was of such special character as to the combination of parts as to have enabled a mechanic of ordinary ingenuity and skill in that particular trade or calling to have constructed and put the improvement in successful operation, *Held* that S. must be regarded as an independent inventor. *Sendelbach v. Gillette,* 22 App. D. C. 168; 109 O. G. 276; 1904 C. D. 597.

620. Upon examination of the evidence and aside from the weight attached to the unanimous decisions of the Patent Office tribunals, *Held* that there is no doubt but that W. was the real inventor and that C. obtained his knowledge of the invention from N.'s drawing made after W.'s original sketch. *Cleveland v. Wilkin,* 27 App. D. C. 311; 1906 C. D. 703; 123 O. G. 1286.

9. Determination of.

621. The question of the exercise of reasonable diligence in adapting and perfecting the invention and also the question of abandonment, from long-settled practice are proper to be considered and determined in deciding upon the principal question of priority of invention. *Christensen v. Noyes,* 15 App. D. C. 94; 90 O. G. 227; 1900 C. D. 212.

622. Where Stevens was the first to file an application for a patent and the testimony for Schupphaus failed to show that he made the invention prior to the date of that application, judgment rendered in favor of Stevens without considering the question whether his application as filed disclosed the invention in controversy, since that matter was settled by proceedings in the Patent Office. *Schupphaus v. Stevens,* 17 App. D. C. 548; 95 O. G. 1452; 1901 C. D. 365.

10. Evidence to Establish.

623. The fact of conception by an inventor, for the purpose of establishing priority, cannot be proved by his mere allegation nor by his unsupported testimony where there has been no disclosure to others or embodiment of the invention in some clearly perceptible form, such as drawings or model, with sufficient

proof of identity in point of time. *Mergenthaler v. Scudder,* 11 App. D. C. 264; 81 O. G. 1417; 1897 C. D. 724.

624. Where a party in order to prevail depends upon earlier dates than those alleged in his preliminary statement and permission to amend the statement to set out said earlier dates has been refused, *Held* that testimony relating to such earlier dates must be disregarded. *Fowler v. McBerty,* 27 App. D. C. 41; 1906 C. D. 585; 121 O. G. 1015.

625. A statement by applicant to his assignee that he does not regard himself as the inventor of the subject-matter claimed in such application is not sufficient to warrant an award of priority to an opponent where it appears that such statement was made during a controversy between the parties with regard to the amount of royalty which should be paid to the assignor. *Gibbons v. Peller,* 28 App. D. C. 530; 127 O. G. 3643; 1907 C. D. 529.

626. Attempts by an inventor to sell his invention to a manufacturing company, made between the date of conception and that of filing his application, a year and a half elapsing, do not show such diligence as will entitle him to priority over another who, during that time conceived, and who filed his application three months prior to the former's assignment to the manufacturing company. *Howell v. Hess,* 30 App. D. C. 194.

627. Where the assignee of H., who furnished the money for making the machine in 1883, which was afterwards dismantled, claims to have subsequently employed another party merely to devise a new feeding device for the machine, but he caused applications for patents covering the entire machine and not merely the feeding device, to be filed in the name of such other party, his conduct held inconsistent with the claim that he regarded H. as the successful inventor of the machine. *Howard v. Hey,* 18 App. D. C. 142; 95 O. G. 1647; 1901 C. D. 375.

628. Where J. claims to have conceived the invention in 1899, but the testimony on his behalf is full of inconsistencies and contradictions, and it appears that he waited three years before filing his application and during that time kept his machine concealed under a heap of rubbish, although there was a demand in the trade for such an invention, *Held* that he has not established his case. *Jenner v. Dickinson,* 25 App. D. C. 316; 117 O. G. 600; 1905 C. D. 672.

629. Where J. saw a notice of D.'s invention in 1900 and did not file his own application for patent until he was induced to do so by H. in 1902, *Held* that no value can be attached to testimony on his behalf that he made the invention in 1899. *Jenner v. Dickinson*, 25 App. D. C. 316; 117 O. G. 600; 1905 C. D. 672.

630. Where there was a failure to explain the reason why the application attested on May 12, 1902, and returned to the patent solicitor was not filed before June 11, *Held*, considering all the evidence relating to the occupation and means of the applicant and his diligence in the employment and payment of his solicitor, with whom he had not the opportunity of meeting, and the very short time which was suffered to elapse that it shows sufficient diligence to entitle him to the benefit of his earlier conception. *Jones v. Cooke*, 25 App. D. C. 524; 117 O. G. 1493; 1905 C. D. 689.

631. C. held entitled to an award of priority over J. and T. by reason of an earlier conception of the invention, coupled with due diligence, extending from a time before the only date established for J. and T. to the filing of C.'s application. *Ib.*

632. Where C.'s company by contract agreed to make improvements upon G.'s patented reel, *Held* that it was incumbent upon C. to show beyond a reasonable doubt that what he did was his own invention and not that of G. *Gedge v. Cromwell*, 19 App. D. C. 192; 98 O. G. 1486; 1902 C. D. 514.

633. After reviewing the testimony, *Held* that the explanation of Dickey as to delay in applying for a patent, while plausible, was not satisfactory; but the proofs show that he was the first inventor, and priority awarded to him over the patentee, Fleming. *Dickey v. Fleming*, 12 App. D. C. 509; 83 O. G. 1348; 1898 C. D. 487.

634. The position taken by Meyer that the testimony on behalf of Rothe does not sufficiently identify the invention in issue, *Held* not well founded, and that Rothe is entitled to an award of priority. *Meyer v. Rothe*, 13 App. D. C. 97; 84 O. G. 649; 1898 C. D. 534.

635. Where S. alleges the earlier dates of conception and reduction to practice, but the evidence shows that his first machines were unsuccessful and that he did not construct a satisfactory machine until after he had seen M.'s invention, *Held* that the de-

cision awarding priority to M. must be affirmed. *Swihart v. Mauldin*, 19 App. D. C. 570; 99 O. G. 2322; 1902 C. D. 540.

636. Where S. was engaged in the special work of devising means to remedy imperfections in scales of the class in controversy, having taken out several patents upon that line, and where he claims to have completed the particular invention in issue, *Held*, that his failure to apply for a patent until six months after he had seen M.'s device is peculiarly significant. *Ib.*

637. Where O. deliberately states in answer to a question propounded by his own counsel that he does not claim to be the inventor of the matter in controversy, priority of invention cannot be awarded to him. *Oliver v. Helbel*, 20 App. D. C. 255; 100 O. G. 2384; 1902 C. D. 565.

638. The evidence on behalf of Bernard, *Held* to have overcome the burden of proof imposed upon him by the earlier application of Huebel and has successfully established his claim to the award. *Huebel v. Bernard*, 15 App. D. C. 510; 90 O. G. 751; 1900 C. D. 223.

639. The decision of the Commissioner of Patents adjudicating priority of invention in favor of McRoberts, *Held* in accordance with the evidence and affirmed. *Doyle v. McRoberts*, 10 App. D. C. 445; 79 O. G. 1029; 1897 C. D. 413.

640. Where P. made the application drawing for A. and put on said drawing A.'s name as the inventor and made no claim at that time that he was the inventor, *Held* that such actions are strongly against his claim to be the inventor, and as his claim to the invention is not supported by any testimony except his own he cannot prevail over A., the senior party. *Pickles v. Aglar*, 13 App. D. C. 556; 86 O. G. 346; 1899 C. D. 268.

641. Where the testimony is conflicting and unsatisfactory, but supports the senior party's allegation of reduction to practice in 1897, as well as it does that of the junior party two years later, *Held* that the decision of the Commissioner in favor of the senior party should be affirmed. *Scott v. Scott*, 18 App. D. C. 420; 96 O. G. 1650; 1901 C. D. 419.

642. Where each party claims to have disclosed to the other an invention jointly embodied in a machine and there is no other direct testimony on the subject, but the collateral circumstances—such as the previous experience of the parties, the refusal of M. to answer questions, and the contradiction by witnesses of state-

ments made by him on other matters—tend to discredit M. and corroborate K., *Held* that the decision must be in favor of K. *Miller v. Kelley,* 18 App. D. C. 163; 96 O. G. 1038; 1901 C. D. 405.

11. Presumptions.

643. Where the junior party admits that his efforts in the field of invention had been superinduced by a knowledge of a different invention by the senior party upon the same lines embodying the germ of the one in controversy and the question arises which of them was the inventor, *Held* that the presumption is in favor of the senior party. *Scott v. Scott,* 18 App. D. C. 420; 96 O. G. 1650; 1901 C. D. 419.

644. Where an appellant comes to the court as the junior applicant and with three concurrent decisions of the tribunals of the Patent Office against him, *Held* that the presumption is strongly against his claim as the prior inventor. *Swihart v. Mauldin,* 19 App. D. C. 570; 99 O. G. 2322; 1902 C. D. 540.

645. Where Houston knew of a demand for the invention, but he suppressed it and practically concealed his device for more than four years after the time when he claims to have actually reduced it to practice and until a rival entered the field, although he had abundant means and ample opportunity to file an application, *Held* that such delay raises a presumption which it is incumbent on him to rebut by clear and satisfactory proof. *Eastman v. Houston,* 18 App. D. C. 135; 95 O. G. 2064; 1901 C. D. 386.

646. H. being the first to reduce to practice and the first to apply to the Office must be presumed to be an original inventor of the machine which it is conceded he built and operated and for which he was the first to make an application for a patent. F. controverts this right of H., and it is incumbent upon him to show by clear and indubitable proof that the presumption in favor of H. is not well founded and that the right is in himself. Such proof F. has failed to produce, and priority of invention is therefore awarded to H. *Funk v. Haines,* 20 App. D. C. 285; 100 O. G. 1764; 1902 C. D. 553.

647. The decision of the Commissioner of Patents awarding priority to F. reversed, since the evidence is not sufficient to overcome the presumption in favor of B. arising from his having

been the first to file his application. *Beals v. Finkenbiner,* 12 App. D. C. 23; 82 O. G. 598; 1898 C. D. 326.

12. Operativeness of Machine.

648. Where the machine relied on by one of the parties as establishing priority of invention is inoperative, and that relied on by his contestant is operative and successful, *Held* that priority should be awarded to him who produced the operative machine. *Glidden v. Noble,* 5 App. D. C. 480; 71 O. G. 141; 1895 C. D. 273.

13. Perfection of Device.

649. Where W. made a device in April, 1896, embodying the construction in issue except one feature and B. made a device embodying all features of the issue in November, 1896, *Held* that B. is the first inventor. *Blackford v. Wilder,* 21 App. D. C. 1; 104 O. G. 578; 1903 C. D. 567.

14. Foreign Inventions and Patents.

650. Appellants built in a foreign country a machine embodying the invention in issue which was explained to an agent who came to this country, *Held* that even if this agent remembered what was explained to him such knowledge on his part, in the absence of disclosure to others or reduction to practice by himself within a reasonable time, would not be equivalent to an introduction of the invention into this country. *Gueniffet v. Wictorsohn,* 30 App. D. C. 432; 134 O. G. 779.

651. W. obtained a French patent on September 25, 1900. The earliest foreign filing date of the opposing party was subsequent to this date, and the evidence did not establish an introduction into this country by said party prior thereto. *Held* that priority of invention was properly awarded to W. *Ib.*

15. Date of Invention.

652. Between rival inventors, the date of the invention in issue is fixed at the time at which a complete and intelligible embodiment by which those skilled in the art can understand it is presented, but it would also appear to be settled that the date of an invention may be prior to the time the invention is embodied in a form capable of being patented. *Christensen v. Noyes,* 15 App. D. C. 94; 90 O. G. 227; 1900 C. D. 212.

16. In General.

653. The former decision holding that as Wood did not advance the broad claim of the issue until after Bechman had filed his application therefor he is not entitled to a judgment of priority for such broad claim, and that neither party is entitled to a judgment of priority of invention or to a patent for the broad issue is adhered to. *Bechman v. Wood*, 15 App. D. C. 484; 1899 C. D. 459.

654. Although priority of invention is awarded to D. over F., yet it is not to be understood by the decision in awarding priority to D. that he is entitled to a patent for his invention, for from the statements of the Commissioner and the Board of Examiners the inference to be drawn would seem to be that D.'s device is found to be wanting in patentability, and therefore that the declaration of interference was based upon mistake or inadvertence. *Dodge v. Fowler*, 11 App. D. C. 592; 82 O. G. 595; 1898 C. D. 320.

655. The decision of the Commissioner of Patents awarding priority of invention to Albert affirmed, for the reasons stated in the case of *Wickers and Furlong v. McKee. Wickers and Furlong v. Albert*, 29 App. D. C. 23; 129 O. G. 1268; 1907 C. D. 599.

656. The decision of the Commissioner of Patents holding that Wickers and Furlong were not exercising diligence when McKee filed his application and awarding priority to McKee on his record date affirmed. *Wickers and Furlong v. Upham*, 29 App. D. C. 30; 129 O. G. 1612; 1907 C. D. 605.

657. Where the evidence shows that H. is not an original inventor, *Held* that the question of diligence of D. is immaterial. *Henry v. Doble*, 27 App. D. C. 33; 1906 C. D. 654; 122 O. G. 1398.

658. The decision of the Commissioner of Patents in awarding priority of invention to Adams affirmed. *Glenn v. Adams*, 12 App. D. C. 175; 83 O. G. 158; 1898 C. D. 407.

659. The decision of the Commissioner of Patents awarding priority of invention to Bernardin reversed. *Northall v. Bernardin*, 7 App. D. C. 452; 74 O. G. 655; 1896 C. D. 183.

660. For the reasons assigned the Commissioner's decision, cause No. 116, (65 MS. Dec., 196,) affirmed and judgment of priority of invention awarded to appellee; but his decision in cause No.

117 (56 MS. Dec., 191) reversed and judgment of priority awarded to appellant. *Griffin v. Swenson,* 15 App. D. C. 135; 89 O. G. 919; 1899 C. D. 440.

661. T. held not to have been in possession of the invention before M. made it, and therefore the decision of the Commissioner in favor of M. affirmed. *Talbot v. Monell,* 23 App. D. C. 108; 109 O. G. 280; 1904 C. D. 606.

662. The evidence on behalf of Cobb held not to establish a possession of the invention by him before Goebel filed his application, and therefore the decision of the Commissioner of Patents awarding priority of invention to Goebel affirmed. *Cobb v. Goebel,* 23 App. D. C. 75; 108 O. G. 1591; 1904 C. D. 589.

663. Dolan held to have reduced the invention to practice before any date which can be awarded Shaffer, and therefore the decision of the Commissioner awarding priority of invention to Dolan affirmed. *Shaffer v. Dolan,* 23 App. D. C. 79; 108 O. G. 2146; 1904 C. D. 592.

664. After reviewing the testimony, *Held* that judgment of priority of invention should be awarded to Holt. *Ingersoll v. Holt,* 15 App. D. C. 519; 90 O. G. 2507; 1900 C. D. 253.

665. After reviewing the facts in the case, *Held* that Christensen was entitled to priority of invention, and the motion for rehearing denied. *Christensen v. Noyes,* 15 App. D. C. 94; 90 O. G. 227; 1900 C. D. 212.

666. The decision of the Commissioner of Patents holding Halle to be the prior inventor of an improvement in card attachments for type-writing machines affirmed. *Slaughter v. Halle,* 21 App. D. C. 19; 102 O. G. 469; 1903 C. D. 519.

667. The testimony on behalf of T. fails to show that he made the invention in liquefying air prior to the date of his application, and since L. had filed his application before that time L. is the first inventor. *Tripler v. Linde,* 21 App. D. C. 32; 102 O. G. 1297; 1903 C. D. 526.

668. Although the preponderance of evidence may be with the appellant, *Held* that he has not established his case beyond a reasonable doubt, and therefore the decision of the Commissioner of Patents awarding priority of invention to the appellee affirmed. *Kelly v. Fynn,* 16 App. D. C. 573; 92 O. G. 1237; 1900 C. D. 339.

669. Sendelbach held to be the original and first inventor of the

subject-matter in controversy and the patent was properly issued to him. *Sendelbach v. Gillette,* 22 App. D. C. 168; 109 O. G. 276; 1904 C. D. 597.

670. The decision of the Commissioner of Patents awarding priority of invention to Monell and James affirmed. *Talbot v. Monell,* 23 App. D. C. 112; 109 O. G. 554; 1904 C. D. 609.

671. The evidence on behalf of F. held insufficient to sustain the *onus* of proof upon him due to his later filing date, and therefore the decision adjudging P. the first inventor affirmed. *Flora v. Powrie,* 23 App. D. C. 195; 109 O. G. 2443; 1904 C. D. 636.

672. St. Amand held to have completed the invention before Tyler took the matter up, and the decision of the Acting Commissioner affirmed. *Tyler v. St. Amand,* 17 App. D. C. 464; 94 O. G. 1969; 1901 C. D. 301.

673. D. held to have been the first to reduce the invention to practice and to be regarded as the first inventor, because of a lack of diligence on the part of S. *Seeberger v. Dodge,* 24 App. D. C. 476; 114 O. G. 2382; 1905 C. D. 603.

674. Cherney held the first inventor of the construction covered by certain counts of the issue and Clauss the first inventor of the construction covered by the other counts. *Cherney v. Clauss,* 25 App. D. C. 15; 116 O. G. 597; 1905 C. D. 635.

675. Held that the junior party, H. has failed to show a conception of the invention before his opponent's filing date and that priority of invention was properly awarded to S. and L. *Harris v. Stern,* 22 App. D. C. 164; 105 O. G. 746; 1903 C. D. 612.

676. As to priority of invention of bottle-sealing cap. See *Northall v. Bernardin,* 7 App. D. C. 452; 1896 C. D. 183.

677. The decision of the Assistant Commissioner holding that Buhoup was the first and original inventor affirmed. *Hein v. Buhoup,* 11 App. D. C. 293; 81 O. G. 2088; 1897 C. D. 772.

678. On appeal to the Court of Appeals of the District of Columbia it was *Held* that the Commissioner was right in his decision that Parmelee was the inventor of the device in controversy, and that decision is therefore affirmed. *Hill v. Parmelee,* 9 App. D. C. 503; 78 O. G. 170; 1897 C. D. 214.

V. CLAIMS.

679. Where an element is included in the claim of a patent, the patentee is not at liberty to show that it is immaterial in order to

make out a case of infringement. *Lane v. Levi,* 21 App. D. C. 168; 104 O. G. 1898; 1903 C. D. 601.

680. Where the invention can be clearly defined by means of four claims, the presentation of twelve claims is objectionable, because the claims are then unnecessarily multiplied. *In re Carpenter,* 24 App. D. C. 110; 112 O. G. 503; 1904 C. D. 669.

680½. A limited construction will not be put upon the terms of a claim where it appears that the art is comparatively new and the terms used have not acquired a fixed and definite meaning therein. *Lindmark v. Hodgkinson,* 31 App. D. C. 612; 137 O. G. 228.

681. A claim should be given the broadest interpretation which it will support, and limitations should not be imported into the claim from the specification to meet the exigencies of the particular situation in which the claim may stand at a given time. *Miel v. Young,* 29 App. D. C. 481; 128 O. G. 2532; 1907 C. D. 561.

682. Where after rejection a claim is amended and allowed, it must be read and interpreted with reference to the rejected claim. *Computing Scale Co. v. Automatic Scale Co.,* 26 App. D. C. 238; 119 O. G. 1586; 1905 C. D. 704.

683. Where the Patent Office rejected a claim as not patentable in view of the prior art, but suggested that if the limitation "depending" were made at a certain point the claim would be patentable, and the applicant, acquiescing, makes the amendment, *Held* that the patentability of the claim depends upon whether there is invention in making the part "depending." *Ib.*

684. Where an applicant before the Patent Office acquiesces in the ruling that his claim is not patentable without amendment, he cannot be heard to question the ruling thereafter, and it is immaterial whether it was right or wrong. *Ib.*

685. The claims of a patent alleged to have been infringed will be restricted to the specific combination described. *Fenton Manuf. Co. v. Office Specialty Co.,* 12 App. D. C. 201.

686. Where an inventor seeking a broad claim which is rejected, in which rejection he acquiesces, substitutes therefore a narrower claim, he cannot be heard to insist that the construction of the claim allowed shall cover that which has been previously rejected. *Computing Scale Co. v. Automatic Co.,* 204 U. S. 609, 127 O. G. 849.

687. Where in a stone-saw construction the claim calls for "re-

movable means for reinforcing the lower ends of the blades during the initial part of a cutting operation" and it appears that the device of Miel, a patentee, was designed to prevent the blades from "chattering or wabbling" laterally, while Young's structure is for the purpose of enabling the blades of the saw "to stand the strain for their work" and to support the saw longitudinally, *Held* that there is no limitation in the claim, which refers broadly to reinforcing means, which necessitates the reading into the claim of structural features found only in the specification of the patent. *Miel v. Young*, 29 App. D. C. 481; 128 O. G. 2532; 1907 C. D. 561.

688. Where the issue covers the method of tanning which consists in subjecting the skins to the action of a certain bath and one party discloses a one-bath process using that bath and also a two-bath process which is distinct from the one-bath process, using it as the second bath, and his opponent discloses only a one-bath process, *Held* that the issue is limited to a one-bath process. *Rosell v. Allen*, 16 App. D. C. 559; 92 O. G. 1036; 1900 C. D. 333.

689. Where in the oath to his application Tripler alleged that he had obtained no foreign patents upon the invention and in the interference he subsequently claimed that an English patent granted to him is for that invention, *Held* that the claim is an afterthought and cannot be maintained without an admission of deliberate fraud and wilful perjury. *Tripler v. Linde*, 21 App. D. C. 32; 102 O. G. 1297; 1903 C. D. 526.

690. Where after his alleged invention of the specific process in controversy M. filed an application with broad claims not disclosing the specific process and upon being informed by P. and C. of their specific process said nothing about having invented it, but thereafter presented claims to it in his application and filed the present application claiming it, *Held* that his claim as the inventor is discredited. *McKnight v. Pohle*, 22 App. D. C. 219; 105 O. G. 977; 1903 C. D. 619.

691. Where the margin of patentability in the claim is narrow and the applicant because of rejections amended it to include certain details of construction in order to secure an allowance, *Held* that those details cannot be regarded as immaterial. *Blackford v. Wilder*, 21 App. D. C. 1; 104 O. G. 578; 1903 C. D. 567.

693. When an applicant's claims to a trimmer for sewing-ma-

chines make no mention of a presser-foot, a difference in structure embodying a particular form of presser-foot which is not clearly pointed out in the record will not be assumed. *In re McNeil,* 28 App. D. C. 461; 126 O. G. 3425; 1907 C. D. 478.

694. A claim for a latch mounted upon a mold-blade section of a type-mold, *Held* to cover matter not within the original disclosure, the words "mounted upon" not being properly descriptive of a part which merely rides in or over another in a slot for the purpose. *In re Duncan,* 28 App. D. C. 457; 126 O. G. 2592; 1907 C. D. 460.

695. Where claims are advanced by a party of conception and disclosure at dates several years before any dates satisfactorily proved and it appears that in the meantime manufacturers were demanding a device of the kind in issue and the party made no disclosure to such manufacturers nor any attempt to reduce to practice, but endeavored to sell patents upon prior devices and failed on the express ground that they did not possess the advantages found in the present invention, *Held* that said claims to early conception and disclosure are entitled to no consideration. *Hope v. Voight,* 25 App. D. C. 22; 115 O. G. 1585; 1905 C. D. 629.

696. Upon a consideration of the original application and the entire record of amendments thereto, *Held* that the amendments of D.'s claims were within the scope of his application and accompanying drawings and were therefore properly allowed. *Seeberger v. Dodge,* 24 App. D. C. 476; 114 O. G. 2382; 1905 C. D. 603.

697. The fact that the invention oversteps the boundary of preexisting knowledge both as to structure and scientific principles warrants a liberal view of the scope of the descriptive specifications rather than a narrow and restrictive one. *Stone v. Pupin,* 19 App. D. C. 396; 100 O. G. 1113; 1902 C. D. 550.

698. A limitation that the fuse is "within the casing" is broad enough to include the fuse anywhere within the outer surface of the casing. It need not be within the cavity of the casing, but may be embedded in the walls. *Sachs v. Hundhausen,* 21 App. D. C. 511; 105 O. G. 1534; 1903 C. D. 625.

699. A claim for a process of dry-pressing which includes subjecting a collection of sheets of paper to pressure without the use of fuller-boards, tying them into a bundle while under pres-

sure, removing them from the press, and allowing them to remain tied until fixed, *Held* to describe merely the operation and effect of the machine and to be invalid. *Busch v. Jones*, 184 U. S. 598; 99 O. G. 229; 1902 C. D. 585.

VI. ASSIGNMENTS.

700. An instrument purporting to be an assignment of an invention for which no patent has issued unaccompanied by a request that the patent be issued to the assignee, or of an invention for which no patent has been applied for, or of an incomplete and future invention, is not of itself an assignment and will not transfer any title, but is simply an executory agreement to assign in the future. *Electrolibration Co. v. Sanche*, 25 W. L. R. 87.

701. Where the company owning certain patents granted to the complainant the exclusive right to use the invention in this district for a certain number of years, the fact that the company is now insolvent and has gone out of business does not effect or limit the exclusive right given to the complainant. *Whitson v. Columbia Phonograph Co.*, 18 App. D. C. 565; 98 O. G. 418; 1902 C. D. 497.

702. To a suit in equity to have an assignment of patent rights, alleged to be fraudulent and to constitute a cloud on plaintiff's title, declared to be fraudulent and void, for the cancellation of such assignment and that the record thereof be expunged from the records of the Patent Office, the parties by whom the alleged assignment was made are indispensable parties, and no decree declaring the assignment fraudulent and void and directing its cancellation can be made in their absence. *Backus Heater Co. v. Simonds*, 2 App. D. C. 290; 66 O. G. 1893; 1894 C. D. 211.

703. The rights involved in such a suit are strictly *in personam*, and no decree can be made affecting them unless it be founded upon control of the parties by the court after due process served or their voluntary appearance. *Ib.*

704. Where the parties by whom the assignment was made are non-residents, an order of publication made against them and personal service thereof upon them in another jurisdiction, but to which no heed was taken, will not have the effect of personal service of process within the jurisdiction. Upon such foreign service merely the court cannot proceed as if the parties were before it and subject them to its decree passed *in personam*. Sec-

tion 787, Revised Statutes of the District of Columbia, has no application to such case. *Ib.*

705. Nor can the court, in the absence of such defendants, decree that the Commissioner of Patents (he having been made a party defendant) shall expunge from the records of the Patent Office the record of the assignment as being there without authority, and declare the same null and void. Even if the court had jurisdiction, so far as the Commissioner of Patents was concerned, that jurisdiction was not complete over the subject-matter in the absence of the non-resident defendants, and no consent of the Commissioner could give the court jurisdiction of the subject-matter. *Ib.*

706. As to the right of assignee of patent to maintain action in own name for infringement. See *Armstrong Whitworth & Co. v. Norton*, 15 App. D. C. 223; 27 W. L. R. 414.

VII. PRACTICE.

707. The practice of the Patent Office is not a matter for regulation by the Court of Appeals of the District of Columbia, and irregularities therein, even if patent on the record, would only be considered by this court when some substantial right of a party has been denied and the point saved for presentation on appeal. *In re Neill*, 11 App. D. C. 584; 82 O. G. 749; 1898 C. D. 332.

708. Departmental practice contrary to law, is not made lawful by the practice of a department for a long period of time; but due regard should be given to a practice which admittedly has prevailed for more than twenty-five years in proceedings of a judicial character, even though a reasonable doubt exists in mind of the court as to the proper construction to be placed upon a statute. *Allen v. U. S. ex. rel. Lowry*, 26 App. D. C. S.

709. The Rules of Practice in the Patent Office when not in conflict with law have the full force and effect of statutes. As the approval of such rules by the Secretary of the Interior is necessary to the adoption and establishment of such rules, the contrary is true that where a rule of procedure is in force it can only be repealed, modified, or suspended by the Commissioner with the approval of the Secretary of the Interior. *Mell v. Midgley*, 31 App. D. C. 534; 136 O. G. 1534.

710. Rules of the Patent Office which are not inconsistent with the express provisions of the statutes are valid and have the force

and effect of law in all matters to which they relate. They are not to be declared invalid upon consideration of doubtful construction, but only where conflict with the law is made plainly to appear. *Steinmetz v. Allen,* 104 O. G. 853; 1903 C. D. 578.

711. A practice established in the Patent Office by Commissioners who were able and experienced patent lawyers should not after remaining in force for many years be disturbed by the court except upon the clearest principle of right and necessity. *Ib.*

712. Rule 125 of the Rules of Practice of the Patent Office if interpreted to require judgment to be rendered upon priority of invention after the patent involved in interference has been extinguished would conflict with the statutes as interpreted by the courts and be invalid; but a fair interpretation of said rule does not prevent dissolution of interference without judgment of priority under such conditions. *Lattig v. Dean,* 25 App. D. C. 591; 117 O. G. 1798; 1905 C. D. 698.

713. A construction of the rules of the Office by means of which motions for mere dilatory purposes could be resorted to should not be adopted unless by express terms such construction cannot be avoided. *Ross v. Loewer,* 9 App. D. C. 563; 77 O. G. 2141; 1896 C. D. 665.

714. The provision in Rule 41 of the Rules of Practice of the Patent Office which compels the separation of claims for a process and claims for its apparatus is invalid, because it precludes exercise of any judgment, however related or connected they may be. *Steinmetz v. Allen,* 192 U. S. 543; 109 O. G. 549; 1904 C. D. 703. *Ex Parte Frasch,* 192 U. S. 566; 109 O. G. 554; 1904 C. D. 716.

715. Rules 41, 42, 133, 134 and 145 considered and *Held* that they cannot upon any fair and reasonable construction be regarded as inconsistent with the statutes relating to the patent system. *Steinmetz v. Allen,* 104 O. G. 853; 1903 C. D. 578.

716. An applicant for a patent has the right to unite in one application claims for a process and claims for an apparatus, where the inventions are related and dependent; and an order of the primary examiner, twice made, denying that right and requiring a division between the claims for a process and those for an apparatus, is equivalent to a rejection of the application, and entitles the applicant to an appeal to the board of examiners- in-

chief under section 4909, R. S. Where the primary examiner refuses to answer and forward the appeal, and a petition to the Commissioner of Patents to direct the primary examiner to forward the appeal is denied, mandamus will lie to compel the Commissioner of Patents to require the primary examiner to forward the appeal to the board of examiners-in-chief. *Steinmetz v. Allen*, 192 U. S. 543; 32 W. L. R. 147.

717. The principles applicable to the proceedings in the Patent Office are so nearly akin to judicial proceedings as to be most properly designated as quasi-judicial, and it is only by regarding these proceedings as such that the validity of the legislation which authorizes appeals to the Court of Appeals from the decision of the Commissioner of Patents can be sustained. *In re Barratt*, 14 App. D. C. 255; 87 O. G. 1075; 1899 C. D. 320.

718. It is not necessary that a duly-certified transcript record of a case in a Federal Court be filed in the Patent Office in order to render it competent for its tribunals to take notice of and be guided thereby. The officials of the Patent Office are not obliged to find their conclusions and judgments upon such evidence produced in such manner and form as is required by the rules of common law. They are not confined to merely technical evidence, but may resort to any source of intelligence upon which they can reasonably and safely act. The findings and judgment of a court as published in an official report are therefore competent to them, and were in this case ample ground for the rejection of claims. *In re Drawbaugh*, 9 App. D. C. 219; 77 O. G 313; 1896 C. D. 527.

719. If it becomes apparent during the course of an interference that its further prosecution would be useless, the proper proceeding is a motion for dissolution. *Lattig v. Dean*, 25 App. D. C. 591; 117 O. G. 1798; 1905 C. D. 698.

720. Where the testimony submitted is not only lacking in form, but is wanting in substance, and though the record may give the impression that essential facts may have been provable, but were not brought out, the case must be decided on the proofs adduced, as the court is not authorized to supply the missing links in the evidence and base its decision on facts only thought to exist, but not disclosed. *Robinson v. Seelinger*, 25 App. D. C. 237; 116 O. G. 1735; 1905 C. D. 640.

721. When the utmost that could be said in favor of the appel-

lant is that the testimony is evenly balanced and the circumstances are all against the contention of the appellant, *Held* that the tribunals of the Patent Office were fully warranted in awarding judgment of priority to the appellee. *Murphy v. Meissner*, 24 App. D. C. 305; 114 O. G. 1830; 1905 C. D. 592.

722. The showing made in support of an application that the appellate court, after affirmance of an interlocutory decree in favor of complainant for an accounting, permits defendant to file an amended answer and take testimony in support thereof, where the grounds were fraudulent concealment of a patent by plaintiff and defendants misapprehension as to nature of suit and complainant's claim, *Held* insufficient. *Farrow v. Eclipse Bicycle Co.*, 18 App. D. C. 101; 29 W. L. R. 218.

723. The appellate court may, in the case of interlocutory appeals, upon a proper showing, revoke or modify its decision, or allow the case to be reopened. *Ib.*

724. Where a party refers in his testimony to a device made by him as embodying "Evans rollers" and in his argument contends that he meant thereby the rollers shown in his application and not those shown in a patent to Evans, *Held* that this distinction should have been made in the testimony instead of the argument and that it is not sufficient to say that both parties understood the term in the same way. *Neilson v. Bradshaw*, 16 App. D. C. 92; 91 O. G. 644; 1900 C. D. 265.

725. Questions proper to be raised in a cause should be urged at the hearing, and not held back to be raised on a motion for rehearing in the event of an adverse decision. *Hien v. Pungs*, 9 App. D. C. 492; 25 W. L. R. 8.

726. It is the duty of the Patent Office to make all proper tests and experiments with regard to matters involved in claims to inventions relating to science and the useful arts to establish the truth as between the parties and as between the parties and the public. *Flora v. Potvin*, 23 App. D. C. 195; 109 O. G. 2443; 1904 C. D. 636.

727. Although section 4904, Rev. Stat., provides that whenever "in the opinion of the Commissioner" an interference exists notice shall be given to the parties, etc., the Commissioner is not obliged personally to determine in the first instance whether an interference in fact exists, but may delegate this duty to the Primary Examiner. The demands of the statute are fully met

when it is provided that at some stage in the proceedings the personal opinion of the Commissioner may be invoked by either party. *U. S. ex. rel. Newcomb Motor Co. v. Moore,* 30 App. D. C. 464; 133 O. G. 1680.

728. The provisions §§ 4903, 4909, Rev. Stat., giving an applicant the right to have his claim twice rejected do not apply in *inter partes* cases. *Ib.*

729. A motion by the junior and defeated party to an interference to dismiss an appeal to the Court of Appeals of the District of Columbia upon the ground that there is no invention in the patent-right claimed is at variance with the oaths in the application and the preliminary statement. *Doyle v. McRoberts,* 10 App. D. C. 445; 79 O. G. 1029; 1897 C. D. 413.

730. Where it is claimed that an alleged invention is wanting in patentability or wanting in identity with a rival applicant's device, *Held* that the proper course to pursue is to move for a dissolution of the interference. The motion cannot be made in the Court of Appeals of the District of Columbia, and except, perhaps, in very extraordinary cases no such question can properly be raised in or considered by this court. This must be regarded both as good practice and well-settled law. *Dodge v. Fowler,* 11 App. D. C. 592; 82 O. G. 595; 1898 C. D. 320.

731. While no motion was made by F. to dissolve the interference, yet if under the law and the rules of the Patent Office it is not improper after adjudication of priority of invention to refuse a patent to the successful party in the interference proceedings upon grounds that have first been developed in those proceedings or upon grounds manifested at any time after the declaration of interference, the court in its decision on priority is not to be understood as precluding such action by the Office. *Ib.*

732. In view of the possible effect upon the determination of priority of an error in a decision holding that a party has a right to make a claim, *Held* that the latter question should not be finally determined by the Primary Examiner who originally declared the interference and that the court would therefore take jurisdiction to determine that question as ancillary to that of priority. *Podlesak v. McInnerney,* 26 App. D. C. 399; 1906 C. D. 558; 120 O. G. 2127.

733. On appeal to the Examiners-in-Chief from a decision of the Examiner of Interferences an assignment of error which assails the decision of the Examiner of Interferences in awarding priority on the whole case to the opposing party is sufficient to preserve appellant's right to argue the question of *res adjudicata* by reason of a judgment in a prior interference. *Carroll v. Hallwood,* 135 O. G. 896; 31 App. D. C. 165.

734. Where the statute gives the right of appeal in interference proceedings from the decisions of any officer of original jurisdiction, it refers to final decisions. The right to such an appeal should be clear, and if there is any doubt as to the construction of the statutes claimed to confer the right, such doubt should be resolved in favor of the long established and acquiesced in practice of the Patent Office. *Allen v. U. S. ex rel. Lowry,* 26 App. D. C. 8; 33 W. L. R. 354.

735. Whatever right a party to an interference has to contest the right of his adversary to make the interfering claim, such right, if denied, is reviewable, if at all, upon the final decision of the question of priority. *Ib.*

736. Neither section 482, 4904, or 4909, R. S., nor any other statute, nor any rule of the Patent Office made by the Commissioner of Patents, gives the right of appeal to the examiners-in-chief from decisions made by the primary examiners, on the hearing of a motion to dissolve an interference, holding that a party has a right to make the claim which is the issue of the interference. *Ib.*

737. Where a motion is made to remand the case to the Patent Office to consider the patentability of the issue in view of certain patents cited and it appears that the Patent Office has not reserved the question of patentability for future consideration, *Held* that the motion must be denied. *Luger v. Browning,* 21 App. D. C. 201; 104 O. G. 1123; 1903 C. D. 593.

738. In remanding the interference to the Patent Office undecided for further consideration of the question of identity of invention, *Held* that if after such consideration the Office adheres to the opinion that there is an interference record with any additions will be further considered by the court. *Podlesak v. McInnerney,* 26 App. D. C. 399; 1906 C. D. 588; 120 O. G. 2127.

739. On failure of appearance for appellant when case called for argument and of printed brief in his behalf, the decision of the Commissioner of Patents in an interference proceeding affirmed. *Peckham v. Price,* 26 App. D. C. 556.

VIII. INTERFERENCE PROCEEDINGS.

1. Nature of Proceeding.

740. In interference cases the proceeding to obtain a patent is distinctly judicial. The controversy is waged between adverse claims of the same right of property, and the public has no interest therein. It contains all the elements of a civil case—a complainant, a defendant, and a judge—actor,*reus et judex. Bernardin v. Seymour,* 11 App. D. C. 91; 79 O. G. 1190; 1897 C. D. 428.

741. Interference cannot properly be declared except when two applications or a patent and an application conflict with each other. If the alleged inventions are substantially different from each other, so as to be each of them patentable, there is no ground for interference. In this case no question of priority can arise. *Cushman v. Lines,* 10 App. D. C. 156; 78 O. G. 2051; 1897 C. D. 346.

2. Parties.

742. Interference proceedings are instituted to determine as between the parties thereto which of them is entitled to an award of priority of the invention claimed. Both cannot be entitled to it, but one may be entitled as against the other, though there may be some third party who might if the claim of that person were placed in issue as between that person and one or both of the parties to the interference proceeding show that he was in fact and in reality entitled to an award of priority of the invention in controversy. *Foster v. Antisdel,* 14 App. D. C. 552; 88 O. G. 1527; 1899 C. D. 413.

743. Where an applicant comes into the Patent Office to overthrow a prior patent, he assumes the position, with all its burdens, of a defendant in a suit who sets up to defeat the right of a plaintiff, the want of novelty and invention covered by the patent held by the plaintiff, or the fact of existence of priority of invention by the defendant or some third person having a right to the

invention superior to that claimed by the plaintiff. *Williams v, Ogle,* 14 App. D. C. 145; 87 O. G. 1958; 1899 C. D. 367.

744. The first applicant becomes the senior party in the declaration of interference, and his prior application imposes the burden of proof upon the junior party or subsequent applicant in trying the issue of priority; but in no other respect does the mere constructive reduction to practice by a subsequent inventor subordinate or affect a prior invention, and this rule in regard to the burden of proof does not apply as against a patentee whose patent has been regularly and lawfully issued in due course of proceeding. *Christensen v. Noyes,* 15 App. D. C. 94; 90 O. G. 227; 1900 C. D. 212.

745. If the practice obtained of allowing the claims or pretensions of any or all persons though not parties to the interference proceedings to be set up as a means of defeating the claims of one of the parties, it would be difficult if not impossible in many cases to try the interference issue as between the immediate parties to it. Such practice would open the door to collusion, and perjury would be the recourse of many who failed to support their claims by legitimate evidence. *Foster v. Antisdel,* 14 App. D. C. 552; 88 O. G. 1527; 1899 C. D. 413.

746. On an issue of priority of invention, constructive reduction to practice of the invention by simply filing an application for patent and having it allowed, or by filing an allowable application for patent, does not in any manner change or enlarge the right of such applicant as against a prior inventor of the same or a similar invention, and which is made the subject of an issue of interference, though such prior inventor may be subsequent in filing an application. *Christensen v. Noyes,* 15 App. D. C. 94; 90 O. G. 227; 1900 C. D. 212.

747. Where a patent is inadvertently granted on an application pending contemporaneously with a pending application of another party, *Held* that the patentee gains no advantage in an interference proceeding and that the patentee, being last to file, is the junior party in the proceeding. *Furman v. Dean,* 24 App. D. C. 277; 114 O. G. 1552; 1905 C. D. 582.

748. Where R. was the first to file his application, and while it was pending M.'s application went to patent, *Held* that R. is the senior applicant and entitled to all of the advantages which his

earlier application gives him. *Michle v. Read,* 18 App. D. C. 128; 96 O. G. 426; 1901 C. D. 396.

3. Claims.

749. The question of the right of a party to make a claim may sometimes be an ancillary question to be considered in awarding priority of invention, and there are good reasons why the question of the right to make the claims may be considered a basis for an award of priority rather than a ground for a dissolution of an interference. *Wickers and Furlong v. McKee,* 29 App. D. C. 4; 129 O. G. 869.

750. The contention that a party has no right to make a claim for a process of producing a printing-surface because he describes a step of heating the plate which is not included in the issue cannot be admitted as well founded where his specification makes it clear that the step is not necessary in all cases. *Ib.*

751. Where one of the parties to an interference who is an applicant had before him when he prepared his application the patent of his opponent and adopted the claims of said opponent for the apparent purpose of an interference, *Held,* that the applicant is not entitled to demand a construction of the claim of the patentee which would render it invalid by reason of that which he himself had accomplished if it can be upheld by any other reasonable interpretation not necessarily inconsistent with the statement of the patentee. *Ruete v. Elwell,* 15 App. D. C. 21; 87 O. G. 2119; 1899 C. D. 379.

752. Where the application of the senior party involved in an interference is a division of an earlier application and the senior party takes no testimony, the senior party is restricted to the date of filing of the earlier application for a constructive reduction to practice. *Robinson v. Seelinger,* 25 App. D. C. 237; 116 O. G. 1735; 1905 C. D. 640.

753. Where the first applicant was found to be the true first and original inventor of his own specific device and apparently the first inventor of any device of the kind, and the second applicant was likewise found to be the true first and original inventor of the specific device stated in his application, this being the order of invention, *Held* that the second applicant could not under any principle of law or any theory of justice be allowed the broad claim which would have dominated the invention of his prede-

cessor in the field, and neither could that predecessor be allowed the broad claim, for the reason that he had not advanced it before the arrival of the other party on the field of invention. *Beckman v. Wood,* 15 App. D. C. 484; 1899 C. D. 459.

754. Held that apparently neither party is entitled to a claim for the feature in controversy which should dominate the other and that apparently the claims presented by both and made the issue should be so re-formed that each should have a specific claim, provided each could draw one to avoid the reference. *Podlesak v. McInnerney,* 26 App. D. C. 399; 1906 C. D. 558; 120 O. G. 2127.

4. Questions in Issue.

755. The question of patentability of the claim in interference is not involved in the interference. After the interference shall have been finally determined the question of patentability may be raised against the successful party. *Hill v. Hodge,* 12 App. D. C. 528; 83 O. G. 1211; 1898 C. D. 480.

756. The patentability of the issue in an interference proceeding is not a jurisdictional fact without which there can be no determination of priority of claim. If the issue is held patentable by the Patent Office the interference proceeds in the regular course on the issue of priority alone. *Johnson v. Mueser,* 29 App. D. C. 61.

757. The question whether the invention in issue was placed in public use by one of the parties to an interference is not one which can be raised in an interference proceeding, but is one for the consideration of the Commissioner of Patents on the final allowance of the patent. *Burson v. Vogel,* 29 App. D. C. 388, 404; 131 O. G. 942; 1907 C. D. 669.

758. It is competent for parties to an interference case to show in the development of their testimony that their devices are different, and thereby preclude any adjudication of priority that would prevent either one from being protected in the possession of his own device. The *prima facie* and *ex parte* adjudication of identity which was the necessary prerequisite to the declaration of interference might be shown upon judicial investigation to have been erroneous, and the interests of justice would seem to demand that it should be open to the parties to make such showing and when such showing is made as part of the cause

and in the ordinary course of the litigation upon the merits it enters into the substance of the cause and is proper to be considered by the Court of Appeals on appeal from the final decision of the Commissioner. *Bechman v. Wood*, 15 App. D. C. 484; 89 O. G. 2459; 1899 C. D. 453.

759. Wood, the senior party, filed his application on October 28, 1893. Bechman, the junior party, filed on October 26, 1895. The interference was declared on the broad issue, which was covered by a broad claim made by Bechman when he filed his application. Wood, however, did not make the broad claim until April 29, 1896. The testimony shows that Wood was the first to conceive of the invention and that Bechman did not in any manner reduce it to practice prior to Wood's filing date. *Held*, that if the broad claim is patentable it must belong to the first inventor of the specific machine, if to any one, and that one is Wood. It certainly cannot be allowed to any subsequent inventor of any other specific mechanism. *Ib.*

760. *Held*, further, that the broad claim is not patentable to either party—not to Bechman, because he was not the first to invent an "independent transferring mechanism" in printing-machines in the combination described; not to Wood, because he did not make the claim before his rival made the discovery of his own patentable invention. *Ib.*

761. *Held*, further, that it is not competent for Wood, who had failed to make a broad claim and thus left the field open for other specific inventions than his own, to seek to control all such specific inventions by procuring a patent on the broad claim which he did not advance prior to the making thereof by Bechman. If the broad claim could be held to be patentable to Wood, the effect of a patent upon it to him would be unjustly retroactive, for it would sweep within its control all specific inventions in the same field made previously to the time when he made his claim. *Ib.*

762. *Held*, further, that while both parties to the interference are or may be entitled to patents for their respective specific devices neither one of them is entitled to a patent for the broad claim of the issue, and therefore there should be no judgment of priority of invention to either party with reference to the broad claim. *Ib.*

763. Neither party to this interference is entitled to prevail

against the other on the broad claim of the issue, the first being estopped from setting it up against the second applicant in consequence of the intervening rights of the latter to his own specific device and the second applicant being precluded from having the benefit of it for the reason that he was not the first on the field of invention. *Ib.*

764. Where it is argued that the junior party against whom the decision on priority is rendered did not disclose the invention in issue in his original application, *Held* that the consideration of this question is not only unnecessary, but is precluded by the previous declaration of interference. *Ostergren v. Tripler,* 17 App. D. C. 557; 95 O. G. 837; 1901 C. D. 350.

765. An agreement is made between an inventor, on the one hand, whereby he assigns a three-fifths interest in his present and future inventions relating to a particular subject, and an assignee, who, in consideration of the three-fifths interest thus asquired, agrees to furnish funds necessary for obtaining letters patent and for exploiting the invention and improvements. In an interference subsequently arising between them the question at issue is simply which party procured from the other the idea of the invention, for the reduction to practice may be regarded as of either. *Milton v. Kingsley,* 7 App. D. C. 531; 75 O. G. 2193; 1896 C. D. 420.

766. The assignee, if he made the discovery in question, did so only in the elaboration and reduction to practice of the ideas of the original inventor, and his obligations to the latter he should not now be permitted to repudiate by procuring a patent in which the latter has no interest. To allow this would be to place a premium upon fraud. *Ib.*

767. At the time of the contract it was certainly not contemplated that the assignee should be let into the secrets of the invention and become entitled to the larger share of the profits and yet be free to experiment as he pleased and appropriate to his own use the result of his experiments. Such a course would be a fraud upon the partnership. *Ib.*

768. Where appellant claimed that patents were wrongly granted to E. and that after he had adopted E.'s claims his application should have been placed in interference with E., *Held* that whether the grant of E.'s patents was right or wrong or capable of satisfactory explanation and whether an interference should

be declared are matters not within the jurisdiction of the Court of Appeals of the District of Columbia. *In re Neil,* 11 App. D. C. 584; 82 O. G. 749; 1898 C. D. 332.

769. If the Court of Appeals of the District of Columbia had a right to inquire into the propriety of the issue of the patents to E., and it was plain that an error had been committed therein, that would not excuse a similar error in favor of the appellant in order that he might be put in interference with him. *Ib.*

770. When the interference has been determined and the question of patentability is before the Primary Examiner, the defeated party to the interference has no other interest in the decision on patentability than as one of the general public whose interests are under the protection of the Commissioner of Patents. *Hill v. Hodge,* 12 App. D. C. 528; 83 O. G. 1211; 1898 C. D. 480.

5. Construction of Issues.

771. The Patent Office should not give so liberal a construction to the terms of an issue as to enable it to include a structure which had previously been held to be patentably distinct therefrom. *Breul v. Smith,* 10 App. D. C. 180; 78 O. G. 1906; 1897 C. D. 332.

772. The meaning given to the counts of an interference must be that intended by the party to the interference first making the claim. *Podlesak v. McInerney,* 26 App. D. C. 399; 1906 C. D. 558; 120 O. G. 2127.

773. Since the claims of an interference issue are to be construed in the light of the application of the party first making them, it would be manifestly improper for the Commissioner of Patents to read into them for any purpose limitations not disclosed in the application of such party. *Sobey v. Holsclaw,* 28 App. D. C. 65; 126 O. G. 3041; 1907 C. D. 465.

774. Where an applicant adopts a claim of a patent for the purpose of procuring an interference, *Held* that the meaning of the issue is to be determined by the specification of that patent. *Funk v. Whitely,* 25 App. D. C. 313; 117 O. G. 280; 1905 C. D. 670.

775. Where the claims of a patentee are copied by an applicant for the purpose of provoking an interference, an issue made on such claims is to be construed in the light of the specification of

the patent. *Bourn v. Hill,* 27 App. D. C. 291; 1906 C. D. 699; 123 O. G. 1284.

776. When a view of the ground covered by the claims of an issue has been accepted by the parties and has prevailed in the Patent Office, it should not be departed from in the final decision if injustice might result from the departure. *Breul v. Smith,* 10 App. D. C. 180; 78 O. G. 1906; 1897 C. D. 332.

777. The issue of an interference between an application and a patent issued during the pendency of the application which involves as one of its elements a "vibratory strip" should not be construed as limited to a vibratory strip having non-magnetic properties simply because the patentee who first made the claim shows a vibratory strip having that characteristic. The reasonable presumption is that the inventor intends to protect his invention broadly. *Andrews v. Nilson,* 27 App. D. C. 451; 1906 C. D. 717; 123 O. G. 1667.

778. The issue as interpreted in the light of the specification of the party first making the same is limited to an improved means for protecting the necessary joints in conductors for high-tension currents of electricity. The invention of the other party is an improvement in insulating-conductors, his plan of insulation at the joints being the same as along the entire length of the conductor. *Held* that the latter has no right to make the claim, the resemblance of the two devices being accidental rather than real. *Vicle v. Cummings,* 30 App. D. C. 455; 134 O. G. 777.

779. The second count, which covers "a tanning-bath," *Held* to be broad enough to cover either that used in a one-bath process where it performs the sole function of tanning or the second bath of a two-bath process where it acts first as a reducing agent and then as a supplementary tanning agent. *Rosell v. Allen,* 16 App. D. C. 559; 92 O. G. 1036; 1900 C. D. 333.

780. Where it is conceded that R. was the first inventor of and the first to use the particular bath, but always as the second bath of a two-bath process and as a reducing and not a tanning bath, *Held* that he is not the first inventor of the process of the first count of the issue, which is construed as limited to a one-bath process of tanning. *Rosell v. Allen,* 16 App. D. C. 559; 92 O. G. 1036; 1900 C. D. 333.

781. Where R. used the bath only as the second bath of a two-

bath process, but discovered that it acted first as a reducing agent and then as a supplementary tanning agent, *Held* that there is no analogy between this certain and direct result of the invention of the bath in issue and those accidental results of inventions which are not understood or appreciated by the inventors and which are held by the courts to be immaterial. *Ib.*

782. Where the issue if broadly construed read upon the devices of both parties, but consisted of a claim which had been allowed over a reference only upon a narrow construction inapplicable to the devices of one party, and it appeared that such construction of the claims was necessary in order to sustain the same, *Held* that, in the opinion of the court, an error had been committed and that the case should be remanded undecided to the Patent Office for further consideration as to identity of invention. *Podlesak v. McInerney*, 26 App. D. C. 399; 1906 C. D. 558; 120 O. G. 2127.

783. If it be incorrectly held that a party to an interference has a right to make a claim in issue, an award of priority to him is made possible. His adversary would thereby be deprived of a substantial right in that he would be refused a claim where he was necessarily the prior inventor, his adversary never having made the invention. *Ib.*

784. Where the records of the case show that the Primary Examiner had found no novelty in the omission of a cutter-bar in the old form of fodder-shredder from the new combination and had "with doubt and hesitation" declared novelty to exist in the restricted action of the cutter-teeth in immediate relation with the lower feed-roll acting as a cutter-bar in the very closest approach that could be accomplished, *Held* that the slight difference in arrangement being the very thing and the only thing that gave novelty to the new combination, it must follow that the practical test of a combination which did not fall within the specific combination is not a reduction to practice of that combination. *Tracy v. Leslie*, 14 App. D. C. 126; 87 O. G. 891; 1899 C. D. 306.

6. Effect on Subsequent Application.

785. Where a party whose application is involved in interference proceedings presents another application based upon the invention involved in the interference, it is proper to refuse a

patent upon the later application until the interference has been terminated. In such case it is just to suspend action on the later application. *In re Wickers and Furlong,* 29 App. D. C. 71; 129 O. G. 2074; 1907 C. D. 608.

7. Preliminary Statement.

786. The sworn preliminary statements required when an interference has been declared constitute the pleadings of the parties, and the court has had occasion several times, and for reasons satisfactory now as then, to approve the practice of holding the parties strictly to the dates given therein. *Hammond v. Basch,* 24 App. D. C. 469; 115 O. G. 804; 1905 C. D. 615.

787. The requirement of specific preliminary statements by the contending parties under oath is a reasonable one, and experience has demonstrated its special adaptation to the conditions that ordinarily exist in interference cases. *Cross v. Phillips,* 14 App. D. C. 228; 87 O. G. 1399; 1899 C. D. 342.

788. A preliminary statement is inconsistent and misleading which alleges that drawings and a device were made before the date assigned for actual conception, and such statement should not have been made without some explanation. *Robinson v. Copeland,* 24 App. D. C. 68; 112 O. G. 501; 1904 C. D. 664.

789. The rule of the Patent Office prescribing that "the parties will be strictly held in their proofs to the dates set up" in their preliminary statements is in accordance with right, reason, and with the principles of justice, for otherwise parties might be misled to their detriment. *Bader v. Vajen,* 14 App. D. C. 241; 87 O. G. 1235; 1899 C. D. 329.

790. Where a party has been refused permission to put back his dates as set out in his preliminary statement after seeing his adversary's dates, any attempt to prove the earlier dates is contrary to the rules of the Patent Office and to the general rules applicable to pleading in courts of law. *Fowler v. McBerty,* 27 App. D. C. 41; 1906 C. D. 585; 121 O. G. 1015.

791. Cases may often arise where the interest of the parties and the public will be best subserved by permitting dates earlier than those set forth in preliminary statements to be proved. It should, however, be done under the supervision of and with the approval of the Patent Office. *Fowler v. Boyce,* 27 App. D. C. 55; 1906 C. D. 659; 122 O. G. 1726.

792. Where the junior party is limited by his preliminary statement to date subsequent to the opposing party's record date, there is no good reason for examining the testimony of such junior party attempting to prove dates earlier than those set up in such preliminary statement where permission to amend the preliminary statement was asked and refused. *Ib.*

793. The dates of conception and reduction to practice are peculiarly within the knowledge of the inventor, and the facts by which they may be established are naturally of difficult contradiction by his adversary. Hence it is quite important to the administration of justice in contests between them that he be required to state those dates with reasonable certainty before notice of the foundations of his adversary's claim. These preliminary statements constitute what may be called the "pleadings" in the case, and to their allegations the evidence must respond. *Cross v. Phillips*, 14 App. D. C. 228; 87 O. G. 1399; 1899 C. D. 342.

794. It is always a suspicious circumstance in a case of interference that after the claim of one of the parties has been fully disclosed and fixed as a specified date the other party should then seek, by amendment of his preliminary statement, to show a date of invention prior to that of his original statement and prior to that of his opponent. *Parker v. Appert*, 8 App. D. C. 270; 75 O. G. 1201; 1896 C. D. 371.

795. Appellant's statement that he made the sketches upon which he relies for proof of his earlier date at said date, but mislaid them and forgot where they were until after the disclosure of the dates of appellee, is not credible in view of the facts surrounding the case, and amendment to his preliminary statement should not have been allowed. *Ib.*

796. It is of the utmost importance that strictness be observed as to the dates furnished in preliminary statements required in cases of interferences, for if parties were allowed to vary their dates at pleasure as to the time of discovery, invention, or disclosure it would inevitably lead to the imputation of deception and bad faith practiced on the part of the party so changing his dates. *Stevens v. Scher*, 11 App. D. C. 245; 81 O. G. 1932; 1897 C. D. 761.

797. In courts both of law and equity the right to amend is not an absolute one, but rests in the discretion of the court, and the exercise of this discretion is not reviewable unless it may be in

case of its palpable abuse. Necessarily the allowance or refusal of leave to amend a preliminary statement in an interference case rests in like manner in the discretion of the Commissioner of Patents, and it might be said for even a stronger reason, because he is vested with the authority to make the needful rules for the regulation of the practice of his Office without the supervising power of an appellate tribunal. *Cross v. Phillips,* 14 App. D. C. 228; 87 O. G. 1399; 1899 C. D. 342.

798. If the exercise of the discretion of the Commissioner in the matter of allowing and refusing leave to amend preliminary statements be subject to review by the Court of Appeals of the District of Columbia at all, it must be confined to those cases where the question comes up properly with the appeal from the decision on the merits and where it can be made clearly to appear that this discretion has been abused to the extent of causing a palpable miscarriage of justice. *Ib.*

799. The rule of the Patent Office which permits the statement of either party to an interference to be amended where material error has been committed through inadvertence or mistake and its correction is essential to the ends of justice is reasonable and just and seems to conform as near as may be, considering the peculiar character of interference cases, to the general rule prevailing in courts of equity. *Ib.*

800. Where leave to amend a preliminary statement is asked and refused by the Patent Office, testimony tending to establish dates earlier than those alleged cannot be considered on the question of priority, even with the consent of counsel, unless expressly approved by the Commissioner of Patents or his representatives. *Fowler v. Boyce,* 27 App. D. C. 55; 1906 C. D. 659; 122 O. G. 1726.

801. If any material error occurs in the preliminary statements, or other statements made to the Office through inadvertence or mistake, the statement may be corrected on motion upon showing to the satisfaction of the Commissioner that the correction is essential to the ends of justice, and the motion to correct the statement must be made, if possible, before the taking of any testimony and as soon as practicable after the discovery of the error. It is only upon complying with this rule that the correction of any material error in preliminary statements can be

made. *Bernardin v. Seymour,* 11 App. D. C. 91; 79 O. G. 1190; 1897 C. D. 428.

802. Where the allegation of the construction of a model is followed by a separate allegation of reduction to practice in a full-sized device upon a later date, the idea of intention to claim for the first construction anything more than conception is precluded. The opposing party may have rested his case on later dates in view of such statement, and to admit proof of an earlier date of reduction than that given would seriously impair, if not destroy, the rule of certainty in pleading long maintained in the Patent Office. *Hammond v. Basch,* 24 App. D. C. 469; 115 O. G. 804; 1905 C. D. 615.

803. Where the preliminary statement of a party alleges that an "experimental" device was constructed in January, 1901, and no date of reduction to practice is given, such party will not be restricted to the date of his application for his reduction to practice where no objection was made to the statement on the ground that it was indefinite. *Burson v. Vogel,* 29 App. D. C. 388, 404; 131 O. G. 942; 1907 C. D. 669.

804. Where F. is limited by his preliminary statement to a disclosure and reduction to practice subsequent to B.'s record date, *Held* that priority should be awarded to B. *Fowler v. Boyce,* 27 App. D. C. 48; 1906 C. D. 580; 121 O. G. 1014.

805. Where the Patent Office awarded priority in favor of the senior party on the record, *Held* that under the case as presented by the preliminary statement, which may be called the pleadings of the party, there was nothing to do but render a decision in favor of the senior party, whose application for the patent was a constructive reduction to practice of the invention several months earlier than the alleged conception of the same by his opponent. *Neth v. Ohmer,* 27 App. D. C. 319; 1906 C. D. 693; 123 O. G. 998.

8. Evidence.

806. In a controversy between two rival applicants the requirement that reduction to practice by the junior party before the senior should be established beyond a reasonable doubt is unduly onerous. *Wurtz v. Harrington,* 10 App. D. C. 149; 79 O. G. 337; 1897 C. D. 359.

807. When one of the parties to an interference has received a

patent, this on its face affords *prima facie* evidence that he is the inventor and that the thing patented is a novelty, and the patentee will not be defeated of his rights under the grant unless the applicant shall establish the priority of his invention beyond a reasonable doubt, and shall also show diligence in reduction to practice, especially where the question of priority has been passed upon in the same way by the various officials of the Office. *Doyle v. McRoberts,* 10 App. D. C. 445; 79 O. G. 1029; 1897 C. D. 413.

9. Dissolution.

808. When the Commissioner has determined that there is no patentable invention in issue, that determination is a virtual dissolution of any interference, for there cannot be interference unless there is at least *prima facie* patentable novelty. *Shellaberger v. Schnabel,* 10 App. D. C. 145; 79 O. G. 339; 1897 C. D. 364.

809. Failure to make a motion under Rule 122 to dissolve an interference upon the ground that an accepted amendment to one of the applications involved is for new matter amounts to an acquiescence in such acceptance and in the decision of the Office that such amendment does not involve new matter. *Croskey v. Atterbury,* 9 App. D. C. 207; 76 O. G. 163; 1896 C. D. 437.

810. Where a Primary Examiner on a motion to dissolve decides that one of the parties has no right to make the claims of an interference issue and such party, after filing an appeal from such decision, fails to prosecute the same and abandons it, such decision becomes final and binding upon the parties and precludes the subsequent *ex parte* consideration of the same question. *U. S. ex rel. Newcomb Motor Co. v. Moore,* 30 App. D. C. 464; 133 O. G. 1680.

10 Trade-marks Excluded.

811. The word "interference" in section 9 of the act establishing the Court of Appeals of the District of Columbia interpreted and *Held* not to mean and include disputes in Trade-Marks under section 3 of the Trade-Mark law of 1881, but to be confined to an interference in patent law. *Einstein v. Sawhill,* 2 App. D. C. 10; 65 O. G. 1918; 1893 C. D. 677.

11. In General.

812. Where a second application was filed while a first appli-

cation was forfeited, and a comparison of the two applications shows that the drawing of the first is the same as one sheet of the second and that the specifications of the first is incorporated in the second, and additional drawings are filed with the second application and additional matter is included in the specification thereof which embodies some features not in the first, *Held* that on an interference on the second application the applicant should have the benefit of his original application as a constructive reduction to practice of the invention set forth therein and embodied in the second application. *Cain v. Park,* 14 App. D. C. 42; 86 O. G. 797; 1899 C. D. 278.

IX. EVIDENCE.

1. Rules for Taking Testimony.

813. Testimony in patent cases of interference is taken substantially according to the rules which prevail in equity, and it is one of the cardinal principles of our jurisprudence that testimony both in equity and at common law must be taken under the safeguard of the right of cross-examination. Affidavits may lay the foundation for the introduction of testimony, but they are not themselves testimony and least of all could they be allowed to contravene testimony already taken. *Neilson v. Bradshaw,* 16 App. D. C. 92; 91 O. G. 644; 1900 C. D. 265.

2. Admissibility and Competency.

814. Where a party to an interference who is in possession of original copies of letters written in the regular course of business is asked to produce them, so that they may be used as evidence, but fails to do so, although he has ample time therefor, letter-press copies produced by the proper custodian of the same may be admitted with the same force and effect as the originals without throwing open the entire letter-press book to the inspection of the opposing party. *Kempshall v. Royce,* 29 App. D. C. 181; 129 O. G. 3162; 1907 C. D. 626.

815. An inventor after having testified in regard to his conception and the work done thereon produced a shorthand diary and read a number of entries from the diary showing dates and memoranda of work done. Of this evidence the court said: "Burson is a man over seventy years of age and appears to have kept a diary for fifty years in which he made a daily record of events. There is nothing in the appearance of this

diary to excite suspicion. The dates follow consecutively. It is true that the record is in shorthand after the Pittman system; but it appears that interpretation thereof could be made with sufficient certainty by one skilled in that method. * * * We see no substantial difference between this and the ordinary use of memoranda by a witness to refresh his memory." *Burson v. Vogel,* 29 App. D. C. 388, 404; 131 O. G. 942; 1907 C. D. 669.

816. The results of the use of the microscope are admissible as evidence and are presumed to be correct until shown to the contrary, upon the same principle that the results of the working of many other scientific instruments are presumed to be correct. *Flora v. Powrie,* 23 App. D. C. 195; 109 O. G. 2443; 1904 C. D. 636.

817. Where exhibits are introduced in evidence and it is not pretended that everything on those exhibits is discernible to the naked eye, an examination of the exhibits by the aid of a microscope is legally admissible. *Ib.*

818. Evidence that some other person than the parties to the interference is the inventor of the issue is not pertinent to an interference proceeding. *Garrels v. Freeman,* 21 App. D. C. 207; 103 O. G. 1683; 1903 C. D. 542.

819. Evidence that a party at a certain time stated that he had reduced the invention in controversy to practice while admissible as tending to establish the fact of conception is clearly incompetent to prove the independent fact of reduction of that conception to practice. *Petrie v. DeSchweinitz,* 19 App. D. C. 386; 99 O. G. 1387.

820. Where, in an interference proceeding, objection had been made to the introduction of letters on the ground that their execution had not been sufficiently proved, the objection was not tenable, as the letters were introduced merely as collateral evidence relating to the conduct of the party, and the fact that they were received in due course of mail and acted upon by the writer and the addressee was sufficient proof of genuineness. *Jones v. Cocke,* 25 App. D. C. 524; 117 O. G. 1493; 1905 C. D. 689.

821. Where in an interference proceeding, objections had been made to the introduction of letters and checks on the ground that it was not shown that they related to the invention in issue,

Held that though the correspondence does not set out the invention and might have related to some other improvement in type-writers there is no reasonable doubt in view of the testimony and surrounding circumstances that the correspondence and checks do relate to the present invention. *Ib.*

822. Where F. in his testimony-in-chief shows that he disclosed the invention in 1897 and in his testimony in rebuttal attempts to show by the same witnesses that he disclosed the invention in 1895, *Held* that such rebuttal testimony is wholly inadmissible and would have tended to discredit the disclosure in 1897 if this latter had not been supported by some record testimony. *Furman v. Dean*, 24 App. D. C. 277; 114 O. G. 1552; 1905 C. D. 582.

823. Where Antisdel, the junior party, made out a *prima facie* case in support of his claim for priority of invention and Foster did not attempt to rebut or overcome it, but relied upon the evidence of Lloyd, one of Antisdel's witnesses, to show that Lloyd and not Antisdel was the inventor of the subject-matter of the invention, *Held* that Lloyd's testimony cannot be used in favor of Foster, and priority of invention is therefore awarded to Antisdel. *Foster v. Antisdel*, 14 App. D. C. 552; 88 O. G. 1527; 1899 C. D. 413.

824. Evidence that some other party than the parties to the interference proceeding is really the inventor of the device in issue is impertinent to the issue and cannot be received or considered by those charged with the duty of determining the issue. *Ib.*

825. Where a party to an interference took testimony to prove a reduction to practice of his invention at a date prior to that set up in his preliminary statement, *Held* that said testimony without amendment to the preliminary statement duly made by the authority of the Commissioner of Patents was inadmissible and entitled to no consideration. *Cross v. Phillips*, 14 App. D. C. 228; 87 O. G. 1399; 1899 C. D. 342.

826. While it is true that the fact of conception by an inventor for the purpose of establishing priority cannot be proved by his mere allegation or his unsupported testimony, where there has been no disclosure to others or embodiment of invention in some clearly perceptible form, such as drawings or models, with sufficient proof of identity in point of time, it does not follow

from this principle that the party upon whom is cast the *onus* of proving the fact of priority of invention is an incompetent witness to testify in his own behalf as to the facts of priority. *Winslow v. Austin,* 14 App. D. C. 137; 86 O. G. 2171; 1899 C. D. 301.

827. It is not necessary that documents from which a witness may have refreshed his memory as to dates be produced at the examination; but the failure to do so would often cause the facts to be regarded as of little weight. When produced and used to assist the memory, they need not be offered as evidence, and in a majority of instances they would be inadmissable if offered. *McCormick v. Cleal,* 12 App. D. C. 335; 83 O. G. 1514; 1898 C. D. 492.

828. There is no reasonable difference between a statement made by a witness fixing a date by reference to an original paper or to a regular business entry in a book in the possession of a person within the jurisdiction and one fixing it by reference to something calculated to fix it in mind claimed to have happened to him or in the community about the same time. A statement of the former character would be preferable, in the interests of justice, for if untrue it would ordinarily furnish ample opportunity to completely discredit the witness. *Laas v. Scott,* 26 App. D. C. 354; 1906 C. D. 621; 122 O. G. 352.

829. *Quaere* whether the testimony of a wife in favor of her husband in an interference case is admissible at all and whether disclosure to a wife is disclosure of an invention to others or to the public in the sense of the patent law. *Harter v. Barrett,* 24 App. D. C. 300; 114 O. G. 975; 1905 C. D. 578.

830. Where a witness refers to an entry in a cash-book, which is not produced, as a means of refreshing his memory and no objection to the testimony is interposed and the production of the book was not demanded, the testimony is admissible. *Lowrie v. Taylor,* 27 App. D. C. 522; 1906 C. D. 713; 123 O. G. 1665.

831. A cash-book, an entry in which is used by a witness to refresh his memory, need not be introduced in evidence. *Ib.*

832. Where a witness testified positively to an alleged date and stated that he was able to fix the date by the daily work of his company, *Held* that it was not necessary to offer the record in evidence and that the record was not admissible in evidence

at all. The entry could only serve to refresh the memory of the witness and enable him to explain why he could fix the date with certainty, but that if counsel had been abundantly careful he would have had the book containing the entry produced and submitted to the inspection of his opponent. *Laas v. Scott,* 26 App. D. C. 354; 1906 C. D. 621; 122 O. G. 352.

3. Weight and Sufficiency.

833. In weighing testimony we are not bound to believe a particular fact, testified to by one or more witnesses, simply because they may not have been directly contradicted therein or impeached generally by evidence tending to show a want of reputation for veracity. The inherent probability or improbability of such fact is to be tested by unquestioned circumstances that surround the main transaction or occurrence, as well as by "the ordinary laws that govern human conduct." *Beals v. Finkenbiner,* 12 App. D. C. 23; 82 O. G. 598; 1898 C. D. 326.

834. The weight of the testimony of the parties to an interference proceeding and its inherent probabilities must be considered in the light of all the circumstances of the case, and though conflict may exist a rational conclusion may be drawn from what appears to be the real transaction as disclosed by the surrounding circumstances—such circumstances as lend support to the credibility of one of the parties as opposed to that of another. *Flather v. Weber,* 21 App. D. C. 179; 104 O. G. 312; 1903 C. D. 561.

835. To overcome a case made by an earlier application the same weight of evidence is not required as in criminal cases. It is only necessary that the burden of proof should be sustained by the junior applicant by a preponderance of testimony. *Estey v. Newton,* 14 App. D. C. 50; 86 O. G. 799; 1899 C. D. 284.

836. Where testimony was introduced to prove things alleged to have been done prior to the dates set up in a preliminary statement, such testimony cannot be regarded as having any weight. *Bader v. Vajen,* 14 App. D. C. 241; 87 O. G. 1235; 1899 C. D. 329.

837. It is well settled that the uncorroborated testimony of the junior party in interference is insufficient to overcome the presumption attaching to the prior filing date of the senior party. *Durkee v. Winquist,* 136 O. G. 229; 31 App. D. C. 248.

838. The uncorroborated testimony of a party as to conception, the making of drawings, and an actual construction of the invention before his rival's invention cannot be accepted, although it may appear plausible. *Sharer v. McHenry,* 19 App. D. C. 158; 98 O. G. 585; 1902 C. D. 503.

839. That the unsupported evidence of a party will not be accepted or acted upon as sufficient proof of the conception of an invention is a well-settled principle, the reasons for which apply with equal force to its reduction to practice. *Petrie v. De-Schweinitz,* 19 App. D. C. 386; 99 O. G. 1387; 1902 C. D. 534.

840. Where the burden is upon a party to establish his case beyond a reasonable doubt by reason of a previously granted patent to his opponent, doubts raised by contradictions and uncertainty in the testimony cannot be removed by conjecture or any plausible theory as to the probability of the situation. Mere preponderance of evidence in his favor is insufficient. *Neilson v. Bradshaw,* 16 App. D. C. 92; 91 O. G. 644; 1900 C. D. 265.

841. The production of a book purporting to show the date of a sale to which a witness has testified adds nothing by way of corroboration of a witness's oral testimony where the person who kept the book is not called to identify it. *Goolman v. Hobart,* 135 O. G. 1123; 31 App. D. C. 286.

842. Evidence of reduction to practice must embrace all the elements of the issue, leaving nothing to inference merely. *Robinson v. Seelinger,* 25 App. D. C. 237; 116 O. G. 1735; 1905 C. D. 640.

843. The mere oral testimony of a witness given five years after the event can be given very little weight when there is no reason shown why the matter should have been fixed in his mind and when the original sketches and devices in regard to which he is testifying have not been produced to show what was done. *Tyler v. St. Amand,* 17 App. D. C. 464; 94 O. G. 1969; 1901 C. D. 301.

844. The testimony as to the making of a certain device given by a witness familiar with the art and interested in improvements therein and who therefore gave particular attention to the disclosure is entitled to much greater weight than that of one not interested in the business. *Greenwood v. Dover,* 23 App. D. C. 251; 109 O. G. 2172; 1904 C. D. 630.

845. Where certain screens in evidence are said by the inventor

to have been made by the process of the issue, but an examination of those screens with a microscope by the tribunals of the Patent Office indicates that they were not made by that process, *Held* sufficient to determine the matter against him in view of the *onus* upon him of proving his case. *Flora v. Powrie,* 23 App. D. C. 195; 109 O. G. 2443; 1904 C. D. 636.

846. Where the inventor testifies that he made certain screens in evidence by the process of the issue, but the screens themselves do not show how they were made, and the only corroborating witnesses testify that the screens were made, but do not know how they were made, *Held* not to establish the fact that he performed the process of the issue. *Ib.*

847. Where the evidence in an interference is conflicting and very unsatisfactory and the *onus* of proof is upon A., the decision of the Assistant Commissioner in favor of J. and F. is the only rational conclusion which could be reached. *Austin v. Johnson,* 18 App. D. C. 83; 95 O. G. 2685; 1901 C. D. 391.

848. Where seven witnesses testifying four years after the event claim to have seen the roller-holder box and a drawing, but no one of them is shown to have had any acquaintance with the photographic art or with any branch of it or to have had any intelligent comprehension of the thing which was exhibited to them and had no interest in the subject-matter and no means save their unaided memories whereby to fix the time, *Held* that the extreme improbability of their testimony is apparent. *Eastman v. Houston,* 18 App. D. C. 135; 95 O. G. 2064; 1901 C. D. 386.

849. Where A. and a member of his company identify certain studs as having been made in 1897 and positively identify certain dies as the ones used in their production and it subsequently appears that the dies referred to will not make the buttons, and it also appears that the memory of the witness is weak as to other matters, *Held* that the evidence is not clear and satisfactory and does not carry conviction with it. *Adams v. Murphy,* 18 App. D. C. 172; 96 O. G. 845; 1901 C. D. 401.

850. Where the inventor alleges the making of caps embodying the invention and the supporting testimony of other witnesses is simply to the effect that they saw caps like cap No. 1, but there are other caps more or less like No. 1 and yet which do not embody the issue in controversy, *Held* that the testimony

amounts to nothing and does not prove the making of the invention. *Lindemeyr v. Hoffman,* 18 App. D. C. 1; 95 O. G. 838; 1901 C. D. 353.

851. Where it is admitted by both parties that the invention was reduced to practice in the presence of both of them and the only dispute between the parties is as to which one is entitled to the benefit of this reduction, *Held* that the fact that the invention was reduced to practice may be taken as established. *Flather v. Weber,* 21 App. D. C. 179; 104 O. G. 312; 1903 C. D. 561.

852. Where G. calls a witness (U.) who testifies that he is the inventor of the issue and this testimony does no more than establish the relation between the witness U. and one of the contesting parties F. of employee and employer, respectively, whereby the assistance of the employee inures to the benefit of the employer under the well-established rule governing that and similar relations, such testimony offered in behalf of G. has the effect to strengthen rather than weaken F.'s claim of act and date of invention. *Garrels v. Freeman,* 21 App. D. C. 207; 103 O. G. 1683; 1903 C. D. 542.

853. The fact that two witnesses have testified to an act of invention instead of one does not change the rule that the unsupported testimony of an inventor is insufficient to establish an alleged date of conception or reduction to practice where these two witnesses are the two applicants who jointly lay claim to the one invention, the one conception. The conception of one is incomplete without conjunction with the other. All the reasons which underlie the rule apply with the same force where there are joint inventors instead of a single one. *Ib.*

854. Where joint inventors testify in their own behalf to a joint conception and no witness is called to prove a disclosure of the invention by them and there are no independent circumstanc : established by the evidence tending to corroborate their statements, these unsupported statements of the joint inventors are insufficient to overcome the priority that had been established on the part of the opposing party. *Ib.*

855. Where the applicant claims to have conceived the invention and to have disclosed it to the patentee and there is but one reduction to practice—that of the patentee—and the testimony of the applicant is clear and unshaken by cross-examination, it

is sufficient for a time to overcome the burden of proof imposed upon the applicant and compel his adversary to account for his claim of the invention. *Gallagher v. Hastings,* 21 App. D. C. 88; 103 O. G. 1165; 1903 C. D. 531.

856. Where the witnesses called to corroborate Cobb as to a disclosure of the invention make it appear that he had in mind the result to be accomplished, but not the means by which it was to be done, *Held* that a conception and disclosure of the invention is not established. *Cobb v. Goebel,* 23 App. D. C. 75; 108 O. G. 1591; 1904 C. D. 589.

857. Where the testimony of the inventor is vague and is corroborated only by witnesses insufficiently skilled, if skilled at all, in the particulars involved, who testified five or six years after the event, *Held* insufficient to overcome the prior filing date of the opposing party. *McKnight v. Pohle,* 22 App. D. C. 219; 105 O. G. 977; 1903 C. D. 619.

858. Where the evidence is very unsatisfactory and uncertain, but shows S. to have been active in experimentation on the general lines of this invention in February, 1897, and that he then filed an abortive application not disclosing this invention and does not allege reduction to practice until the summer of 1897, *Held* that he has not satisfactorily shown conception in February. *Silverman v. Hendrickson,* 19 App. D. C. 381; 99 O. G. 1171. 1902 C. D. 527.

859. The allegation on behalf of S. that he reduced the invention to practice in the summer of 1897 does not show that he reduced it to practice before June 9. *Ib.*

860. Where one of the parties to an interference testifies to a conversation between him and the other contestant relative to a disclosure of the invention by the former to the latter and a clerk in the store in which such alleged conversation took place testifies to precisely the same conversation twenty months after it took place and it appears that at the time the conversation took place such clerk was waiting upon a customer, the remarkable likeness in the two versions under the circumstances indicates a manufactured story, and the testimony is weakened rather than strengthened by the attempted corroboration. *Alexander v. Blackman, 26* App. D. C. 541; 1906 C. D. 602; 121 O. G. 1979.

861. Where the only testimony taken by joint inventors upon

the question of the date of their invention is their own depositions, *Held* that the depositions of parties to interference upon this point, unless corroborated by independent circumstances established by the evidence, are clearly insufficient to prove conception of the invention. *Podlesak v. McInnerney*, 26 App. D. C. 399; 1906 C. D. 558; 120 O. G. 2127.

862. Evidence considered and *Held* insufficient to clearly prove that the invention of the issue originated with F. rather than H. *French v. Halcomb*, 26 App. D. C. 307; 1906 C. D. 547; 120 O. G. 1824.

863. The statements in a memorandum of a note-book produced by F. one of the interfering parties, and alleged to disclose the invention in issue, *Held* insufficient to prove conception where it appears that the entry was seen by no one and there is no corroborative evidence on the point except a statement of another witness that F. produced such a book at a given date. *Ib.*

864. The testimony reviewed and *Held*, in view of the unquestioned facts of the case and the circumstances surrounding the transactions between L. and D. to sustain D.'s claim that he was the original inventor. *Duff v. Latshaw*, 136 O. G. 658; 31 App. D. C. 255.

865. K., who succeeded D. as superintendent of L.'s factory, filed an application for the invention in issue at L.'s suggestion and for his benefit, L.'s application not being filed until after the interference was declared between K. and D. *Held* that this strongly discredits L.'s claim to inventorship. *Ib.*

866. The testimony of a witness that photographic copies of application drawings are "practically the same thing" as a prior construction is very materially weakened by the admission under cross-examination that he did not understand such drawings, because he did not understand mechanical drafting. *Goolman v. Hobart*, 135 O. G. 1123; 31 App. D. C. 286.

867. The testimony of a party to an interference that he devised a removable metallic plate for a specified purpose after he had received the suggestion of a third party through the opposing party of a removable plate covered with cloth for the same purpose is equivalent to an admission that the opposing party was first in possession of the invention in issue covering a removable surface or plate broadly and also a metallic removable

plate for such purpose. *Bossart v. Pohl,* 135 O. G. 453; 31 App. D. C. 218.

868. The evidence in an interference case, *Held* to show that the senior party was not the original inventor, but that the junior party, from whom he derived his knowledge, was entitled to priority. *Smith v. Smith,* 31 App. D. C. 518; 136 O. G. 850.

869. Where R., who was a patent solicitor, familiar with the patent law, both as inventor and solicitor, entered into a contract with K. and J., joint claimants of the invention in issue, according to the terms of which he was to attempt the sale of the invention and if he was successful he was to have one-third of the proceeds, *Held* to constitute a substantial acknowledgement that the invention was made by K. and J. *Rics v. Kirkegaard,* 30 App. D. C. 199; 132 O. G. 845.

870. Where in an interference case a party presents evidence of completion of the invention prior to the date to which he is restricted by his preliminary statement, *Held* that such evidence is entitled to some consideration upon the question of diligence as tending to show that he had some reason to be satisfied with the practicability of his device. *Hammond v. Basch,* 24 App. D. C. 469; 115 O. G. 804; 1905 C. D. 615.

871. Where an applicant relies upon an earlier application and its filing date is such that if he had made the invention at that time it could have been described and claimed in such application, but was not, *Held* that the omission to include the invention of the issue in such application discredits his testimony that he has made the invention at such early date. *Norden v. Spaulding,* 24 App. D. C. 286; 114 O. G. 1828; 1905 C. D. 588.

872. Where it is established beyond question that B. had working drawings and a model made of the invention and that H. saw them and understood their construction and operation and said nothing about any previous conception or disclosure of it by himself, notwithstanding the fact that both parties were at the time in the employ of the same company, which was engaged in the manufacture of similar devices and whose superintendent solicited suggestions from its employees for improved constructions, and H. persisted for more than a year in the same silence after seeing the invention as disclosed by B. and did not even seek within that time to protect himself by an application for a patent, *Held* that H.'s conduct was antagonistic to his claim of

invention and was not consistent with the existence of a right on his part which he was desirous to protect. *Harter v. Barrett,* 24 App. D. C. 300; 114 O. G. 975; 1905 C. D. 578.

873. The testimony of a wife as to disclosure of an invention must be rigidly scrutinized and not lightly admitted as sufficient without some corroboration of its truth, in view of the difficulty, often amounting to impossibility, of contradicting it or even of subjecting it to proper cross-examination. *Ib.*

874. Where the oral testimony of a wife as to disclosure of an invention is given from her unaided memory and is wholly uncorroborated by other evidence, though the testimony itself is specific and explicit enough, *Held* such testimony insufficient to establish her husband's claim of conception and disclosure of the invention. *Ib.*

875. Where Howard and his assignee testify that the operation of the machine in 1883 was successful and the testimony of two employees of the post-office was to the same effect, but was vague and indefinite and given sixteen years after the event, *Held* insufficient to overcome the presumption raised by the apparent abandonment of the machine. *Lloyd v. Antisdel,* 17 App. D. C. 490; 95 O. G. 1645; 1901 C. D. 371.

876. Where a gun embodying the extractor mechanism in controversy was tested by Government officers at the proving-ground and a memorandum was made of defects in the firing mechanism and other parts of the breech mechanism, but nothing was said of the extractor, the silence as to the extractor is not proc that it was satisfactory. *Dashiell v. Tasker,* 21 App. D. C. 64; 103 O. G. 2174; 1903 C. D. 551.

877. Where S. claims to have made the invention in 1897 and was thereafter employed by H.'s company which he knew was in pursuit of some such device and he failed to disclose the invention to the officers of the company, although he did suggest other improvements, his conduct indicates that he did not have the invention as alleged. *Slaughter v. Halle,* 21 App. D. C. 19; 102 O. G. 469; 1903 C. D. 519.

878. Where seven witnesses testifying four years after the event claim to have seen the roller-holder box and a drawing, but no one of them is shown to have had any acquaintance with the photographic art or with any branch of it or to have had any intelligent comprehension of the thing which was exhibited

to them and had no interest in the subject-matter and no means save their unaided memories whereby to fix the time, *Held* that the extreme improbability of their testimony is apparent. *Eastman v. Houston,* 18 App. D. C. 135; 95 O. G. 2064; 1901 C. D. 386.

879. Where C.'s testimony to a certain date of conception was clearly corroborated by the witness B., whose intelligence and capacity to understand and explain the disclosure made by C. are apparent, and B., though deeply interested in the result, stands unimpeached, and the few surrounding circumstances that shed any light upon the question tend to support C.'s claim and none are inconsistent with it, *Held* that such claim is established. *Turnbull v. Curtis,* 27 App. D. C. 567; 1906 C. D. 732; 123 O. G. 2312.

880. A delay of nearly three years in filing an application after an alleged reduction to practice by one who was a manufacturer in the art to which the invention belonged and who had full knowledge of the need for the invention and ample means for making improvements outweighs the mere oral testimony of witnesses who do not testify clearly and positively. *Bourn v. Hill,* 27 App. D. C. 291; 1906 C. D. 699; 123 O. G. 1284.

881. If there could be any doubt that the invention of the issue was disclosed by certain specifications to the perception of H., who undertook the preparation of a proposal to meet their requirements, it is removed by his own admission under examination as a witness that they suggest the subject-matter of the interference. *Henry v. Doble,* 27 App. D. C. 33; 1906 C. D. 654; 122 O. G. 1398.

882. Where a certified copy of an application was introduced in evidence, but no proof was made as to the application having been allowed, *Held* that as the Commissioner had examined the files of his Office and found that the said application had been formally allowed and had considered the fact in making his decision it was sufficient proof that the application had been allowed. *Cain v. Park,* 14 App. D. C. 42; 86 O. G. 797; 1899 C. D. 278.

883. Where a caveat disclosed substantially the invention in interference, *Held* that the expression in the caveat of a desire to mature the same does not show that the invention could not

have been reduced to practice at its date. *Colhoun v. Hodgson*, 5 App. D. C. 21; 70 O. G. 276; 1895 C. D. 122.

884. Elwell, the junior party and patentee, filed his application January 20, 1896, and Ruete filed November 6, 1896. To overcome Elwell's case, Ruete alleged conception on January 17, 1895, and reduction in February or March, 1895. *Held* that Ruete, on whom was the burden of proof and who under the rules is required to prove his case by evidence so cogent as to leave no reasonable doubt, has failed to discharge the *onus* placed upon him, and priority is therefore awarded to Elwell. *Ruete v. Elwell*, 15 App. D. C. 21; 87 O. G. 2119; 1899 C. D. 379.

885. Where the testimony in an interference proceeding between an applicant and a patentee shows that the former was present on one of the first occasions upon which the invention which is the subject of the issue was tested and that he ridiculed the attempt as impossible of execution and dangerous to attempt, where the testimony also shows that the applicant did not claim credit for the invention when he was first accustomed to hear it attributed to the patentee, where it appears that the application was filed after the issue of the patent and is a substantial copy thereof, and where there are other and corroborating circumstances, the presumption that the patentee is the prior inventor has not been disturbed. *Doyle v. McRoberts*, 10 App. D. C. 445; 79 O. G. 1029; 1897 C. D. 413.

886. Where Winslow relied upon his record date to prove priority and Austin took testimony and claimed that he disclosed the invention to Winslow before Winslow filed his application, *Held* that Winslow's failure to rebut this assertion of Austin's furnished convincing evidence that Austin was the prior inventor. *Winslow v. Austin*, 14 App. D. C. 137; 86 O. G. 2171; 1899 C. D. 301.

887. The fact that Austin took an assignment from Licht and Keeney, who were the assignees of Winslow, ought not to be taken as an admission on his part that he in reality and truth had no claim to the invention involved in the issue and that the sole and exclusive right was in Winslow. *Ib.*

888. Where a witness falsifies a fact in respect of which he cannot be presumed liable to mistake, courts are bound "upon the principles of law, morality and justice to apply the maxim,

'falsus in uno falsus in omnibus.' " *Alexander v. Blackman,* 26 App. D. C. 541; 1906 C. D. 602; 121 O. G. 1979.

888a. Where a party attempts to fix a certain date, as to which he has no independent recollection, by reference to the dates in a cash-book showing when another party was absent, and the cash-book also shows that such party was absent at other times not remote, *Held* that the evidence is not sufficient to fix the earlier date rather than the later. *Howard v. Bowes,* 31 App. D. C. 619; 137 O. G. 733.

888b. Where the inventor has no definite recollection of the time he conceived his invention, but can only estimate the date by the filing of a certain document which was filed five days after the filing of the opposing party's application, and in answer to one question he placed his conception at a few weeks prior to the filing of the document and later admits that before testifying he fixed the time in the affidvait at about one week, *Held* that the evidence is too uncertain to overcome the filing date of the opposing party's application. *Steinmetz v. Thomas,* 31 App. D. C. 574; 137 O. G. 479.

4. Burden of Proof.

889. A patent is *prima facie* evidence of its own validity and that it was regularly issued; and the burden of proving want of novelty in the invention is on the party seeking to establish that fact. *Busch v. Jones,* 16 App. D. C. 23; 28 W. L. R. 535.

890. The burden is upon the applicant to establish, by proof that is clear and conclusive, the patentability of the invention as claimed. *Durham v. Seymour,* 6 App. D. C. 79; 71 O. G. 601; 1895 C. D. 307.

891. In questions of priority of invention in matters of interference the party first making application for patent has a *prima facie* case as against a junior applicant. The *onus* of proof is upon the latter, and unless the *onus* is fully discharged the senior applicant must prevail. *Hunter v. Stikeman,* 13 App. D. C. 214; 85 O. G. 610; 1898 C. D. 564.

892. The burden of proof is not only upon a junior applicant to show priority of invention, but he must also show that he has used reasonable diligence in developing and perfecting his invention, for in such cases mere conception without actual reduction to practice within a reasonable time amounts to nothing. *Ib.*

893. The burden of proof is upon the party who is the last to file his application in the Office, and this status of the parties is not changed by the fact that the junior applicant may have obtained a patent. *Hunt v. McCaslin*, 10 App. D. C. 527; 79 O. G. 861; 1897 C. D. 401.

894. A junior applicant has the burden of overcoming the presumption of priority that attaches to another from the fact of his earlier filing date. *Smith v. Smith*, 31 App. D. C. 518; 136 O. G. 850.

895. Where the burden of proof is heavy upon the applicant as being both the junior in the Office and being required to overcome the effect of a patent in the hands of his opponent, *Held* that an earlier application filed by the applicant cannot lighten this burden of proof where such application does not disclose the issue. *Norden v. Spaulding*, 24 App. D. C. 286; 114 O. G. 1828; 1905 C. D. 588.

896. Upon him who would overcome the presumption that to the person who has first reduced to practice belongs the merit also of priority of conception, the burden rests of doing so by satisfactory evidence. *Bader v. Vajen*, 14 App. D. C. 241; 87 O. G. 1235; 1899 C. D. 329.

897. The burden of establishing priority imposed upon the last to file application, *Held* greatly increased by the concurring decisions of the several tribunals of the Patent Office in favor of his opponent. *Turnbull v. Curtis*, 27 App. D. C. 567; 1906 C. D. 732; 123 O. G. 2312.

898. There is no tendency toward laxity in the application of the rule that a conclusive weight of evidence is necessary to establish priority on the part of an applicant to overcome a regular and formal patent granted to his opponent. *Sharer v. McHenry*, 19 App. D. C. 158; 98 O. G. 585; 1902 C. D. 503.

899. It is the settled rule of this court that unanimity of decision in the Patent Office imposes upon an appellant the burden of showing very clearly that error was committed in the final decision of the Commissioner in order to warrant its reversal. *In re Adams*, 24 App. D. C. 275; 114 O. G. 2093; 1905 C. D. 602. *Talbot v. Moncll*, 23 App. D. C. 108; 109 O. G. 280; 1904 C. D. 606.

900. Where a patent is inadvertently issued while an application by another is pending, without an interference, no advantage

accrues to the patentee on the question of burden of proof. *Cutler v. Leonard*, 31 App. D. C. 297; 136 O. G. 438. *Shaffer v. Dolan*, 23 App. D. C. 79; 108 O. G. 2146; 1904 C. D. 592.

901. Where an applicant is involved in interference with a previously-granted patent, the burden is upon him to prove his case beyond a reasonable doubt. *Dashiell v. Tasker*, 21 App. D. C. 64; 103 O. G. 2174; 1903 C. D. 551. *Meyer v. Surfert*, 21 App. D. C. 26; 10_ O. G. 1555; 1903 C. D. 529. *Sendelbach v. Gillette*, 22 App. D. C. 168; 109 O. G. 276; 1904 C. D. 597. *Gedge v. Cromwell*, 19 App. D. C. 192; 98 O. G. 1486; 1902 C. D. 514.

902. The burden of proof is heavily cast upon an applicant who is placed in interference with a patentee when the application was not filed until after the date of the grant of the patent. *Gallagher v. Hastings*, 21 App. D. C. 88; 103 O. G. 1165; 1903 C. D. 531.

903. Where the junior party has a patent to contend with and he was induced to file his application by a perusal of that patent, the burden of proving his case beyond a reasonable doubt is upon him. *Kelley v. Fynn*, 16 App. D. C. 573; 92 O. G. 1237; 1900 C. D. 339.

904. Where Q.'s application was filed after O.'s patent issued, but it appears that at the time of the issue there was a joint application by H. and Q. pending, *Held* that Q. can derive no benefit in so far as the burden of proof is concerned from the joint application. *Quist v. Ostrom*, 23 App. D. C. 69; 108 O. G. 2147; 1904 C. D. 594.

905. In an interference case between B. and C., *Held* that the controversy turned entirely upon the facts in evidence, that in addition to the burden imposed upon him by the patents regularly issued to C., B. has that of overcoming the effect of the successive adverse decision in the Patent Office; that the evidence on behalf of B. is uncertain, fraught with suspicion, and cannot be accepted as sufficient proof of the facts essential to establish the appellant's averments either as originally made or as sought to be amended, and that the decision of the Commissioner must be affirmed. *Bauer v. Crone*, 26 App. D. C. 352; 1906 C. D. 545; 120 O. G. 1824.

906. An applicant in interference with a patent granted before the filing of the application has the burden of proving his case

beyond a reasonable doubt, and this burden is not discharged where the testimony merely raises a doubt as to which of the two parties made the invention or whether a third party may not have contributed the essential idea which led to the invention. *French v. Halcomb*, 26 App. D. C. 307; 1906 C. D. 547; 120 O. G. 1824.

907. If the application of one of the parties to an interference is a division of an earlier application filed prior to that of his adversary, the burden of overcoming this earlier date is on the latter. *Howell v. Hess*, 30 App. D. C. 194.

908. Where Corry and Barker were not only the junior parties, but admittedly employed by McDermott to construct a machine embodying an invention made by him, *Held* that the burden is upon them to prove that the improvements embodied by them in the machine were their own invention and not the ideas suggested by McDermott. *Corry v. McDermott*, 25 App. D. C. 305; 117 O. G. 279; 1905 C. D. 668.

909. Where the senior party was a patentee, but the application of the junior party was pending when the patent issued, no benefit accrued to the senior party from his possession of a patent in respect to the burden of proof imposed upon his adversary. *Paul v. Hess*, 24 App. D. C. 462; 115 O. G. 251; 1905 C. D. 610.

910. Where the senior party relies upon his record date, the burden is upon the junior party to show reduction to practice preceding that date or else earlier conception followed with due diligence to reduction to practice, either actual or constructive. *Ib.*

911. Where devices embodying an invention are made and after trials discarded and thrown in the scrap, and no similar devices were ever used afterward, and only upon reading a patent which had been granted to another person does the inventor recall the fact that he thought he had the same device some years before, *Held* that while this is not an unusual idea under such circumstances claims of this character must be proved by testimony of the clearest and most satisfactory character before they can be accepted. *Lemp v. Mudge*, 24 App. D. C. 283; 114 O. G. 763; 1905 C. D. 571.

912. The fact that a patent has been issued irregularly during the pendency of an interfering application does not give it an

advantage in the interference proceeding, and such proceedings should be governed by the ordinary rules of the courts of law in respect to the burden of proof. *Wurts v. Harrington,* 10 App. D. C. 149; 79 O. G. 337; 1897 C. D. 359.

913. Where a patent has been regularly issued and a question of anticipation or priority is raised in a suit for infringement or in proceedings in interference, a strict rule as to the proof required to overcome the patent, especially where the testimony from its nature and circumstances is open to suspicion, should prevail. *Wurts v. Harrington,* 10 App. D. C. 149; 79 O. G. 337; 1897 C. D. 359.

914. Where the junior party's application was pending when the senior party's patent was granted, the senior party does not thereby gain any advantage with respect to the burden of proof. The patent was irregularly issued, and the junior party need only prove his case by a preponderance of evidence. *Andrews v. Nilson,* 27 App. D. C. 451; 1906 C. D. 717; 123 O. G. 1667.

915. When an application goes to patent upon a claim which is not a proper division of another application in interference, the patentee should derive no advantage in an interference by presumption from the fact of issue of the patent on the divisional application; but, coming in subsequently to the filing of his opponent's claim, by claim of prior invention, he should bear the burden that such claim naturally imposes as between contending applicants in the production of proof as applied to both interferences. *Porter v. Louden,* 7 App. D. C. 64; 73 O. G. 1551; 1895 C. D. 707.

916. Where A.'s application was on file and involved in an interference in which L. testified as a witness and L. thereafter at the instance of the other party to the interference filed an application in his own name, the burden of proof is strongly on him. *Lloyd v. Antisdel,* 17 App. D. C. 490; 95 O. G. 1645; 1901 C. D. 371.

5. Presumptions.

917. No limitation upon the claims by proceedings in the Patent Office, nor any abandonment of any part of the invention is to be presumed, but must be shown by clear and convincing proof. *Computing Scale Co. v. Automatic Scale Co.,* 26 App. D. C. 238; 119 O. G. 1586; 1905 C. D. 704.

918. Where similar improvements are made by many inventors at the same time, the inferences are that the desirability for improvement has become known and that no great exercise of inventive talent was called into play. *Ib.*

919. Long and unexplained delay yielding to activity only when the knowledge comes of the entrance of a rival on the field is always presumptive evidence that what is claimed to have been a reduction to practice was no more than an unsatisfactory or abandoned experiment. *Oliver v. Felbel,* 20 App. D. C. 255; 100 O. G. 2384; 1902 C. D. 565.

920. The failure to call a witness who could clear up a number of doubtful points raises the inference that the testimony of such witness would be unfavorable. *Alexander v. Blackman,* 26 App. D. C. 541; 1906 C. D. 602; 121 O. G. 1979.

921. As between two parties each claiming disclosure of the invention to the other, where one of such parties has a practical knowledge of the art and the other has not there is a strong presumption in favor of the one having such practical knowledge. *Ib.*

922. Where the circumstances are such that it would have been most natural for S. to have disclosed the invention to a company engaged in making such devices and he fails to do so until stimulated to activity by a knowledge of what his opponent was doing, the presumption that he did not have the invention is stronger than the testimony of witnesses. *Slaughter v. Halle,* 21 App. D. C. 19; 102 O. G. 469; 1903 C. D. 519.

923. Where T. did not file his application for a patent until fourteen months after K.'s application was filed, although he knew of K.'s application and claim to the invention, *Held* that the presumption is in favor of K., and the burden is upon T. to prove his case by full and satisfactory evidence. *Tyler v. Kelch,* 19 App. D. C. 180; 98 O. G. 1282; 1902 C. D. 506.

924. Where the attorney for M. went to the opposing party to disclose his invention and discuss the question of joining interests and it is admitted that he did not disclose the specific process in controversy and did not claim it when the opposing party disclosed it, the presumption against his claim as inventor cannot be overcome by vague and uncertain testimony. *McKnight v. Pohle,* 22 App. D. C. 219; 105 O. G. 977; 1903 C. D. 619.

925. Assuming the truth of the statement contained in the pre-

liminary statement of F. or even that contained in his testimony as to the time of conception of the invention, the great delay in attempting to complete and reduce the invention to practical operation is entirely without explanation and must consequently give rise to a strong presumption against his pretensions. *Funk v. Haines,* 20 App. D. C. 285; 100 O. G. 1764; 1902 C. D. 553.

926. Where one of the parties to an interference testifies that it was his idea that went into a model and that he directed the other contestant to make the model and witnesses corroborate this and the said contestant fails to testify in his own behalf, *Held* that the contestant's silence is most potent testimony against him. *Ingersoll v. Holt,* 15 App. D. C. 519; 90 O. G. 2507; 1900 C. D. 253.

927. Where there was but one person besides the parties themselves who had any direct knowledge of their respective claims to the conception of the invention—viz.: a draftsman employed by G., who was present at the interview and heard all that occurred—and the testimony shows that this person is still in the employ of G. and could have been called by either party, any unfavorable inference that may arise from the failure to call this witness ought to operate against G. rather than H., for the reason that it is hardly to be presumed that H. had an equal opportunity with G. to know what his recollections of the occurrence might be. It is hardly possible to believe that G. did not know whose testimony this witness would corroborate if called to testify. *Gallagher v. Hastings,* 21 App. D. C. 88; 103 O. G. 1165; 1903 C. D. 531.

928. Where the issue relates to ejecting mechanism of a match-machine and the device introduced in evidence is merely the ejecting mechanism, but the witnesses say it was used on a full-sized match-machine, it may be fairly inferred that the machine included all of the parts usual in such machines. *Wyman v. Donnelly,* 21 App. D. C. 81; 104 O. G. 310; 1903 C. D. 556.

929. Where the issue covers a burner having a particular form of wick and the evidence shows that some form of wick was used in the device, but does not indicate its construction, *Held* that the fact that the particular form is the one that would naturally be used does not warrant the conclusion that it was

used. *Blackford v. Wilder,* 21 App. D. C. 1; 104 O. G. 578; 1903 C. D. 567.

930. Where A. claims to have reduced the invention to practice in July, 1897, and thereafter worked on other inventions, but did nothing with the one in controversy until he filed his application on January 14, 1899, and in the meantime M. perfected his invention, *Held* that the presumption is warranted that what was done by A. amounted to nothing more than an abandoned experiment until the contrary is clearly shown. *Adams v. Murphy,* 18 App. D. C. 172; 96 O. G. 845; 1901 C. D. 401.

931. Where a party claims to have produced the hinge of the issue and to have appreciated its value and utility, but according to his own showing laid it aside and did nothing in the matter for three years and a half, although his company was engaged in manufacturing hinges and he knew, during a part at least of the time, that a rival company was putting substantially the same hinge on the market, *Held* that his conduct raises a strong presumption that he was not in possession of the invention and makes it incumbent upon him to establish the fact by evidence so clear and convincing as to leave no reasonable doubt in the matter. *Tyler v. St. Amand,* 17 App. D. C. 464; 94 O. G. 1969; 1901 C. D. 301.

932. Where the evidence indicated that the senior party derived the invention in controversy from the junior party and that prior to the junior party's application the senior party admitted that the invention was made by the junior party, *Held* that the election of the senior party to rely on his record date rather than to take the stand and explain such admissions is significant evidence of their truth. *Kempshall v. Royce,* 29 App. D. C. 181; 129 O. G. 3162; 1907 C. D. 626.

6. Extrinsic Evidence.

933. When the contesting parties to an interference are not independent inventors, working out the same conception separately and unknown to each other, but each claims the conception and reduction to practice of a construction that was set on foot by one to meet a novel condition and was manufactured by the other, and the only witnesses are the contesting parties, each of whom testifies in his own behalf, which testimony results in conflict of statement, it is natural and prop-

er to look to the unquestioned facts and circumstances that surround the transaction, or occurrence, and shed light upon it, to ascertain whether they, and the proper inference therefrom, corroborate or contradict one or the other party. For such purposes they are always entitled to more or less weight and sometimes even carry more than do the words of witnesses. *Gallagher v. Hastings,* 21 App. D. C. 88; 103 O. G. 1165; 1903 C. D. 531.

7. Depositions.

934. The refusal of the Commissioner of Patents to suppress portions of a deposition because of the inclusion therein of alleged copies of letter-press copies of letters written by one party to the other is not reversible error. *Kempshall v. Royce,* 29 App. D. C. 181; 129 O. G. 3162; 1907 C. D. 626.

935. An affidavit of a physician attached to a deposition, setting forth the physical condition of a witness who has left the stand during cross-examination in an interference proceeding, because of inability to stand the strain of cross-examination, forms no part of such deposition. The affiant should have been called and sworn to testify as a witness. *Munster v. Ashworth,* 29 App. D. C. 84; 128 O. G. 2088; 1907 C. D. 556.

936. Rothe, who is a German, was not conversant with the English language. The notary public before whom Rothe's testimony was adduced acted as commissioner and took down the answers of Rothe in the English language, after having interpreted the interrogatories to him in German, without being sworn as an interpreter. *Held* that the deposition so taken was admissible and that it was not necessary to swear the notary as interpreter. *Meyer v. Rothe,* 13 App. D. C. 97; 84 O. G. 649; 1898 C. D. 534.

937. The uniform tenor of the decisions is to the effect that when an interpreter is required he shall be sworn as a witness, but that no interpreter is required when the officer taking the deposition is himself conversant with the language of the witness, and when no interpreter is required there can be no requirement of an oath to interpret faithfully. Unless error or unfairness is affirmatively shown, the official character of the officer taking the deposition and his official certificate thereto conformably with the requirements of law are sufficiently guaranty that the duty

imposed upon him by law has been faithfully performed. *Meyer v. Rothe*, 13 App. D. C. 97; 84 O. G. 649; 1898 C. D. 534.

938. While there may be cases where it would be proper that the officer should be specially sworn as an interpreter, yet a deposition should not be rejected merely because it does not appear affirmatively that the officer has been sworn to report correctly the answers of a witness given in a foreign language with which the officer is himself familiar. *Ib.*

939. Our depositions are required to be in the English language, and in that language alone is the officer required to take them down and return them. There can be no objection to a deposition signed by a witness not conversant with the English language. Such a deposition is not different in principle from one signed by a witness who cannot read or write and who signs by mark. *Ib.*

940. The rule that if a deposition is in any respect open to irregularities the objection must be taken before the cause goes to hearing is as salutary and as necessary in interference proceedings in the Patent Office as it is in the ordinary courts of justice. *Ib.*

8. Cross-examination.

941. Where a party to an interference, relying upon certain specified installations as a reduction to practice, is asked upon cross-examination whether any other installations had been made, the question should be answered, as a wider range is allowable in the cross-examination of a party to the proceeding; but if such general questions were followed up by further questions clearly showing an intention to elict information relating to the business of such party irrelevant to the questions at issue the witness might well refuse to answer under the advice of counsel. *Jansson v. Larsson*, 30 App. D. C. 203; 132 O. G. 477.

942. Where a witness in an interference proceeding after testifying on his own behalf and after answering a few questions on cross-examination states that he is unable to withstand the strain of cross-examination and leaves the stand and his counsel refuses to ask for an extension of time for taking testimony in order that the witness may be cross-examined at some time in the future, alleging that the witness is in such bad physical condition that there is no prospect of his being able to testify within a year, if at all, *Held* that counsel, knowing the condition of the

witness, should either have refrained from offering him as a witness in his own behalf or, having done so, should have consented to some reasonable postponement. Under such circumstances the direct examination should have been excluded upon motion. *Munster v. Ashworth,* 29 App. D. C. 84; 128 O. G. 2088; 1907 C. D. 556.

9. Leading Questions.

943. It is the law that testimony adduced by leading questions cannot be excluded from consideration unless objection to it has been promptly interposed. The leading character of the questions may be good ground for scanning the testimony with critical care, but is no ground for discrediting it. *Smith v. Brooks,* 24 App. D. C. 75; 112 O. G. 953; 1904 C. D. 672.

10. Exhibits.

944. Where exhibits are offered in evidence on which to predicate a reduction to practice and these exhibits are lacking in one or more elements of the issue, the necessary elements in the exhibits cannot be supplied unless warrant for such finding is found in the record. *Robinson v. Seelinger,* 25 App. D. C. 237; 116 O. G. 1735; 1905 C. D. 640.

945. Affidavits would be permitted to show or explain material changes that may have occurred by accident or otherwise in an exhibit after its transmission to the court, but they will not be received by the court in contradiction or correction of the record of the proceedings in the Patent Office. *Blackford v. Wilder,* 21 App. D. C. 1; 104 O. G. 580; 1903 C. D. 573.

946. To guard against accidental changes in exhibits resulting from frequent handling, it would be prudent for the party offering them to have them particularly described in respect of appearance, construction, and operation at the time that he offers them in evidence. *Greenwood v. Dover,* 23 App. D. C. 251; 109 O. G. 2172; 1904 C. D. 630.

11. Ex parte Affidavits as.

947. Where after the taking of testimony was closed and the interference was on appeal to the Commissioner on the merits *ex parte* affidavits were filed by one of the parties to correct alleged errors and deficiencies in the testimony, *Held* that there was not only no error in the action of the Commissioner in disregard-

ing those affidavits, but that it would have been gross error to have considered them at all for the purpose for which they were presented. *Neilson v. Bradshaw,* 16 App. D. C. 92; 91 O. G. 644; 1900 C. D. 265.

12. Variance.

948. Where the evidence on behalf of a party to an interference shows that the invention was made at a date later than that alleged in the preliminary statement, *Held* that the evidence is not to be disregarded because of the variance from the statement. *Herman v. Fullman,* 23 App. D. C. 259; 109 O. G. 1888; 1904 C. D. 625.

949. Where the dates proved are later than those alleged in the preliminary statement no harm or prejudice is caused to the opposing party, and since it is a general rule that no attention will be paid to technical objections which have caused no substantial injury, *Held* that the evidence will not be disregarded. *Ib.*

951. The fact that an applicant in his testimony states his conception at an earlier date than in his statement, the fact that he declined to submit for general examination by opponent's counsel the sketch-book from which he states the drawings offered in evidence were cut, and the fact that he declined to answer some of the questions put to him do not constitute grounds for disregarding his testimony. *Croskey v. Atterbury,* 9 App. D. C. 207; 76 O. G. 163; 1896 C. D. 437.

952. Where the testimony fails to show that the device when made embodied a certain element included in the issue, the allegation that such element was in the device when introduced in evidence and was subsequently lost is immaterial. *Blackford v. Wilder,* 21 App. D. C. 1; 104 O. G. 580; 1903 C. D. 573.

953. In the production of proof in matters of interference the parties must be held strictly to the dates set forth in their preliminary statements. *Funk v. Haines,* 20 App. D. C. 285; 100 O. G. 1764; 1902 C. D. 553.

954. Testimony tending to establish dates earlier than those alleged in the preliminary statement will not be considered either by the tribunals of the Patent Office or by the Court of Appeals on appeal from the Commissioner of Patents unless timely amendment of such statement is made, and the court is without power to consider such testimony where leave to amend is asked and

refused. *Lowrie v. Taylor,* 27 App. D. C. 522; 1906 C. D. 713; 123 O. G. 1665.

955. A party is not called upon to rebut any testimony of his opponent tending to establish dates earlier than those set up in the opposing party's preliminary statement. *Lowrie v. Taylor,* 27 App. D. C. 522; 1906 C. D. 713; 123 O. G. 1665.

13. Records of Patent Office.

956. While as a general rule nothing is to be considered as evidence in an interference case unless introduced into the record before final submission, yet, neither the general purpose nor the efficiency of the rule is impaired by the creation of an exception thereto in favor of the consideration of a relevant and material fact shown by a record in the Patent Office entered in the regular course of proceedings therein. *Cain v. Park,* 14 App. D. C. 42; 86 O. G. 797; 1899 C. D. 278.

957. Some of the records and papers of the Patent Office are public records, and of these any person is entitled to copies upon paying the usual fee therefor; but there are others not public records, and of these no one is entitled to copies without showing that they are material evidence for him, and the Commissioner of Patents cannot be required to furnish copies until such showing is made. Abandoned applications are evidently of the latter character. (Section 892, Revised Statutes, construed.) *Bulkley v. Butterworth,* 81 O. G. 505; 1897 C. D. 685.

958. No person is required to submit his private papers to others or produce them in court on the demand of a party to a suit on his allegation or claim that they are material evidence for such party, but only in obedience to the mandate of the court in which such suit is pending, and it is only reasonable that when a public officer has under his control a paper or document in its nature private, or such as the public generally is not entitled to have access to as a public record, he should not be compellable to produce it or deliver copies of it until he has some information from the court in which the case is pending that it is required as evidence. *Ib.*

959. The court in which a suit is pending and not the Commissioner of Patents is the appropriate tribunal to determine whether a given paper should be produced as evidence and where there is no satisfactory showing, as by a certificate of the court, that a paper is proper evidence the Commissioner of Patents may re-

fuse copies of such paper, and a writ of mandamus will not issue to him to furnish such copies. *Ib.*

14. Generally.

960. The fact that in the testimony a party makes no attempt whatever to support the allegation of his preliminary statement as to the dates indicates a reprehensible looseness of assertion on his part and tends to discredit him. *Shaffer v. Dolan,* 23 App. D. C. 79; 108 O. G. 2146; 1904 C. D. 592.

961. Where Vajen swore to the disclosure which evidences his alleged conception of the invention and Bader denied that disclosure, which is not claimed to have been made to any other person than himself, *Held* that the utmost that can be said in favor of Vajen is that the testimony is balanced. *Bader v. Vajen,* 14 App. D. C. 241; 87 O. G. 1235; 1899 C. D. 329.

X. REISSUES.

1. Grounds for.

962. Insufficiency of claim is such inoperativeness as will sustain reissue. *In re Briede,* 27 App. D. C. 298; 1906 C. D. 677; 123 O. G. 322.

963. Failure to obtain a sufficient claim through the failure of the attorney and the inventor to understand the formulation of claims is such inadvertence, accident, or mistake as will sustain reissue. *Ib.*

964. Where the invention covered by a patent is simple and the patent clearly and definitely describes it, and the patentee immediately upon the issue thereof discovers that the single claim allowed is too narrow and does not properly cover his invention, and upon calling his attorney's attention to this fact they advised him that the claim was as broad as could be obtained, and it does not appear that they acted in bad faith, *Held* that a delay of five years in seeking a reissue cannot be excused upon the plea that the original attorneys did not understand the invention, since under the circumstances it was the duty of the patentee to consult other counsel without delay. *In re Ams,* 29 App. D. C. 91; 127 O. G. 3644; 1907 C. D. 532.

965. Where in excuse for delay in applying for a reissue it is alleged by the applicant that he did not know that his claims were narrow until a decision by the court, *Held* that the mistake, if

any, was one of law, not of fact, and that ignorance of the law is no excuse. *In re Starkey*, 21 App. D. C. 519; 104 O. G. 2150; 1903 C. D. 607.

966. The original patent was issued on September 15, 1885, and an application for reissue was not filed in the Patent Office until November 6, 1888. *Held* that the application for reissue of the patent was not made within a reasonable time and that there was no sufficient evidence of inadvertence, accident, or mistake to entitle appellant to a reissue of the patent under the statute, according to the rule laid down in the case of *Topliff v. Topliff*, 145 U. S. 156. *In re Messinger*, 12 App. D. C. 532; 83 O. G. 1995; 1898 C. D. 506.

967. Where an application clearly discloses a process and an apparatus and through inadvertence, accident, or mistake the applicant accepts a patent with a limited claim to the apparatus, although the process is the dominant part of his invention, *Held* that the patent may be reissued to include the process in the absence of intervening rights. *In re Heroult*, 29 App. D. C. 42; 127 O. G. 3217; 1907 C. D. 521.

968. Where a patentee clearly discloses a process and an apparatus for carrying out the process and claims only the apparatus, the failure to claim the process was either intentional or the result of inadvertence, accident, or mistake, for which section 4916, Revised Statutes, furnishes a remedy. *Ib.*

969. Applicants usually act through solicitors or attorneys, and their inadvertence, accidents, and mistakes, if such in fact, are remediable under the statute permitting reissue when it is clear that there is no fraudulent or deceptive intent or attempt to destroy an intervening right. *Ib.*

2. Applications.

970. From the well-settled principles of the law of reissues, as expressed by the Supreme Court, not only must the application for reissue be founded upon the same invention as that covered by the original patent and as shown by the original specification and claims, but there must be due diligence shown in discovering the mistake or inadvertence and in the application for reissue and in the prosecution of such application. *In re Messinger*, 12 App. D. C. 532; 83 O. G. 1995; 1898 C. D. 506.

971. The oath filed by an applicant for reissue should not be

entirely ignored, but must be traversed by the Patent Office. *In re Briede*, 27 App. D. C. 298; 1906 C. D. 677; 123 O. G. 322.

972. Where the inventor and his attorney resided abroad and where unfamiliar with the English language and with the requirements of our patent law and the application for reissue was filed seven months and four days after the grant of the patent, *Held* that there was no undue delay in making application for reissue. *Ib.*

973. Delay of two years in filing an application for a reissue of a patent with broader claims will usually be treated as an abandonment to the public of everything not claimed in the original. This rule is based upon the analogy between a reissue application and the case of an inventor who fails to apply for a patent of his invention within two years from the date of its public use or sale, which the statute ordains is conclusive evidence of its abandonment. *In re Ams*, 29 App. D. C. 91; 127 O. G. 3644; 1907 C. D. 532.

974. Where a patent describes certain parts of a device as having a specified function, a claim in an application for the reissue of such patent which refers to such parts as "means" for performing a different function, requiring a relative location of the parts which was not originally disclosed, relates to new matter. The facts that the reissue application was not filed for about two years after the grant of the patent and that the claim was not made for about nine months after the filing of such application strongly indicate that the claim was not suggested by the original disclosure. *In re Hocy*, 28 App. D. C. 416; 127 O. G. 2817; 1907 C. D. 516.

3. Effect of.

975. Upon reissue of a patent the original patent is surrendered, extinguished, and canceled, the reissue takes its place as a new grant for its unexpired term, no rights can be predicated upon the original patent, all pending suits brought thereon fail, and no judgment of any nature can thereafter be based upon it. *Lattig v. Dean*, 25 App. D. C. 591; 117 O. G. 1798; 1905 C. D. 698.

976. Where during interference proceedings between applicant and patentee the patentee reissues the patent in interference without the interfering claims, the Examiner of Interferences was without jurisdiction to render any judgment for or against either party, as the Patent Office had ousted itself of jurisdiction by

extinguishing the patent in interference through the reissue thereof. *Ib.*

977. Where a reissue application is involved in an interference with a patent the application is regarded as a continuation of the original application and the party is entitled to the date of that original application for a constructive reduction to practice. *Austin v. Johnson,* 18 App. D. C. 83; 95 O. G. 2685; 1901 C. D. 391.

4. Scope of Claim.

978. Claims will not be allowed in a reissue application which are not clearly readable upon the disclosure of the patent, and the contention that they cover an "adaptation or means" involving "immaterial changes" is of no avail where the patent does not disclose the nature of the changes or how the adaptation can be accomplished. *In re Lacroix,* 30 App. D. C. 299; 133 O. G. 2181.

979. In an application for the reissue of a patent for a cigar-bunchshaping machine disclosing no means for transporting the bunch after it is formed except the hand of the operator claims cannot properly be allowed which include as an element means for "transferring" or "transporting" the bunches. *Ib.*

980. The deliberate cancellation of claims from an application in response to an official objection precludes the assertion of such claims in an application for the reissue of a patent granted thereon notwithstanding the fact that applicant had another application pending in which such claims could have been made which had not matured into a patent when the application for reissue was filed . *Ib.*

981. In determining whether a claim presented in a reissue application is for the same invention as that of the patent the same rules apply as would be involved if the claim was presented by an amendment to the application as originally filed. *In re Bricde,* 27 App. D. C. 298; 1906 C. D. 677; 123 O. G. 322.

982. Where the reissue claim omitted a feature of the original claim and embodied an element not included in the original claim and recited a specific operation of the device, *Held* that the operation recited was an obvious one and that the claim of the reissue was not for a different invention from that of the patent. *Ib.*

983. The ruling in each case where claims have been held in-

valid for the reason that they were not for the same invention as that originally disclosed has been based upon the ground that the specification has been expanded by the introduction of new matter upon which the new claims were built, or the claims were for parts of the invention other than the parts for which claims were originally made, or machine claims were changed to method claims, or the reverse, or the question of the "same invention" was affected by intervening rights, or laches, or fraud, or in reissue cases by an absence of the necessary inadvertence, accident, or mistake. *Ib.*

984. The "same invention" as that phrase is used in the reissue statute refers to whatever invention was described in the original Letters Patent and appears to have been intended to be secured thereby. *In re Bricde,* 27 App. D. C. 298; 1906 C. D. 677; 123 O. G. 322.

985. Where the reissue claim is for the same invention as appears from the specification and claim of the original patent to have been the invention thereof and the applicant has exercised due diligence in discovering his mistake and returning to the Patent Office and there are no intervening rights and the error has arisen through inadvertence, accident, or mistake and there is no fraud shown, a reissue with a broadened claim is permissible. *In re Briede,* 27 App. D. C. 298; 1906 C. D. 677; 123 O. G. 322.

986. Where six years after the grant of a patent application for reissue is made with broader claims, the claims were properly rejected on the ground of laches. *In re Starkey,* 21 App. D. C. 519; 104 O. G. 2150; 1903 C. D. 607.

987. After the lapse of two years after the issue of a patent a reissue which seeks to enlarge the claims of the original patent will not be granted or if granted will be held invalid unless special circumstances are shown to excuse the delay. *Ib.*

988. Where there was a mistake as to the scope of the original claims, *Held* that there is no excuse for the failure to discover it for a period of six years, particularly where the patent was not difficult to understand and was often examined. *Ib.*

989. Where the claim sought by reissue was not as broad as the claim made in the original application and canceled, *Held* that this is of no consequence where the reissue claim was included in the original claim. It is well-settled law that a reissue cannot be

allowed for the restoration of claims once rejected and withdrawn. *In re Denton,* 12 App. D. C. 504; 83 O. G. 1347; 1898 C. D. 483.

990. When an applicant for a reissue had amended and limited an original claim to a greater extent than was necessary, *Held* that such limitation may have been a mistake of judgment, but it was certainly an abandonment of all that was contained in the original claim and which was not contained in the subsequent amendment. There can be no middle ground or retrogression to take back part of what has been abandoned any more than to take back the whole. *Ib.*

5. Generally.

991. The conclusion of the Commissioner of Patents that the addition to the original claim of a feature shown and described in the original patent does not confer patentability on the reissue claim was right, since the whole combination was substantially passed upon by the Circuit Court of Appeals. *In re Briggs,* 9 App. D. C. 478; 78 O. G. 169; 1897 C. D. 211.

XI. FOREIGN PATENTS.

992. Where an application is filed in this country on April 23, 1898, for an invention patented in England and it appears that the application and provisional specification were filed in the British Patent Office on May 1, 1897, the complete specification was filed February 28, 1898, and was accepted June 1, 1898, and the patent was sealed and delivered August 16, 1898, *Held* that the application here cannot be allowed in view of section 4887, Revised Statutes. *In re Swinburne,* 19 App. D. C. 565; 99 O. G. 1625; 1902 C. D. 537.

993. The time of filing the application in the British Patent Office accompanied only by the provisional specification must be taken as the date of the application for the foreign patent within the meaning of section 4887, Rev. Stat. *Ib.*

994. The original paper called the "application" is not a mere introduction to the provisional specification and the provisional specification is not the equivalent of a caveat under the United States law. *Ib.*

995. Independent of the form or function of either specification that may be filed in connection with it the instrument entitled the application throughout the British patent law remains the in-

itiatory step in the proceeding to obtain a patent under that law and must therefore fix the date from which the limitation of section 4887, Revised Statutes, begins to run. *Ib.*

996. Where a protest was entered in the German Patent Office to the grant of a claim for a method for making steel bars for tools by combining two bars of different grades of steel so that the superior steel is inserted in a bar of inferior steel, on the ground that the method was already known, and the protest was overruled, *Held* that the action of the German Office can have no influence upon the determination of the present case, as there is no evidence that the references before the Patent Office here were before the German Office. *In re Bedford,* 14 App. D. C. 376; 87 O. G. 1611; 1899 C. D. 357.

997. Where an alleged official copy of the specifications and drawings annexed to a French patent is introduced in evidence, but no copy of the patent itself is produced, *Held* that the patent cannot be regarded as in evidence. *Rousseau v. Brown,* 21 App. D. C. 73; 104 O. G. 1120; 1903 C. D. 587.

XII. INTERNATIONAL CONVENTION.

998. The International Convention for the Protection of Industrial Property, concluded at Paris, March 20, 1883, is in the nature of a contract between the parties and is not self-executing. It requires legislation by Congress to render it effective in this country. *Rousseau v. Brown,* 21 App. D. C. 73; 104 O. G. 1120; 1903 C. D. 587.

999. The various stipulations of the convention of 1883 are of such a character as to require a modification of the statutes in this country to give them full force and effect. *Ib.*

1000. The Act of March 3, 1897, amending sections 4886 and 4887 of the Revised Statutes, did not have the effect of making the convention effective and giving a party the benefit of priority from the date of his application for patent in a foreign country. *Ib.*

1001. An application for a patent filed in a foreign office affords no evidence of priority of invention in an interference proceeding in the Patent Office in this country in the absence of legislation giving it that effect. *Ib.*

XIII. INFRINGEMENT.

1002. After rights under a patent have been granted any per-

son who gets control of the patent with knowledge or notice, actual or constructive, must be assumed to have taken subject to such rights and is disqualified from infringing those rights. *Whitson v. Columbia Phonograph Co.*, 18 App. D. C. 565; 98 O. G. 418; 1902 C. D. 497.

1003. The claim of a combination is not infringed if any of the material parts of the combination are omitted, but if any one of the parts is only formally omitted and is supplied by a mechanical equivalent performing the same office and producing the same result, the patent is infringed. *Fenton Manuf. Co. v. Office Specialty Co.*, 12 App. D. C. 201. Reversed in 174 U. S. 492.

1004. In a suit for infringment, where experts are called to testify as to anticipations they should be required to point out the several resemblances and differences. *Ib.*

1005. A patent for a composition of matter to be used as a furniture polish, consisting of distilled water, paraffin oil, coal oil, butter of antimony, alkanet root, and oil of mirbane, is not infringed by a composition from which the ingredient of coal oil is omitted. And in such case the patentee will not be permitted to show that the ingredient of coal oil is no essential part of his invention, and that the use of it in his composition has nothing to do with the quality of the compound as a polishing fluid. *Lane v. Levi*, 21 App. D. C. 168; 31 W. L. R. 131.

1006. The omission of one of the ingredients distinctly claimed in the patent for a composition of matter is not an infringement. The composition as claimed is an entirety, and disappears with the removal of one of its elements. *Ib.*

1007. The expiration of a patent pending suit to enjoin infringement and for an accounting will not defeat the jurisdiction of equity to take the account prayed. *Busch v. Jones*, 16 App. D. C. 23; 28 W. L. R. 535.

1008. In a suit in equity to enjoin the infringement of certain patents where it appeared that the question of their validity had been decided adversely by the United States Circuit Court of Appeals for the Third Circuit and that that decision had been followed by two other courts in cases where the real parties in interest were the same, *Held* that the court below properly applied the doctrine of comity in the absence of some new and material defense, and its decree dismissing the bill of complaint

affirmed. *Brill v. Washington Ry. & El Co.*, 30 App. D. C. 255; 134 O. G. 1563.

1009. In actions for infringement, the patent is *prima facie* evidence of invention as well as that the patentee is the original inventor; and the existence of a reasonable doubt arising on the case made by the defendant is sufficient to sustain the plaintiff's claim of invention. *Fenton Mfg. Co. v. Office Specialty Mfg. Co.*, 12 App. D. C. 201; 26 W. L. R. 116.

1010. As to right of assignee of patent to maintain action in own name for infringement, see *Armstrong Whitworth & Co. v. Norton*, 15 App. D. C. 223; 27 W. L. R. 414.

1011. Where the lower court held all claims of the patent to be valid and infringed, but the accounting was based upon the infringement of claim 5 and that claim is found on appeal to be invalid, the decision below must be reversed and the case remanded for proceedings in accordance with the opinion. *Busch v. Jones*, 184 U. S. 598; 99 O. G. 229; 1902 C. D. 585.

1012. The claims of Patent No. 700,919 in suit are not infringed by the defendant when those claims are limited, as they must be, by the prior art. *Computing Scale Co. v. Automatic Scale Co.*, 26 App. D. C. 238; 119 O. G. 1586; 1905 C. D. 704.

1013. Claims 1 and 2 of Letters Patent granted to Philip Levi on February 18, 1902, for a furniture polish, *Held* not infringed by a composition including all of the elements of the claims except coal oil. *Lane v. Levi*, 21 App. D. C. 168; 104 O. G. 1898; 1903 C. D. 601.

XIV. PARTICULAR PATENTS.

1014. The claims in the application of Caleb W. Durham, for drainage apparatus for buildings, Serial No. 152, 488, filed January 10, 1885, examined and *Held* to be not patentable in view of the prior art. *Durham v. Seymour*, 6 App. D. C. 79; 71 O. G. 601; 1895 C. D. 307.

1015. Letters Patent No. 450,124, granted April 7, 1891, to Horace J. Hoffman, for storage case for books, etc., examined in view of evidence in an interference proceeding and *Held* to be valid and proposed new evidence refused consideration. *Fenton v. Office Specialty Man. Co.*, 68 O. G. 1390; 1894 C. D. 474.

1016. Claims 1 and 2 of Letters Patent No. 450,124, issued April 7, 1891, to Horace J. Hoffman for improvements in storage-cases for books, *Held* to be invalid. being anticipated by the prior

art. *Office Specialty Man. Co. v. Fenton Metallic Man. Co.*, 174 U. S. 492; 87 O. G. 1608; 1899 C. D. 352, reversing 12 App. D. C. 201.

1017. Applications of Daniel Drawbaugh, serial No. 111, 554, filed November 12, 1893, and serial No. 126, 530, filed April 3, 1884, for telephone transmitters, examined and *Held* to have been properly rejected by the Patent Office, as Drawbaugh was not the inventor. *In re Drawbaugh*, 9 App. D. C. 219; 77 O. G. 313; 1896 C. D. 527.

1018. *Held* that the decided weight of the evidence supports the claim of the appellee, and that the decision of the Commissioner of Patents is correct and must be affirmed. *Roberts v. Brinkman*, 10 App. D. C. 543; 79 O. G. 1190; 1897 C. D. 427.

1019. Application of Nathan W. Musgrave and Harold P. Nye, for smokeless fuel and process of preparing it. *Held* not patentable in view of the prior art. *In re Musgrave*, 10 App. D. C. 164; 78 O. G. 2047; 1897 C. D. 336.

1020. Application of Louise Snyder examined in view of reference cited thereto and *Held* allowable. *In re Snyder*, 10 App. D. C. 140; 78 O. G. 485; 1897 C. D. 254.

1021. Claim 5 of Letters Patent No. 204,741 granted to Joshua W. Jones, for a process of dry-pressing and removing type indentations from printed sheets, *Held* invalid, as covering merely the function of the machine. *Busch v. Jones*, 184 U. S. 598; 99 O. G. 229; 1902 C. D. 585, reversing 16 App. D. C. 23.

1022. Claims 1, 2, 3 and 4 of Patent No. 204,741 for a bookbinder's dry-press and sheet-tie, *Held* valid notwithstanding the existence of devices of the same general character used in various arts for compressing and tying various materials. *Ib.*

PENDING APPLICATIONS. See TRADE-MARKS, 78-85, 120.

PERFECTION OF DEVICE. See PATENTS, 649.

PETITION FOR CANCELLATION OF TRADE-MARK.

See TRADE-MARKS, 97, 98.

PICTORIAL ILLUSTRATIONS. See COPYRIGHTS, 2.

PLEADING.

1. Where an interlocutory decree for an accounting, and a ref-

erence to the auditor to state such account, is, on appeal specially allowed, affirmed by this court, and the cause remanded for the accounting decreed, the court below is without authority to allow the defendant to amend its answer and reopen the cause for the taking of additional testimony in support thereof; but the application in such case must be made to this court. *Farrow v. Eclipse Bicycle Co.*, 18 App. D. C. 101; 29 W. L. R. 218.

2. Where in a suit for an accounting against the assignee of an invention, a substituted device for which the assignee was bound to account was not embraced in the reference to the auditor, the better practice would have been to have brought it in by supplemental bill, but the defendant having had ample notice of the claim and having contested it, the failure to file a supplemental bill was mere matter of form and should not delay the final determination of the cause. *Eclipse Bicycle Co. v. Farrow*, 23 App. D. C. 411; 32 W. L. R. 265.

See MANDAMUS, 46-49; PATENTS, VIII 7; TRADE-MARKS, 113.

PRACTICABILITY OF INVENTION. See PATENTS, 15.

PRACTICE. See APPEALS; EQUITY, 3; MANDAMUS, 45-56; PATENTS, 145, 161, 163, 205, 207, 707; PLEADING, 2; PUBLIC OFFICERS, 4; STATUTES, 6.

PRELIMINARY STATEMENT. See APPEALS, 40-42; PATENTS, VIII 7.

PRESUMPTIONS. See APPEALS, 75; PATENTS, 8, 30, 168, 185, 393-396, 442, 425, 426, 462, 473, 563, 578, 643-647, IX 5, 885.

PRIMARY EXAMINERS. See APPEALS, 37-39, 74, 146, 152, 157, 160; COMMISSIONER OF PATENTS, 3; PATENTS, 727.

PRIMARY EXAMINER OF TRADE-MARKS. See TRADE-MARKS, 89.

PRINCIPAL AND AGENT. See PATENTS, 377-380.

PRINCIPAL AND ASSISTANT. See PATENTS, 576.

PRINTS.

Registration of. See *Regina Music Box Co. v. Allen*, 31 W. L. R. 114.

PRIORITY OF INVENTION. See APPEALS; PATENTS.

PRIOR USE. See PATENTS, 367.

PROCESS.

In a suit in equity for the cancellation and surrender of an alleged fraudulent assignment of a patent and to expunge such assignment from the records of the Patent Office, the rights involved are strictly in *personam,* and personal service within the jurisdiction where suit brought, upon the parties to the assignment, is essential to the jurisdiction of the court. *Backus Co. v. Simonds, 2* App. D. C. 290; 22 W. L. R. 137.

PROCESSES. See PATENTS, II, 13, 20-22, 32, 36, 37, 43, 65, 68-70, 90, 92, 94, 107-109, 122, 335, 704.

PROCESS AND APPARATUS. See PATENTS, 197, 202, 716.

PROPERTY RIGHTS. See PATENTS, 2-9.

PUBLICATION. See COPYRIGHTS, 7, 10, 11.

PUBLIC OFFICERS.

1. A decree against a public officer, passed after his retirement from office, will not bind his successor. *Backus Co. v. Simonds,* 2 App. D. C. 290; 22 W. L. R. 137.

2. Courts are bound to take judicial notice of a change in the incumbency of a public office. *Ib.*

3. A petition for a writ of mandamus to a public officer of the United States abates by reason of his retirement from office, as well after judgment and pending an appeal therefrom as before. *Seymour v. Nelson,* 11 App. D. C. 58; 25 W. L. R. 542.

4. As to practice where pending an appeal on a petition for mandamus against a public officer, such officer retires. See *Seymour v. Nelson,* 11 App. D. C. 58; 25 W. L. R. 542.

See MANDAMUS, 27, 28, 52, 53.

PUBLIC POLICY. See TRADE-MARKS, 9.

PUBLIC RECORDS. See APPEALS, 122; PATENTS, 957.

PUBLIC USE. See PATENTS, 428, 429, 430.

PUBLISHERS. See COPYRIGHTS, 3, 4.

RECORD ON APPEAL. See APPEALS, 122-127, 132.

RECORDS OF PATENT OFFICE. See APPEALS, 122; JUDICIAL NOTICE, 2; MANDAMUS, 20; PATENTS, IX. 13.

REDUCTION TO PRACTICE. See APPEALS, 81; PATENTS, 196, 197, 241-259, III 3, IV 1, 648, 744, 746, 752, 784, 802, 803, 812, IX, 919.

REGISTRATION OF LABELS. See COMMISSIONER OF PATENTS, 9.

REGISTRATION OF TRADE-MARKS. See APPEALS, 56; TRADE-MARKS.

REHEARING.

The indiscriminate practice of filing motions or petitions for rehearing condemned. *Hien v. Pungs*, 9 App. D. C. 492; 25 W. L. R. 8.

As to appellate practice in respect of. See *Durham v. Seymour*, 10 App. D. C. 274; 25 W. L. R. 9.

REINSTATEMENT OF INTERFERENCE. See MANDAMUS, 16.

REISSUES. See COMMISSIONER OF PATENTS, 5; PATENTS, X.

REJECTED APPLICATIONS. See PATENTS, 716; TRADE-MARKS, 85.

REJECTION OF CLAIMS. See APPEALS, 150-157.

REJECTED CLAIMS. See EQUITY, 6; PATENTS, 728.

RELATED CLAIMS. See PATENTS, 194, 197, 204.

RELATED INVENTIONS. See PATENTS, 716.

RELEASE OF CLAIM TO INVENTION. See CONTRACTS, 5.

REMANDING CASE TO PRIMARY EXAMINER. See APPEALS, 114.

REMEDIES.

1. Where the court refused to consider testimony of a party which had been suppressed in the Patent Office and affirmed the record judgment below unfavorable to such party, the party still has a remedy under § 4915, Rev. Stat., and if there successful

can invoke relief under § 4918 of the Rev. Stat. *Jones v. Starr,* 26 App. D. C. 64; 117 O. G. 1495; 1905 C. D. 694.

2. Where a petition to the Commissioner of Patents to direct the primary examiner to forward to the board of examiners-in-chief an appeal from an order of the primary examiner requiring a division between claims for a process and claims for an apparatus, is refused, the proper remedy is by mandamus to the Commissioner to compel him to require the primary examiner to forward the appeal, and not by appeal to the Court of Appeals of the District of Columbia. *Ex parte Frasch,* 192 U. S. 566; 32 W. L. R. 153.

3. It might be proper under some circumstances to have the patent issue to an inventor of an improvement and then by process in Equity compel an immediate assignment to an original inventor; but the jurisdiction of this court is equitable as well as legal in character, and that circuitous course is unnecessary. *Milton v. Kingsley,* 7 App. D. C. 531; 75 O. G. 2193; 1896 C. D. 420.

See APPEALS, 139; COPYRIGHTS, 21; TRADE-MARKS, 107; INJUNCTION; MANDAMUS.

REOPENING INTERFERENCE. See APPEALS, 41-44, 131.

RES ADJUDICATA.

1. The doctrine of *res adjudicata,* or estoppel by former judgment as defined by the Supreme Court of the United States, is applicable to adjudications made in the Patent Office. *Blackford v. Wilder,* 28 App. D. C. 535; 127 O. G. 1255.

2. Where an application for patent was rejected by each tribunal of the Patent Office and the applicant filed a new application without substantial change, the subordinate tribunals were right in declaring the question of patentability *res adjudicata. Fay v. Ducll,* 15 App. D. C. 513; 90 O. G. 1157; 1900 C. D. 232.

3. While a liberal right of filing a new application in place of one rejected has been recognized by the Supreme Court in the cases where the Commissioner of Patents has reconsidered his former grounds of rejection and issued a patent, yet it does not follow that the doctrine of *res adjudicata* may not be applied to such new application in the discretion of the Commissioner. It is as much to the public interest that there should be an end of litigation in the tribunals of the Patent Office as in others. *Ib.*

4. Where judgment is rendered in an interference proceeding in the Patent Office holding that the issue was limited to matters not found in certain exhibits upon which a party relies for an award of priority, although such party contends to the contrary, and no appeal is taken from such holding and the case is finally decided adversely to such party, *Held* that in a subsequent interference between the same parties on an issue which is the same as the prior issue, with the exception that in the second interference such limitations were omitted, the question of priority is *res adjudicata*. *Horine v. Wende*, 29 App. D. C. 415; 129 O. G. 2858; 1907 C. D. 615.

5. Where an applicant after having been refused a patent by the Commissioner on appeal presented a new application containing claims differing from those of the earlier application in phraseology, rather than in meaning, *Held* that such differences or any changes merely broadening claims that have been once determined do not affect the conclusiveness of the former adjudication and that the subject-matter was *res adjudicata*. *In re Edison*, 30 App. D. C. 321; 133 O. G. 1190.

6. Where in a court of law there has been one investigation and one adjudication, such action becomes final and can only be reviewed, if at all, by way of appeal. Subsequent suit for the same subject-matter and between the same parties cannot be sustained, and there is no good reason why the course of procedure should be different in the Patent Office. *In re Barratt*, 14 App. D. C. 255; 87 O. G. 1075; 1899 C. D. 320.

7. While the rules that govern the finality and conclusiveness of adjudication at the common law do not apply in the strict sense to administrative or *quasi*-judicial actions in the Executive Departments of the Government, yet in such actions as well as in judicial proceedings it is both expedient and necessary that there should be an end to controversy. *Ib.*

8. On an appeal to the court relating to priority of invention the question whether one party's application furnishes a basis for the claims of the issue will not be considered, since it is rendered *res adjudicata* by the declaration of the interference. The only question to be determined is priority of invention. *Herman v. Fullman*, 23 App. D. C. 259; 109 O. G. 1888; 1904 C. D. 625.

9. Where a second interference is declared between the same applications on an issue relating to the same subject-matter of

invention as that of a prior interference, of broader scope than the first issue, and the constructions relied on, respectively, as evidencing conception and reduction to practice of the invention of both issues are the same and the fundamental facts of both cases are the same, *Held* that the final decision in the first interference is conclusive and that the question of priority is *res adjudicata* unless it can be made to appear that the question upon which the determination of the second case rests is one that neither was nor could have been presented and determined in the first case. *Blackford v. Wilder,* 28 App. D. C. 535; 127 O. G. 1255; 1907 C. D. 491.

10. Whether or not the question of priority of invention is *res adjudicata* by reason of a judgment in a prior interference is a question which may be raised at any stage of the interference proceedings, and it is not only proper, but is the duty of the tribunal before whom the case is tried to take up and consider this question of its own motion where it is not raised by the parties. *Carroll v. Hallwood,* 135 O. G. 896; 31 App. D. C. 165.

11. Where, in an interference proceeding, after bringing a motion to dissolve the interference, alleging non-patentability and non-interference in fact, and unsuccessfully contesting the same, the senior party abandoned the invention of the issue and the Patent Office rendered judgment of priority in favor of the junior party, the senior party cannot thereafter file an amendment to his application claiming the invention which is comprehended in the prior issue and have the question of priority between the same parties readjudicated; the decision in the first interference renders the question of priority of the more limited issue of the second interference *res adjudicata. Ib.*

12. Where an applicant appealed to the Court of Appeals from the decision of the Commissioner of Patents holding that his invention was without patentable novelty, and the court sustained the decision of the Commissioner and suggested to applicant to file a bill in equity, and applicant instead of following the suggestion filed a new application for the same matter that was in the first application, *Held,* on appeal to the court on the second application that the question of patentable novelty will not be again passed upon, as that question is *res adjudicata. In re Barratt,* 14 App. D. C. 255; 87 O. G. 1075; 1899 C. D. 320.

13. Upon a motion to dissolve it was held that one of the par-

ties had no right to make the claims in issue and the appeal from that decision was abandoned; but subsequently in the *ex parte* prosecution of that party's case it was held by the examiners-in-chief that said party had a right to make the identical claims and the interference was redeclared. The Commissioner thereupon set aside the *ex parte* decisions and directed a rehearing of the case before the examiners-in-chief *inter partes*. *Held* that the decision in the interference was *res adjudicata* and that the Commissioner was without authority to direct the readjudication in such *ex parte* application of the question whether said party had a right to make the identical claims of the issue of the interference. *U. S. ex rel. Newcomb Motor Co. v. Moore*, 30 App. D. C. 464; 133 O. G. 1680.

14. It is not for a moment supposable that if a device produced in an incomplete state by the defense in a court suit was or had been practically operative it would not have been produced in evidence in an operative condition. In view of this and in view of a finding by the Supreme Court that the original instrument did not disclose the complete invention and that all claims to the contrary are wholly unfounded in truth such finding will be accepted as final and conclusive. *In re Drawbaugh*, 9 App. D. C. 219; 77 O. G. 313; 1896 C. D. 527.

See APPEALS, 139, 140; PATENTS, 733.

RETIREMENT FROM OFFICE. See ACTIONS, 2; APPEALS, 135; COMMISSIONER OF PATENTS, 10; MANDAMUS, 53, 54; PUBLIC OFFICERS, 1, 3, 4.

ROYALTIES. See ACCOUNTS AND ACCOUNTING, 3; CONTRACTS, 7.

RULES OF COURT.

While some rules of court may be modified in special cases, they are in general as binding upon the court as upon parties and counsel, and rigid adherence is required to time-rules which are intended to have the effect of statutes. *In re Bryant*, 9 App. D. C. 447; 77 O. G. 1599; 1896 C. D. 648.

RULES OF PRACTICE. See APPEALS, 8, 9, 15, 16, 18, 27, 47, 103; COMMISSIONER OF PATENTS, 2; PATENTS, 709-715, 940; TRADE-MARKS, 72.

SALES. See PATENTS, 431-436.

SATURDAYS.

Saturday, after 12 o'clock noon, is a half holiday for all purposes. *Ocumpaugh v. Norton*, 24 App. D. C. 296; 32 W. L. R. 846.

SEALS OF STATES. See TRADE-MARKS, 8, 10.

SECOND APPLICATION. See PATENTS, 190, 191.

SECRETARY OF INTERIOR.

As to supervisory power over action of Commissioner of Patents in respect of disbarment of attorneys. See *Wedderburn v. Bliss*, 12 App. D. C. 485; 26 W. L. R. 293.

See ATTORNEYS; COMMISSIONER OF PATENTS, 1.

SECRETION OF PAPERS. See APPEALS, 122.

SENIOR AND JUNIOR APPLICANTS. See PATENTS, 551-555.

SERVICE OF PROCESS. See PROCESS.

SPECIFIC PERFORMANCE. See CONTRACTS, 2, 3.

STATE SEALS AND ARMS. See TRADE-MARKS, 8, 10.

STATUTES.

1. In construing a statute the court is not always confined to a literal reading thereof, and may consider its object and purpose, the things with which it is dealing, and the conditions of affairs which led to its enactment so as to effectuate rather than destroy the spirit and force of the law which the legislature intended to enact. *American Tobacco Co. v. Werckmeister*, 207 U. S. 284; 133 O. G. 1433.

2. The terms of a statute relating to appeals in patent cases should receive a reasonable interpretation and be so construed as to avoid multiplying litigation or producing unnecessary delay and expense to parties concerned, and to prevent, as far as possible, embarrassment and hindrance to proceedings in Patent Office. *Westinghouse v. Duncan*, 2 App. D. C. 131.

3. The foregoing rule of construction held applicable to appeals in Patent Office in interlocutory proceedings in interferences. *Allen v. U. S. ex rel. Lowry*, 26 App. D. C. 8.

4. Where the words of an act, or part of an act, are plain and

clear, are not inconsistent with the general object, and lead to no absurd result, the courts have no right to refuse their operation, or to limit their effect, by a construction based upon conjecture. *In re Drawbaugh*, 3 App. D. C. 236; 67 O. G. 929; 1894 C. D. 297.

5. In ascertaining the meaning of terms used in a statute there is no better criterion than the statute itself or other previous or similar statute in which the same legislative body has given expression to its purpose. *Einstein v. Sawhill*, 2 App. D. C. 10; 22 W. L. R. 89.

6. In construing a statute claimed to confer the right of appeal in interference proceedings from the decisions of any officer of original jurisdiction doubt should be resolved in favor of the long established and acquiesced in practice of the Patent Office. *Allen v. U. S. ex rel. Lowrey*, 26 App. D. C. 8; 33 W. L. R. 354.

7. The copyright statutes are to be reasonably construed. They will not by judicial construction either be unduly extended to include privileges not intended to be conferred, nor so narrowed as to exclude those benefits that Congress did intend to confer. *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339.

8. The construction placed by an Executive Department of the Government upon a statute enacted for its guidance and the regulation of its business must, unless plainly erroneous, receive due weight and consideration, and should not be disregarded except for cogent reasons. *Wedderburn v. Bliss*, 12 App. D. C. 485; 26 W. L. R. 293.

9. While the construction of a statute by the Commissioner of Patents would not be binding upon a court should the statute properly come before it for interpretation, yet such construction placed upon it for a number of years would be entitled to great respect and might be controlling. *Stapleton v. Duell*, 28 W. L. R. 835; 93 O. G. 2532; 1900 C. D. 409.

10. As under the Constitution Congress has power to make laws which shall be necessary and proper for carrying out that express power of the Constitution in regard to protecting patents, it follows that Congress may provide such instrumentalities in relation to the matter as in its judgment will be best calculated to effect that object. *Bernardin v. Duell*, 172 U. S. 576; 86 O. G. 995; 1899 C. D. 287.

11. The second clause of § 4887, Rev. Stat., as amended March

3, 1903, construed and *Held* not to be retroactive and not to apply to applications pending at the time of its passage. *De Ferranti v. Lindmark*, 30 App. D. C. 417; 134 O. G. 515.

12. Section 487, Rev. Stat., is not repealed by the act of July 4, 1884, *Wedderburn v. Bliss*, 12 App. D. C. 485; 26 W. L. R. 293.

See ATTORNEYS; MANDAMUS, 26; PATENTS, 171, 172, 199, 734, 736, 1000; TRADE-MARKS, 60, 94.

STATUTES CONSTRUED.

I. ACTS OF CONGRESS.

1861, March 2 (Appeals to Commissioner of Patents). See *Stapleton v. Duell*, 17 App. D. C. 575; 95 O. G. 1049; 1901 C. D. 359.

1870, July 8, § 24, 16th Stat. 198 (Patentability of invention). See *In re Drawbaugh*, 3 App. D. C. 236; 67 O. G. 929; 1894 C. D. 297.

1874, June 18, 18 Stat. 78, c. 301 (Registrable labels). See *Allen v. U. S. ex rel. Regina Music Box Co.*, 22 App. D. C. 271; 105 O. G. 747; 1903 C. D. 615.

1881, March 3 (Duty of Commissioner of Patents in respect of application for trade-mark). See *Bronson Co. v. Duell*, 17 App. D. C. 471. (Trade-mark interference), See *Giles Remedy Co. v. Giles*, 26 App. D. C. 375; 120 O. G. 1826; 1906 C. D. 552. (Registrable trade-marks), See *In re Mark Cross Co.*, 26 App. D. C. 101; 116 O. G. 2534; 1905 C. D. 658. Section 2 (Trade-marks), See *Seymour v. South Carolina*, 2 App. D. C. 240; 66 O. G. 1167; 1894 C. D. 174.

1884, July 4, 23 Stat. 98 (Disbarment of attorneys), See *Wedderburn v. Bliss*, 12 App. D. C. 485; 83 O. G. 296; 1898 C. D. 413.

1891, March 3, (Appeals to the Supreme Court of the United States), See *Durham v. Seymour*, 161 U. S. 235; 74 O. G. 1731; 1896 C. D. 274.

1892, June 30, (Legal holidays), See *Ocumpaugh v. Norton*, 24 App. D. C. 296.

1893, February 9, 27 Stat. 434 (Constitutionality of act), See *Bernardin v. Duell*, 13 App. D. C. 379; *Bernardin v. Seymour*, 10 App. D. C. 294; 79 O. G. 1190; 1897 C. D. 428. (Appeals from Commissioner of Patents), See *Hein v. Pungs*, 9 App. D. C. 492; 77 O. G. 1600; 1896

C. D. 649; *Hulett v. Long*, 15 App. D. C. 284; 89 O. G. 1141; 1899 C. D. 446. Section 8 (Appeals to the Supreme Court of the United States), See *Rousseau v. Brown*, 21 App. D. C. 73; 104 O. G. 1120; 1903 C. D. 587. Section 9 (Appeals from Commissioner of Patents). See *Hisey v. Peters*, 6 App. D. C. 68; 71 O. G. 892; 1895 C. D. 349; *Westinghouse v. Duncan*, 2 App. D. C. 131; 66 O. G. 1009; 1894 C. D. 170; *Einstein v. Satchill*, 2 App. D. C. 10; 65 O. G. 1918; 1893 C. D. 677.

1894. July 30, (Appeals from Commissioner of Patents), See *Hein v. Pungs*, 9 App. D. C. 492; 77 O. G. 1600; 1896 C. D. 649.

1897. March 3, 29 Stat. 692, c. 391 (Effect of foreign patent on application), See *De Ferranti v. Lyndmark*, 30 App. D. C. 417; 134 O. G. 515.

1903. March 3, 32 Stat. 1225, c. 1019 (Effect of foreign patent on application), See *De Ferranti v. Lyndmark*, 30 App. D. C. 417; 134 O. G. 515; *Gucniffet v. Victorsohn*, 30 App. D. C. 432; 134 O. G. 779.

1905. February 20, 33 Stat. 724 (Trade-mark rights), See *In re Standard Underground Cable Co.*, 27 App. D. C. 320; 123 O. G. 656; 1906 C. D. 687; *In re American Glue Co.*, 27 App. D. C. 391; 123 O. G. 999; 1906 C. D. 695. (Opposition to registration of trade-mark), See *Gaines v. Knecht*, 27 App. D. C. 530; 123 O. G. 657; 1906 C. D. 690; *Gaines v. Carlton Importation Co.*, 27 App. D. C. 571; 123 O. G. 1994; 1906 C. D. 731. (Who may question constitutionality of act), See *Buchanan-Anderson-Nelson Co. v. Breen*, 27 App. D. C. 573; 134 O. G. 322; 1906 C. D. 750. (Appeals to Court of Appeals), See *Giles Remedy Co. v. Giles*, 26 App. D. C. 375; 120 O. G. 1826; 1906 C. D. 552. (Registrable trade-marks), See *Worster Brewing Corporation v. Ructer*, 30 App. D. C. 428; 133 O. G. 1190; *In re A. G. Spalding & Bros.*, 27 App. D. C. 314; 123 O. G. 321; 1906 C. D. 674. Section 1 (Application for registration of trade-mark), See *In re A. G. Spalding & Bros.*, 27 App. D. C. 314; 123 O. G. 321; 1906 C. D. 674. Section 5 (Registrable trade-marks), See *Kentucky Distilleries & W. Co. v. Old Lexington Club Distilling Co.*, 31 App. D. C. 223;

135 O. G. 220; *Wm. A. Rogers, Ltd., v. International Silverware Co.*, 30 App. D. C. 97; 129 O. G. 3503; *In re Crescent Typewriter Supply Co.*, 30 App. D. C. 324; 133 O. G. 231; *Battle Creek Sanitarium Co. v. Fuller*, 30 App. D. C. 411; 134 O. G. 1299; *Worster Brewing Corporation v. Rueter*, 30 App. D. C. 428; 133 O. G. 1190; *In re Hopkins*, 29 App. D. C. 118; 128 O. G. 890; 1907 C. D. 549; *In re National Phonograph Co.*, 29 App. D. C. 142; 128 O. G. 1295; 1907 C. D. 550; *Calm, Belt & Co.*, 27 App. D. C. 173; 122 O. G. 354; 1906 C. D. 627; *In re William Conners Paint Manuf. Co.*, 27 App. D. C. 389; 123 O. G. 999; 1906 C. D. 696; *In re American Glue Co.*, 27 App. D. C. 391; 123; O. G. 999; 1906 C. D. 695. Section 6 (Notice of opposition), See *Martin v. Martin & Boxme Co.*, 27 App. D. C. 59; 122 O. G. 734; 1906 C. D. 642. Section 13 (Registrable trade-marks), See *Buffalo Pitts Co. v. Duell*, 28 W. L. R. 789; 93 O. G. 1491; 1900 C. D. 397; (Cancellation of registered trade-mark), See *McIlhenny's Son v. New Iberia Extract Co.*, 30 App. D. C. 337; 133 O. G. 995; *Martin v. Martin & Boxme Co.*, 27 App. D. C. 59; 122 O. G. 734; 1906 C. D. 642. Section 14 (Amendment of application for trade-mark), See *In re Mark Cross Co.*, 26 App. D. C. 101; 116 O. G. 2534; 1905 C. D. 658. Section 24 (Amendment of application for trade-mark), See *In re Mark Cross Co.*, 26 App. D. C. 101; 116 O. G. 2534; 1905 C. D. 658.

1907, March 2, 34 Stat. 1251, c. 2573 (Application for trade-mark), See *Hall's Safe Co. v. Herring-Hall-Marvin Safe Co.*, 31 App. D. C. 498; 135 O. G. 1804.

II. REVISED STATUTES OF THE UNITED STATES.

§ 481, (Appeals to Examiners-in-Chief), See *Steinmetz v. Allen*, 22 App. D. C. 56; 102 O. G. 231; 1903 C. D. 632.

§ 482, (Appeals to Examiners-in-chief), See *Steinmetz v. Allen*, 22 App. D. C. 56; 102 O. G. 231; 1903 C. D. 632; *Allen v. U. S. ex rel. Lowry*, 26 App. D. C. 8.

§ 483, (Powers of Commissioner of Patents), See *Steinmetz v. Allen*, 192 U. S. 543; 109 O. G. 549; 1904 C. D. 703.

§ 487, (Disbarment of attorneys), See *Wedderburn v. Bliss*, 12 App. D. C. 485; 83 O. G. 296; 1898 C. D. 413.

§ 780, (Appeals to Supreme Court of the United States), See *Rousseau v. Brown*, 21 App. D. C. 73; 104 O. G. 1120; 1903 C. D. 587.

§ 4886, (Abandonment of right to patent), See *In re Mower*, 15 App. D. C. 144; 88 O. G. 191; 1899 C. D. 395; (Foreign patents as evidence), See *Rousseau v. Brown*, 21 App. D. C. 73; 104 O. G. 1120; 1903 C. D. 587; (Public sales), See *In re Mills*, 25 App. D. C. 377; 117 O. G. 904; 1905 C. D. 677; (Public use barring right to patent), See *Burson v. Vogel*, 29 App. D. C. 388; 131 O. G. 942; 1907 C. D. 669; (Distinguishing inventions), See *In re Frasch*, 27 App. D. C. 25; 122 O. G. 1048; 1906 C. D. 648.

§ 4887, (Filing application when foreign patent pending), See *In re Swinburne*, 19 App. D. C. 565; 99 O. G. 1625; 1902 C. D. 537; (Foreign application for patent as evidence), See *Rousseau v. Brown*, 21 App. D. C. 73; 104 O. G. 1120; 1903 C. D. 587.

§ 4888, (Application for patent), See *Lotz v. Kenney*, 31 App. D. C. 205; 135 O. G. 1801; (Disclosure of invention), See *Hopkins v. Newman*, 30 App. D. C. 402; 134 O. G. 2028.

§ 4894, (Application for patent), See *In re Spittcler*, 31 App. D. C. 271; 134 O. G. 1301; (Abandonment of application for patent), See *Duryea v. Rice*, 28 App. D. C. 423; 126 O. G. 1357; 1907 C. D. 443; *In re Hien*, 166 U. S. 432; 79 O. G. 507; 1897 C. D. 367; (Appeals from Commissioner of Patents), See *Hien v. Pungs*, 9 App. D. C. 492; 77 O. G. 1600; 1896 C. D. 649.

§ 4897, (Renewal applications), See *Cutler v. Leonard*, 31 App. D. C. 297; 136 O. G. 438; *Christensen v. Noyes*, 15 App. D. C. 94; 90 O. G. 227; 1900 C. D. 212.

§ 4904, (Appeals from Commissioner of Patents), See *Hulett v. Long*, 15 App. D. C. 284; 89 O. G. 1141; 1899 C. D. 446; (Appeals to Examiners-in-Chief), See *Allen v. U. S. ex rel. Lowry*, 26 App. D. C. 8; (Notice of interference), See *United States ex rel. Newcomb Motor Co. v. Moore*, 30 App. D. C. 464; 133 O. G. 1680.

§ 4909, (Appeals to Examiners-in-Chief), See *In re Mygatt*, 26 App. D. C. 366; *Allen v. U. S. ex rel. Lowry*, 26 App.

D. C. 8; *Steinmetz v. Allen*, 22 App. D. C. 56; 102 O. G. 231; 1903 C. D. 632.

§§ 4909-4911, (Rejection of claims by Primary Examiner), See *United States ex rel. Newcomb Motor Co. v. Moore*, 30 App. D. C. 464; 133 O. G. 1680.

§ 4910, (Appeals to Examiner-in-Chief), See *Steinmetz v. Allen*, 22 App. D. C. 56; 102 O. G. 231; 1903 C. D. 632.

§ 4911, (Appeals from Commissioner of Patents), See *Hisey v. Peters*, 6 App. D. C. 68; 71 O. G. 892; 1895 C. D. 349.

§4914, (Appeals to Supreme Court of the United States), See *Rousseau v. Brown*, 21 App. D. C. 73; 104 O. G. 1120; 1903 C. D. 587.

§4915, (Remedies), See *Jones v. Starr*, 26 App. D. C. 64; 117 O. G. 1495; 1905 C. D. 694; *Johnson v. Mueser*, 29 App. D. C. 61; *Durham v. Seymour*, 6 App. D. C. 78; 71 O. G. 601; 1895 C. D. 307; *Sobey v. Holsclaw*, 28 App. D. C. 65; 126 O. G. 3041; 1907 C. D. 465; (Application to appeals from Commissioner of Patents), See *Doyle v. McRoberts*, 10 App. D. C. 445; 79 O. G. 1029; 1897 C. D. 413.

§ 4916, (Reissue of patent), See *In re Heroult*, 29 App. D. C. 42; 127 O. G. 3217; 1907 C. D. 521; *In re Hoey*, 28 App. D. C. 416; 127 O. G. 2817; 1907 C. D. 516.

§ 4918, (Remedies), See *Jones v. Starr*, 26 App. D. C. 64; 117 O. G. 1495; 1905 C. D. 694.

§ 4919, (Recovery for infringement of patent), See *Armstrong Whitworth Co. v. Norton*, 15 App. D. C. 223.

§4920, (Contesting validity of patent), See *Yates v. Hunson*, 8 App. D. C. 93; 74 O. G. 1732; 1896 C. D. 278.

§ 4952, (Copyrights), See *Stern v. Rosey*, 17 App. D. C. 562.

III. CODE OF LAWS FOR THE DISTRICT OF COLUMBIA.

§ 558, (Notaries public), See *Hall's Safe Co. v. Herring-Hall-Marvin Safe Co.*, 31 App. D. C. 498; 135 O. G. 1804.

§ 1389, (Appeals to Court of Appeals), See *Ocumpaugh v. Norton*, 24 App. D. C. 296.

STRIKING APPLICATION FROM FILES. See APPEALS, 51.

SUBSTITUTION OF ELEMENTS. PATENTS, II, 5; 132, 140.

SUBSTITUTION OF EQUIVALENTS. See PATENTS, II 6; 142.

SUBSTITUTION OF PARTIES. See MANDAMUS, 55.

SUPERIORITY AND POPULARITY OF INVENTION. See PATENTS, II, 16.

SUPREME COURT OF THE UNITED STATES. See APPEALS, 1-4.

SURRENDER OF PATENT. See PATENTS, 975.

SYMBOLS. See TRADE-MARKS.

TESTS. See PATENTS, III 3; 440-442, 726.

TIME FOR FILING APPLICATION FOR PATENT. See PATENTS, 171, 172.

TIME FOR APPEAL. See APPEALS, 13-29, 113.

TITLE.

As to what constitutes a cloud on title. See *Columbia Sand Dredging Co. v. Miller*, 20 App. D. C. 245; 30 W. L. R. 469.

See PATENTS, 700.

TRADE-MARKS.

I. What Registrable.
II. Right to.
III. Application for Registration.
IV. Commissioner's Power in Determining Right to Registration.
V. Effect of Registration.
VI. Cancellation.
VII. Interference.
VIII. Evidence.
IX. Appeals.
X. Mandamus to Compel Registration.

1. What Registrable.

1. By the change in the wording of the law when § 3 of the act of 1881 was adopted Congress did not intend to throw open the door of registration to every name and symbol that caprice might adopt regardless of the old and well-settled rules of law as to

what words and marks constitute proper trade-marks. *Bronson Co. v. Ducll,* 17 App. D. C. 471; 95 O. G. 229; 1901 C. D. 330.

2. As an ordinary surname cannot be appropriated as a trade-mark to the exclusion of others of the same name, it follows that the rules of law relating to the similarity of technical trade-marks cannot be applied to the use of such surname as a mark, notwithstanding the confusion that may result from its legitimate use by such others. The law relating to unfair competition may apply under certain conditions, but not that of infringement. *Rogers v. International Silverware Co.,* 30 App. D. C. 97; 129 O. G. 3503.

3. The name "Wm. A. Rogers" *Held* entitled to registration under the last proviso of § 5 of the Trademark Act approved February 20, 1905, notwithstanding the prior adoption and continuous use of the names "Wm. Rogers Mfg. Co." and "Wm. Rogers and Son," as a party is entitled to use his own name, actually or legally acquired, without regard to the confusion that may result from similarity. *Ib.*

4. Section 5 of the Trademark Act of 1905 is broad enough to prohibit the registration of any word that has an exclusive geographical significance or that would suggest any particular geographical location. *In re Crescent Typewriter Supply Co.,* 30 App. D. C. 324; 133 O. G. 231.

5. A non-technical mark is not entitled to registration under the ten-year proviso of § 5 of the Trademark Act of February 20, 1905, unless it is shown that the applicant possessed and enjoyed an actual use of the mark for the specified period to the sole exclusion of all others, and if it appears that during such period another was using the same word as a trademark upon the same character of goods the use cannot be considered "exclusive" within the meaning of the statute. *Worcester Brewing Corp. v. Ructer & Co.,* 30 App. D. C. 428; 133 O. G. 1190.

6. A mark which simulates the Great Seal of the United States is not registrable as a trademark under the act of February 20, 1905. *In re American Glue Co.,* 27 App. D. C. 391; 1906 C. D. 695; 123 O. G. 999.

7. The registration of a trade-mark the pictorial representation of which simulates the seal of the Department of Justice of the United States and in some parts the Great Seal of the United States is prohibited under § 5 of the act of February 20, 1905.

In re William Conners Paint Co., 27 App. D. C. 389; 1906 C. D. 696; 123 O. G. 999.

8. A mark which simulates the arms or seal of the State of Maryland is not registrable under the last proviso of the fifth section of the Trademark Act of February 20, 1905, providing for the registration of marks which had been in actual and exclusive use by the applicants for ten years next preceding the passage of the act, as the use was not *exclusive*. Applicants could never acquire such a property right in the seal or the coat-of-arms of the State of Maryland as to *exclude* the State from the use thereof. *In re Cahn, Belt & Co.*, 27 App. D. C. 173; 1906 C. D. 627; 122 O. G. 354.

9. That the use of the coat-of-arms of the United States or of the flag or of armorial bearings and decorations for purposes of trade is against public policy or order has been recognized by the legislatures of various States in acts prohibiting their use, in the International Convention for the Protection of Industrial Property, concluded at Paris, March 20, 1883, and by the Commissioners of Patents in refusing registration to marks of this character, and it was in recognition of this public policy that Congress inserted the provision prohibiting the registration of such marks. *Ib.*

10. A trademark for whisky consisting of a pictorial representation of the arms and seal of the State of Maryland, with certain additions or variations, is not entitled to registration under the last proviso of the fifth section of the Trademark Act of February 20, 1905 (33 Stat., 724, ch. 592), as it simulates the arms and seal of the State of Maryland and violates the express provision of such section which prohibits the registration of any mark which "consists of or comprises the flag or coat-of-arms or other insignia of the United States or any simulation thereof or of any State. *Ib.*

11. When an applicant seeks a registration under the ten-year proviso, he should not be permitted to register a word or name not recognized by the law as a lawful trademark for any articles of commerce save those upon which he has actually used the mark for the required period. *In re Spalding & Bros.*, 27 App. D. C. 314; 1906 C. D. 674; 123 O. G. 321.

12. The word "Standard" as applied to phonographs *held* de-

scriptive and therefore not registrable. *In re National Phonograph Co.*, 29 App. D. C. 142; 128 O. G. 1295; 1907 C. D. 550.

13. The applicant's claim to the use of "Standard" as a trademark is in nowise strengthened, because the word is applied only to machines of inferior design which are not in any sense standard. The word cannot be appropriated as a trademark whether it is truly descriptive or falsely descriptive. *Ib.*

14. The word "Orient" is generally understood to refer to certain Eastern countries, and, as applied to ink-ribbons and carbon-paper, *Held* to be geographical and not registrable. *In re Crescent Typewriter Supply Co.*, 30 App. D. C. 324; 133 O. G. 231.

15. A mark for ink-ribbons and carbon-paper consisting of the word "Orient" inclosed in a wreath, the letters E and I of the word being printed as a monogram, *Held* not registrable under § 5 of the Trademark Act of 1905, as the word "Orient" is geographical. *Ib.*

16. A trademark comprising the words " 'Oriental Cream,' associated with an eagle holding a scroll in its beak," is not registrable as a trademark for a skin-lotion because of its geographical significance. *In re Hopkins*, 29 App. D. C. 118; 128 O. G. 890; 1907 C. D. 549.

17. Trademarks consisting of the words "Zodenta" and "Sozodont" are quite dissimilar and the former is not calculated to mislead or deceive the average purchaser who may seek to buy the latter. The resemblance is not such as to preclude a proper determination of the question upon demurrer. *Hall and Ruckel v. Ingram*, 28 App. D. C. 454; 126 O. G. 759; 1907 C. D. 441.

18. A judgment dismissing a petition for a writ of mandamus to compel the Commissioner of Patents to register the words "Ever-Ready" as used by the relators in commerce with foreign nations and the Indian tribes as a trademark for coffee mills, registration having been refused by the Commissioner on the ground that the words are descriptive simply of the qualities or characteristics of the articles manufactured and therefore not the subject of appropriation as a lawful trademark, was proper. *Bronson Co. v. Duell*, 17 App. 471; 29 W. L. R. 126.

19. A trademark consisting of a six-pointed star with the letters "G E" inscribed in monogram in the center *held* to so nearly resembled the trademark consisting of a six-pointed star surrounded by two circles, having inscribed between the inner and

outer circles the words "The Celebrated Star Lager Beer" as to cause confusion and deception. *Ehret v. Star Brewing Co.*, 31 App. D. C. 507; 136 O. G. 1533.

20. The word "Sterling" as a trade-mark for ale or for any other kinds of goods is descriptive of the quality of the articles on which it is used, as it denotes that the article is genuine, pure, and of superior quality, and it is therefore ineligible for registration as a technical mark. *Worcester Brewing Corp., v. Reuter & Co.*, 30 App. D. C. 428; 133 O. G. 1190.

21. A mark cannot be registered under the "ten-years" clause of the act of February 20, 1905, where a mark so nearly identical thereto as to be likely to confuse and mislead the public has been used by another during the ten years next preceding the passage of the act. *Kentucky Distilleries, &c., Co. v. Old Lexington Club Distilling Co.*, 135 O. G. 220; 31 App. D. C. 223.

22. A trademark consisting of the word "Victoria," associated with a medallion bearing the representation of the head of the late Queen Victoria and surmounted by a crown suspended from the letter "t" of said word, does not so nearly resemble the mark of the opponent, which consists of the figure of a knight on horseback resting upon an ornamental pedestal bearing the inscription "The Victor," as to be likely to cause confusion in the mind of the public. *Andrew McLean Co. v. Adams Manuf. Co.*, 31 App. D. C. 509; 136 O. G. 440.

23. Where the mark of an applicant so resembles a prior registered mark that the goods of each would be likely to be known to the public by the same name, the registration of the former should be refused. *In re Indian Portland Cement Co.*, 30 App. D. C. 463; 134 O. G. 518.

24. A trademark the distinguishing feature of which consists of an Indian's head showing profile with the conventional feather head-dress, within a circle, was properly refused registration in view of the prior use on the same class of goods of a mark showing a front view of an Indian's head with a feathered head-dress. *Ib.*

25. The words "Health Food" as applied to bread, crackers, etc., are clearly descriptive of the goods with which they are used and cannot be appropriated and registered as a technical trademark. *Battle Creek Sanitarium Co. v. Fuller,* 30 App. D. C. 411; 134 O. G. 1299.

26. The mark "Chancellor Club" for cocktails so nearly resembles the prior registered mark "Club Cocktails" for the same goods as to be likely to cause confusion in the mind of the public, and is therefore not registrable. *In re S. C. Herbst Importing Co.*, 30 App. D. C. 297; 134 O. G. 1565.

27. A trademark consisting of the compound word "Eidelweiss-Maltine" set in an elaborate picture or design was properly refused registration in view of the prior use of the word "Maltine" as a trademark for goods of the same descriptive properties. *Peter Schoenhofen Brewing Co. v. Maltine Co.*, 30 App. D. C. 340; 134 O. G. 1805.

28. The word "Club" as applied to liquors having become descriptive and the word "Lexington" being geographical, the term "Old Lexington Club" as applied to whisky is not registrable as technical trademark. *Kentucky Distilleries, &c., Co. v. Old Lexington Club Distilling Co.*, 135 O. G. 220; 31 App. D. C. 223.

29. Where the applicant is a corporation a trade name which is substantially a reproduction of the corporate name cannot be registered as a technical trademark. *Ib.*

30. Gasoline and vapor stoves are used for the same purpose as coal and wood stoves and belong to the same genus. One who adopts the word "Jewel" as a trademark for gasoline and vapor stoves with full knowedge of the use at that time of the same word for coal and wood stoves is not entitled to registration. *American Stove Co. v. Detroit Stove Works*, 31 App. D. C. 304; 134 O. G. 2245.

31. The words "Self-Loading" as applied to a cartridge adapted for use with an automatic gun are descriptive and not registrable as a technical trademark. *Winchester Repeating Arms Co. v. Peters Cartridge Co.*, 30 App. D. C. 505; 134 O. G. 2030.

32. The words "Shredded Whole Wheat" as applied to certain food preparations *Held* to be descriptive, and therefore incapable of appropriation as a trademark. *Natural Food Co. v. Williams*, 30 App. D. C. 348; 133 O. G. 232.

33. A trademark consisting of "flakes of mica impressed or otherwise applied to the external surface of an insulating-tube or tubular coverings for electric wires" was properly refused registration, for the reason that the registration would operate, so far as it could have any effect, to give the applicant a monopoly of conduits or tubular coverings of flake-mica composition. The

office of a trademark in a legal sense is to point out distinctly the origin or ownership of the article to which it is affixed, or, in other words, to give notice who was the producer. Words, letters, or symbols which indicate merely the quality of the goods to which they are affixed cannot be appropriated as trademarks. *In re American Circular Loom Co.*, 28 App. D. C. 446, 450; 126 O. G. 2191.

34. If the sole purpose of the use of the flakes of mica is to obtain protection "for the distinctive appearance obtained by placing bright scales on a dark background," registration was properly denied on the ground that it was an ingenious attempt to obtain a trademark of which color, unconnected with some symbol or design, is the essential feature. *Ib.*

35. The words "Circular Loom" refused registration as a trademark for "conduits and coverings for electrical conductors consisting of fiber spirals wrapped with fiber and tape, and covered with a protective cotton tube with an outer coating of an insulating compound and mica" on the ground that they are descriptive of the protective cotton tube, which is one of the material parts of the construction. An inspection of the article shows that the cotton tube is woven on a circular loom, which must be known to dealers in the goods, and it may well be inferred that this product of a circular loom is considered a superior quality in the trade. *Ib.*

36. Sometimes arbitrary words, adopted primarily as a mark to indicate origin or ownership, may through long-continued and wide sale of the particular article come to indicate quality also, and in such event the owner would not be debarred from their protection as a trade-mark. It would have to appear with certainty, however, that at the time of adoption the mark was for the purpose of indicating origin, manufacture, or ownership and not at all as descriptive of grade or quality. *Ib.*

II. Right to.

37. The right to a trademark is not created by the Federal Government and does not emanate from it; and all that Congress has sought to do in legislating upon the subject is to provide a recording act. *Einstein v. Sawhill*, 2 App. D. C. 10; 22 W. L. R. 89.

38. The owners of trademarks who are permitted to obtain registration of the same are those that in the manner and under the

conditions prescribed shall have used such words and symbols only as at common law are susceptible of exclusive appropriation as trademarks, and this is one of the essential elements of "the presumptive lawfulness of claim to the alleged trademark" with the decision of which the Commissioner of Patents is charged. *Bronson Co. v. Ducll,* 17 App. D. C. 471; 95 O. G. 229; 1901 C. D. 330.

39. The owners of trademarks who, by the first section of the act of Congress of March 3, 1881, are permitted to obtain registration of the same, are those that, in the manner and under the conditions prescribed, shall have used such words and symbols only as at common law are susceptible of exclusive appropriation as trademarks; and this is one of the essential elements of "the presumptive lawfulness of claim to the alleged trademark" with the decision of which the Commissioner of Patents is charged. The performance of this duty involves the exercise of discretion; in respect of it the function of the Commissioner is judicial. *Ib.*

40. Where Rosenbush in his application alleges adoption in 1891, but the earliest date mentioned in his testimony is the "spring of 1895," and his testimony is only supported by that of a former partner, who fixes the date as "about a year and a half" after August 1, 1894, when the firm commenced business, *Held* insufficient to prevail over the Rose Shoe Manufacturing Company, which presents the testimony of several credible witnesses who clearly trace the use of the trademark by the Rose Shoe Manufacturing Company, and its predecessors in business from the year 1894. *Rose Shoe Mfg. Co. v. Rosenbush & Co.,* 28 App. D. C. 465; 127 O. G. 394; 1907 C. D. 484.

41. Where several successive firms manufacturing ladies' shoes are shown to have occupied the same factory, it is reasonable to suppose that once having adopted a trade-name, they would continue its use notwithstanding a reorganization of the firm. *Ib.*

42. In determining the question of priority of adoption and use of a trademark for bitters made from certain roots and barks and bottled, evidence of the use of such mark on a package containing a mixture of ground roots and bark with directions how to make the bitters by steeping them in Holland gin may be properly considered, the goods being of the same descriptive

properties. *Schuster Co. v. Muller,* 28 App. D. C. 409; 126 O. G. 2192; 1907 C. D. 455.

43. Where any symbol or label claimed as a trademark is so worded as to contain a distinct assertion which is false, no property right can be claimed, nor can the right to the exclusive use of it be maintained by a court of equity. Courts of equity will not interfere by injunction where there is any lack of proof in the applicant's case or any misrepresentation in his trademark or label, nor will the courts uphold in any one a privilege of deceiving the public. An exclusive privilege to deceive the public is not one that a court of equity can sanction nor one which the Commissioner of Patents should aid. *Ib.*

44. Evidence submitted by a party to a trade-mark interference tending to show that the mark as used by the opposing party was deceptive considered and *Held* insufficient to establish the fact. *Ib.*

45. Whatever interest in a trademark a retiring partner of a firm may have had ceases upon his withdrawl from the firm and remains with the surviving partner. *Bluthenthal and Bickhart v. Bigbie Bros. & Co.*, 30 App. D. C. 118; 130 O. G. 2068.

46. The general rule that when a partner retires from a partnership and assents to the retention by the other partners of the possession of the old place of business and the future conduct of the business by them under the old name the trademark remains with the latter has no application to the facts of this case. *Giles Remedy Co. v. Giles*, 26 App. D. C. 375; 1906 C. D. 552; 120 O. G. 1826.

47. In the absence of express agreement a trademark used theretofore by one who enters into partnership with others does not at the dissolution of the partnership, caused by the withdrawal of the member bringing the mark into the partnership, remain the property of the partnership. *Ib.*

48. Applicant held entitled to registration of the words "Old J" and "Old Jay Rye" with the picture of a jay as a trademark for whisky, notwithstanding the ownership by the opponent of the words "Old Crow" with a picture of a crow for the same goods. *Gaines & Co. v. Carlton Importation Co.*, 27 App. D. C. 571; 1906 C. D. 731; 123 O. G. 1994.

49. It is not to be presumed that in enacting a registration law Congress intended to confer upon parties the right even to

register marks, whether subject or not to lawful appropriation, in connection with articles upon which they had not been used. *In re Spalding & Bros.*, 27 App. D. C. 314; 1906 C. D. 674; 123 O. G. 321.

50. The last proviso of § 5 of the Trademark Act of February 20, 1905, relating to the registration of marks which had been in actual and exclusive use for ten years, was intended to provide for the registration and protection of marks which were not technical trademarks, but which had been actually used as trademarks by the applicants or their predecessors from whom they derived title and in which the user had acquired property rights for more than ten years next preceding the passage of the act. *In re Cahn, Belt & Co.*, 27 App. D. C. 173; 1906 C. D. 627; 122 O. G. 354.

51. Where it appears that Sanford Giles first adopted and used the trademark and secured registration thereof and subsequently the mark was used by him and by Daniel Giles at a single place of business under the name of the Giles Remedy Company until a disagreement between them which resulted in their separation, *Held* that Sanford Giles was the owner of the mark and that judgment of priority must be in his favor. *Giles Remedy Co. v. Giles*, 26 App. D. C. 375; 1906 C. D. 552; 120 O. G. 1826.

52. Assuming, as held by the Commissioner of Patents, that the word "Eureka" is a valid trademark for press-boards and that its use on samples of such boards was a trademark use, the evidence is sufficient to justify the holding that M. & Co. were entitled to register this mark. *Case Bros. v. Murphy & Co.*, 31 App. D. C. 245; 136 O. G. 228.

53. The use of the words "Pure Old Rye Whiskey" in connection with a trade-mark on labels placed on bottles containing whiskey which is part rye and part bourbon and contains neutral spirits and coloring-matter is such false representation as will disentitle the user of the mark to register the same. *Levy & Co. v. Uri*, 135 O. G. 1363; 31 App. D. C. 441.

54. It was the purpose of the Trade-Mark Act to protect manufacturers and dealers, because in so doing the public would in turn be protected. It was not the purpose of the act to recognize the right of any person, firm or corporation to deceive the public by the use of a deceptive mark. *Levy & Co. v. Uri*, 135 O. G. 1363, 31 App. D. C. 441.

55. Applicant adopted as a trade-mark for injectors the word "Monitor." These injectors were of the type shown in the Gresham patent, which had expired prior to that time, and also embodied the features of the Wohlers patent, which was of limited scope. Later other styles of injectors were made and designated by various names, of which "Monitor" was a part. None of these injectors embodied the features of the Wohlers patent. *Held* that these facts do not bring the case within the ruling of Singer Mfg. Co. v. June, (163 U. S. 169,) and applicant is entitled to register the mark. *Edna Smelting &Refining Co. v. Nathan Manuf. Co.*, 30 App. D. C. 487; 135 O. G. 664.

56. Where a trade-mark had been applied to an article prior to the adoption of features covered by a patent, the expiration of the patent does not terminate the exclusive right to the use of the mark. *Ib.*

57. Where a customer orders a manufacturer to put up goods under a certain brand, which originated with the customer, the brand belongs to him and not to the manufacturer. *Michigan Condensed Milk Co. v. Kenneweg Co.*, 30 App. D. C. 491; 135 O. G. 451.

58. The evidence considered and held not to establish that Kenneweg & Company, the predecessor in business of the applicant, with whom the mark in issue originated, had only an exclusive license to use the mark in a limited territory. *Ib.*

59. The fact that after discovering that the opponent was using the mark in issue applicant took no steps to prevent this use does not constitute such laches as will defeat its right of registration. *Ib.*

60. The whole trade-mark act must be read and construed together, and every requisite to registration required by the previous sections must be held to apply to registration under section 13. *Buffalo Pitts Co. v. Duell*, 28 W. L. R. 789; 93 O. G. 1491; 1900 C. D. 397.

61. That a particular brand of cards was known to the trade as "Stage" cards does not prove use of the name "Stage" as a trade-mark to indicate origin and ownership. *U. S. Playing Card Co. v. Clark*, 30 App. D. C. 208; 132 O. G. 681.

62. Evidence considered and held to show that the ace of spades bearing a conventional figure of Columbia was adapted, used, and advertised as a trade-mark for playing-cards and that

the word "Stage" was used in addition thereto merely for the purpose of indicating style, class, and grade. *Ib.*

63. The term *actual use* in the ten-year proviso of the Trade-Mark Act should be strictly construed. *In re Spalding & Bros.*, 27 App. D. C. 314; 1906 C. D. 674; 123 O. G. 321.

64. The words "lawfully used" in section 3 of the act of 1881 means a use which could, under established rules of law, result in the lawful exclusive appropriation of the alleged trade-mark and does not mean merely use in lawful commerce. *Bronson Co. v. Duell*, 17 App. D. C. 471; 95 O. G. 229; 1901 C. D. 330.

65. In determining if applicant's use of a mark has been "exclusive" within the meaning of section 5 of the Trade-Mark Act it is immaterial whether the opposer used the mark as a trade-mark or merely in a descriptive sense. *Natural Food Co. v. Williams*, 30 App. D. C. 348; 133 O. G. 232.

66. The fact that the opposer built machines to produce shredded whole wheat and actually produced and sold such an article is sufficient corroboration of his testimony that the boxes in which the product was packed were marked "Shredded Whole Wheat." *Ib.*

67. Where the appellant applied under the ten-year proviso of the act of February 20, 1905, for the registration of the words "Old Tucker" as a trade-mark for whisky and it was shown that the appellee had used the words "J. C. Tucker" as a trade-mark for whisky since January 15, 1902, *Held* that the appellant is not entitled to register the mark since it had not had exclusive use of its trade-mark for the statutory period. *Brown-Forman Co. v. Beech Hill Distilling Co.*, 30 App. D. C. 485; 134 O. G. 1565.

68. Whether an isolated sale in a foreign country for the purpose of giving foundation to the affidavits is foreign commerce within the meaning of the law, *quaere*. *South Carolina v. Seymour*, 2 App. D. C. 240; 66 O. G. 1167; 1894 C. D. 174.

69. There is nothing in the dispensary law of the State of South Carolina intended to give authority for trade in liquors outside the limits of the State. It follows, therefore, that the sale of a case of State liquors in Canada by the State commissioner was not authorized by the law and was not the act of the State, but of the officer. *Ib.*

70. The Commissioner did not err in the conclusion that the

Trade-Mark applied for had not been lawfully used in foreign commerce. *Ib.*

III. Application for registration.

71. When registration is claimed under the ten-year proviso of the Trade-Mark Act, it should clearly appear in the application for such registration that every condition precedent has been fully complied with. *In re Spalding & Bros.*, 27 App. D. C. 314; 1906 C. D. 674; 123 O. G. 321.

72. Any rule of the Patent Office which would require the drawing filed to be a facsimile of the sample specimen furnished would be invalid. *In re Standard Underground Cable Co.*, 27 App. D. C. 320; 1906 C. D. 687; 123 O. G. 656.

73. Where the label used by the applicant has the word "Eclipse" printed upon a dark background representing a partial solar eclipse, together with descriptive words and the name and address of the applicant, and the application drawing shows merely the word "Eclipse," *Held* that registration of the mark shown upon the drawing should not be refused on account of the omission from the drawing of the additional matter shown in connection with that mark upon the label. *Ib.*

74. "Implements, apparatus, and goods used in athletic games and sports" *Held* indefinite and of no force as a statement of the particular description of the goods upon which the trade-mark has been used. *In re Spalding & Bros.*, 27 App. D. C. 314; 1906 C. D. 674; 123 O. G. 321.

75. For the purpose of registration a fermented malt liquor which is advertised as a "pleasing tasteful invigorating tonic as well as a pleasant beverage, for strengthening and building up the system recommended for convalescents and nursing mothers by all leading physicians," must be considered as goods of the same descriptive properties as a non-alcoholic viscous syrup sold as a medicine and tonic, notwithstanding the fact that in the application for registration the former is designated as lager-beer. *Peter Schoenhofen Brewing Co. v. Maltine Co.*, 30 App. D. C. 340; 134 O. G. 1805.

76. The fact that a fermented malt liquor to which applicant applied its mark was advertised as a tonic and as a product entirely different from that described in the application is sufficient ground for the refusal of registration. *Ib.*

77. An application is not "pending" after refusal by the Commissioner merely because no rehearing had been asked for or had. Neither the act of 1881 nor the rules provided for a rehearing and of course no rehearing could be had under the act of 1881 after it was repealed. *In re Mark Cross Co.*, 26 App. D. C. 101; 116 O. G. 2534; 1905 C. D. 658.

78. The use of the qualifying word "pending" in regard to applications which could be amended indicates that Congress did not intend that all applications for registration of trade-marks which had not been allowed at the time when the act went into effect could be further prosecuted under the provisions of that act. *Ib.*

79. By permitting the amendment of "pending" applications to bring them under the new law Congress did not intend to open the door to the further prosecution of all applications finally rejected during the last twenty-four years. *Ib.*

80. The words "pending applications" in sections 14 and 24 of the act of 1905 must be given their natural and ordinary meaning, since no reason is apparent for giving them a forced construction. "Pending" properly indicates the period before final judgment. *Ib.*

81. To give the word "pending" its natural meaning protects to the full extent all those who had applications undecided remaining in the Patent Office filed under the act of 1881. It saves the rights of all who have not exhausted or forfeited all of their rights—all those against whom no final judgment had been given. *Ib.*

82. The trade-mark Act of 1881 provided for no action upon an application save registration or a refusal of registration, and when either of these was done nothing remained to be done, and the application was no longer pending. *Ib.*

83. An amendment seeking to bring an application under the Trade-Mark Act of 1905 should be entered, and if it is believed that the application is not one of those which may be brought under the new law in accordance with sections 14 and 24 registration may be refused. An appeal lies from such refusal. *Ib.*

84. Sections 14 and 24 of the Trade-Mark Act of 1905, permitting the amendment of pending applications to bring them under the new law, do not apply to applications in which registration has been finally refused. *Ib.*

85. A trade-mark application under the act of 1881 which had been rejected by the Examiner and by the Commissioner on appeal cannot be regarded as "pending," and therefore it cannot be brought under the act of 1905 by amendment. *Ib.*

86. An application for registration of a trade-mark for whisky is not restricted to corn whisky. *Somers &Co. v. Neuman,* 134 O. G. 2031; 31 App. D. C. 193.

IV. Commissioner's Power in Determining Right to Registration.

86½. The Trade-Mark act does not vest in the Commissioner of Patents the power to decide for the applicant the scope of his claimed mark. *In re Standard Underground Cable Co.,* 27 App. D. C. 320; 1906 C. D. 687; 123 O. G. 656.

87. The duties imposed upon the Commissioner of Patents by the Trade-Mark act of March 3, 1881, are not ministerial, but their discharge requires the exercise of judgment and discretion, and his action in refusing to issue a certificate of registration of a trade-mark cannot be controlled by a writ of mandamus. *South Carolina v. Seymour,* 2 App. D. C. 240; 66 O. G. 1167; 1894 C. D. 174.

88. The authority to make regulations and requiring applicants to comply with them seems to imply that the Commissioner is left free to institute the necessary inquiry in his own mind. *Ib.*

89. The action of the Primary Examiner of Trade-Marks is but the report of a partial examination made by a subordinate. *Ib.*

90. The decision of the Commissioner goes to the question of the lawful use of the trade-mark in commerce with foreign nations or the Indian tribes, and whether the applicant has actually used the trade-mark in such commerce, and then whether he has the right to the use of it at all. He must decide whether the alleged trade-mark is in itself a lawful trade-mark, or is identical with the trade-mark of another, or is a deceptive imitation, or is the property of the applicant. *Ib.*

91. The Commissioner of Patents under the Trade-Mark statute of March 3, 1881, is not invested with discretionary power to determine whether the applicant for registration is *lawfully* engaged in foreign trade. *South Carolina v. Seymour,* 65 O. G. 1221; 1893 C. D. 622.

92. The discretion of the Commissioner, under that statute, is

to decide the presumptive lawfulness of claim to the ownership of the alleged trade-mark, not whether such mark is lawfully used in foreign commerce. *Ib.*

93. The Commissioner having denied registration to the State of South Carolina on the ground that in his judgment, the statute under which the State's officers and agents were acting did not authorize a trade with foreign nations, *Held* that that question was one for the courts in a proper case and the people of the State to determine, it not being a matter in which the United States, the Commissioner of Patents, or the general public had any concern or interest. *Ib.*

94. The purpose of the act of 1905 is to prevent and not to promote confusion, to protect and not to deceive the public. The language used empowers the Commissioner to exercise his discretion as to whether a proposed mark should be registered. If in his opinion its registration will "be likely to cause confusion or mistake in the mind of the public" or "deceive purchasers," he is bound to reject it. *In re S. C. Herbst Importing Co.*, 30 App. D. C. 297; 134 O. G. 1565.

V. Effect of Registration.

95. The registration of a trade-mark is not conclusive of a right of property therein. *Rogers v. International Silverware Co.*, 30 App. D. C. 97; 129 O. G. 3503.

96. Although the Trade-Mark Act of 1870 was held unconstitutional, the registration of a mark under that act is evidence of a claim to the mark by the registrant as of the date of the registration. *American Stove Co. v. Detroit Stove Works*, 31 App. D. C. 304; 134 O. G. 2245.

VI. Cancelation.

97. As the statute providing for the cancelation of registered trade-marks (act of Feb. 20, 1905, sec. 26, 33 Stat. L.) does not contemplate that any one may petition the Commissioner to cancel a trade-mark regularly registered, but it does provide that any one who "shall deem himself injured" may do so, the petition for cancelation must contain a statement of fact on this jurisdictional question sufficiently full to show that the petitioner has been injured by the registration, and this fact must not be left to conjecture, but must affirmatively appear, and where such a statement of fact is lacking the petition is demurra-

ble. *McIlhenny's Son v. New Iberia Extract of Tabasco Pepper Co.*, 30 App. D. C. 337; 133 O. G. 995.

98. An averment in a petition for the cancelation of the registered trade-mark "Tabasco" for pepper-sauce that petitioner has used such trade-mark is not sufficient, for the reason that unless the word has been used in the same business no injury contemplated by the statute would have followed. *McIlhenny's Son v. New Iberia Extract of Tabasco Pepper Co.*, 30 App. D. C. 337; 133 O. G. 995.

99. In a petition for the cancelation of a registered trade-mark a general averment that the registration "has been much to the prejudice, damage, and loss" of the petitioner unsupported by averments of facts is merely the conclusion of the pleader and is not a sufficient averment of damage to give petitioner a standing in a cancelation proceeding. *Ib.*

VII. Interference.

100. The question of interference in fact should be raised before the Examiner of Interferences in accordance with the requirements of Rule 49 of the Trade-Mark Rules within the time stated therein. It will not be determined on appeal when not properly raised below. *Somers & Co. v. Newman*, 134 O. G. 2031; 31 App. D. C. 193.

101. Where the Patent Office has decided that the trade-mark of each party is registrable, the burden is on the opponent to show that as a matter of fact there is such similarity between the marks as to be likely to cause confusion and deceive ordinary purchasers. *Andrew McLean Co. v. Adams Manuf. Co.* 136 O. G. 440; 31 App. D. C. 509.

102. It is not sufficient for an opponent to say that he believes he would be damaged by the registration of applicant's mark. He must allege some fact showing an interest in the subject- matter from which damage might be inferred. *Battle Creek Sanitarium Co. v. Fuller*, 30 App. D. C. 411; 134 O. G. 1299.

103. A party who has not used a mark as a trade-mark upon goods of a like description to applicant's can suffer no damage from its registration by the latter, and a notice of opposition which alleges merely that the opponent used the mark in its advertising-matter is demurrable. *Ib.*

104. A demurrer to a notice of opposition having been sustained by the Examiner of Interferences on the ground that the

opponent did not allege that it had used the mark on goods of substantially the same descriptive properties as applicant's the appropriate time to ask leave to amend was when the demurrer was sustained, and when the case came before the Commissioner on appeal it was discretionary with him to allow or to refuse the leave to amend. *Ib.*

105. Where a trade-mark registrant is shown to have been the first to adopt and use the mark and to have been the owner at the time he secured the registration, he is not to be defeated in an interference by showing that his opponent subsequently acquired title to the mark from him. Such showing might in appropriate proceedings justify compelling the transfer of the certificate of registration; but it does not justify the holding that the later applicant was the first to adopt and use the mark. *Giles Remedy Co. v. Giles,* 26 App. D. C. 375; 1906 C. D. 552; 120 O. G. 1826.

106. Section 6 of the Trade-Mark Act of February 20, 1905, providing that the affidavit in support of the notice of opposition shall be made by the person who would be damaged by the registration, is not satisfied by the affidavit of the attorney or agent of such party. *Martin v. Martin & Bowne Co.,* 27 App. D. C. 59; 1906 C. D. 642; 122 O. G. 734.

107. Where the owner of a trade-mark is deprived of his right to oppose registration thereof by another by the enforcement of the letter of the statute, he is not thereby deprived of his right of property in the trade-mark. Aside from the usual remedies at law and in equity for the protection or recovery of property rights, he may possibly obtain a remedy through a declaration of interference under section 7 or by a cancelation under section 13. *Ib.*

108. Where the mark of an applicant consists of the words "Raven Valley" accompanied by a pictorial representation of three ravens in the bare limbs of a tree and the opposer's trade-mark consists of the words "Old Crow" and it is stated that the words have been used by customers of the opposer accompanied by the picture of a crow, even admitting that the words "Old Crow" as a trade-mark would be interfered with by the picture of a crow and that the raven and the crow belong to the same family, *Held* that there is no such similarity between the marks of the parties as would justify refusing the applicant registration. *Gaines & Co. v. Knecht & Son,* 27 App. D C. 530; 1906 C. D. 690; 123 O. G. 657.

109. A party opposing the registration of a trade-mark cannot raise the question of the validity of the Trade-Mark Act, for courts sit only to protect and vindicate rights of persons or property, and the certificate of registration must be read in connection with the act and derives its whole vitality from the act. If the act is void, so is the certificate void upon its face, and no right of property is infringed upon or threatened. *Ib.*

110. Where an application was filed for the registration of a trade-mark for whisky, described as "the word 'Henderson' on a ribbon design beneath which is a shield upon which is a monogram composed of the letters and character 'B. & K.,'" and an opposition to the registration was made on the ground that the application is a fraudulent attempt to appropriate appellant's trade-mark consisting of "the representation of a Maltese or Templar cross and a panel below the same bearing the word 'Anderson' in white letters, the cross and panel appearing in red and each having a border in gold," *Held* that there is not the slightest similarity between the two marks except as to the words "Anderson" and "Henderson," that both are well-known names of persons, counties, and towns, and there is no reasonable ground of confusion between them, that it is not probable that the purchasing public will understand the word "Henderson" as indicating the goods put on the market by the owner of the mark "Anderson" and that one is as much entitled to claim the name "Henderson" as another is that of "Anderson." *Buchanan-Anderson Nelson Co. v. Breen and Kennedy*, 27 App. D. C. 573; 1906; C. D. 750 124 O. G. 322.

111. An opposer is in no situation to raise the question of the constitutionality of the Trade-Mark Act, and consideration thereof declined. *Gaines & Co. v. Carlton Importation Co.*, 27 App. D. C. 571; 1906 C. D. 731; 123 O. G. 1994.

112. Where it is urged that the Patent Office is without jurisdiction to grant registration of a trade-mark for the reason that the act under which the application is made is unconstitutional and void, *Held* that if the act is void the opposer has no standing as a party to this proceeding, for the procedure upon which the opposer challenges the validity of the act is provided by the act itself. *Gaines & Co. v. Knecht & Son*, 27 App. D. C. 530; 1906 C. D. 690; 123 O. G. 657.

113. A demurrer to an opposition to the registration of a trade-

mark stands as an admission of the allegations of the opposition in so far as they state facts and not conclusions of law and cannot be supported by an affidavit subsequently filed by the applicant relating to facts set forth in the notice of opposition. *Rogers v. International Silverware Co.*, 30 App. D. C. 97; 129 O. G. 3503.

114. Where an objection was raised in the Office that the attempted verification was invalid because made before and certified to by a notary who was at the same time the attorney of the opponent for the prosecution of the opposition and no leave was applied for to cure the defect by verifying it before a qualified notary, but the action taken was to file a new opposition, entitled an amendment, which was signed by the same authorized representative officer of the corporation and vertified before a proper notary, *Held* that this was practically a new opposition and as such came too late. *Hall's Safe Co. v. Herring-Hall-Marvin Safe Co.*, 31 App. D. C. 498; 135 O. G. 1804.

115. An opposition which was verified before a notary who was at the same time attorney for the opponent is invalid. *Hall's Safe Co. v. Herring-Hall-Marvin Safe Co.*, 135 O. G. 1804; 31 App. D. C. 498.

VIII. Evidence.

116. The practice of attorneys in trade-mark cases of disregarding the rules of evidence by asking questions grossly leading and suggestive, condemned. *American Stove Co. v. Detroit Stove Works*, 134 O. G. 2245.

117. The indefinite oral testimony of witnesses as to the sale of goods bearing a given trade-mark, given more than thirty years after the events to which the testimony relates, will not be accepted as sufficient where it appears that records were in existence which would have proved the facts desired to be proved beyond peradventure, had they been consulted. *American Stove Co. v. Detroit Stove Works*, 31 App. D. C. 304; 134 O. G. 2245.

IX. Appeals.

118. The word "interference" in § 9 of the act establishing the Court of Appeals of the District of Columbia held not to mean and include disputes in Trade-Mark cases under § 3 of the Trade-mark law of 1881. *Einstein v. Sawhill*, 2 App. D. C. 10; 65 O. G. 1918; 1893 C. D. 677.

119 A trade-mark interference declared under the act of 1881, but not decided until after the passage of the act of February 20, 1905, is appealable to the Court of Appeals of the District of Columbia under the act of February 20, 1905, where the only application involved has been amended to bring it under the provisions of that act. *Giles Remedy Co. v. Giles*, 26 App. D. C. 375; 1906 C. D. 552; 120 O. G. 1826.

120. A trade-mark application which was involved in an interference at the time of the passage of the act of February 20, 1905, was a pending application such as might be amended to bring it under the act. *Ib.*

121. The reopening of a case for the introduction of newly-discovered evidence is always a matter for the trial court and in its discretion, and the Court of Appeals of the District of Columbia will not review the decision of the Commissioner of Patents upon this point, except where it appears that there has been an abuse of discretion. *American Stove Co. v. Detroit Stove Works*, 31 App. D. C. 304; 134 O. G. 2245.

122. Where a party filed a trade-mark application under the act of 1881 and seeks to amend it under section 24 of the act of 1905 to bring it under the provisions of the new law, but the Commissioner decides that he is not entitled to amend to bring the case under the new law, *Held* that the Commissioner has virtually refused registration, and his decision is appealable. *In re Mark Cross Co.*, 26 App. D. C. 101; 116 O. G. 2534; 1905 C. D. 658.

123. The refusal of the Commissioner of Patents to register a trade-mark does not involve the right to the trade-mark, but the registration of the mark, and it is the value of the registration and not the value of the trade-mark that determines the sum of money involved. *South Carolina v. Seymour*, 153 U. S. 353; 67 O. G. 1191; 1894 C. D. 318.

124. Where upon the refusal of the Commissioner to register a trade-mark a writ of mandamus was unsuccessfully sought against him, upon the ground that upon the facts submitted his duty was ministerial and not discretionary, no objection to the validity of the Trade-Mark law under which the Commissioner acted being made, nor the existence or lawfulness of his authority thereunder being drawn in question, and the only controversy upon the proceedings being as to the construction of the law as to the extent of the Commissioner's authority, *Held* that

such controversy did not draw into question the validity of an authority exercised under the United States. *South Carolina v. Seymour,* 153 U. S. 353; 67 O. G. 1191; 1894 C. D. 318.

X. Mandamus to Compel Registration.

125. Mandamus will not lie save in a plain case and where there is no other legal remedy, and under no circumstances can the writ of mandamus be made to operate as a writ of error. *South Carolina v. Seymour, 2* App. D. C. 240; 66 O. G. 1167; 1894 C. D. 174.

126. Mandamus will not lie to compel the Commissioner of Patents to register a trade-mark after an application therefor has been rejected by him. *Ib.*

127. The Commissioner, in the present case, having exercised and exhausted his discretion, and having refused to register simply on the ground that he has decided that the act of engaging in foreign trade is *ultra vires* the relator, *Held* proper case for peremptory mandamus, the relator having complied with the provisions of the Trade-Mark statute and the lawful regulations of the Patent Office. *South Carolina v. Seymour,* 65 O. G. 1221; 1893 C. D. 622.

128. Where the Commissioner of Patents, while deciding that a print or label presented for registration had artistic merit, refused to register the same on the ground that it was not descriptive of the article of manufacture upon which it was to be used: *Held,* that the reason assigned for such refusal was unsound, and that mandamus would lie to compel him to admit the said print or label to registration. *Regina Music Box Co. v. Allen,* 31 W. L. R. 114.

129. Where the Commissioner refused to register the words "Ever-Ready" on the ground that they are descriptive simply of the qualities or characteristics of the articles manufactured and do not constitute a lawful trade-mark, *Held* that his action involves the exercise of discretion vested in him by law, and therefore a mandamus will not lie to control his action. *Bronson Co. v. Duell,* 17 App. D. C. 471; 95 O. G. 229; 1901 C. D. 330.

130. It is the duty of the Commissioner in considering an application for registration to determine whether or not the mark is a lawful trade-mark, and the performance of this duty involves discretion. The decision below dismissing a petition for mandamus controlling his action in such a matter affirmed. *Ib.*

See APPEALS, 56, 57; COMMISSIONER OF PATENTS, 12; MANDAMUS, 11, 15, 19.

TRADE NAME. See TRADE-MARKS, 29, 41.

UNFAIR COMPETITION. See TRADE-MARKS, 2.

USE. See PATENTS, 6, 426, 428, 429, 430, 437-439, 499; TRADE-MARKS.

UTILITY. See PATENTS, 15, 39, 49, 91, 107, II, 15, 16.

VARIANCE. See PATENTS, IX 12.

VENDOR AND VENDEE. See COPYRIGHTS, 17.

VESTED RIGHTS. See APPEALS, 16, 103; PATENTS, 3, 4.

WORDS AND PHRASES.

1. Where it is alleged in a preliminary statement that an invention is conceived "in the early spring of 1900," such statement necessarily means not earlier at the utmost than March 1, 1900. *Richards v. Meissner,* 24 App. D. C. 305; 114 O. G. 1831; 1905 C. D. 595.

2. The meaning of the words "surreptitiously" or "unjustly" in section 4920, Revised Statutes, and prior statutes discussed. *Yates v. Huson,* 8 App. D. C. 93; 74 O. G. 1732; 1896 C. D. 278.

3. The word "decision" in the last clause of section 9 of the act of February 9, 1893, providing that "any party aggrieved by a decision of the Commissioner of Patents in any interference case may appeal therefrom to said Court of Appeals," interpreted and *Held* to mean only a decision of the Commissioner of Patents awarding priority of invention. *Westinghouse v. Duncan,* 2 App. D. C. 131; 66 O. G. 1009; 1894 C. D. 170.

4. *"Exclusive use."* See TRADE-MARKS, 65.

5. *"Lawfully used."* See TRADE-MARKS, 64.