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July 15th

# INTERFERENCE PROCEEDINGS

IN

# THE UNITED STATES PATENT OFFICE.

# RULES OF PRACTICE.

INCLUDING

## INTERFERING PROCEEDINGS UNDER CAVEATS,

AND

## THE RULES OF PRACTICE IN TRADE-MARK INTERFERENCE CASES.

## 1869—1891.

ANNOTATED BY

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# INTRODUCTION.

1.

The first statutory provision relating to interferences was that of the Act of 1793, Chap. XI, Section 8, which provided that interfering applications should be submitted to arbitration, and established a rule for the selection of the arbitrators.

There was no further legislation on the subject until the Act of 1836, which established the United States Patent Office, with the Commissioner of Patents as its head, and which provided in Section 8 for a form of procedure in the Patent Office in cases of interferences.

Section 16 of the same act gave a remedy by bill in equity on an adverse decision of the Board of Examiners in the case of an interfering application and an unexpired patent.

The Act of 1870 repealed that of 1836 and re-enacted in Sections 42 and 46 the substance of Section 8 of 1836. To these correspond Sections 4904 and 4909 of the Revised Statutes now in force.

## 2. THE CAVEAT.

The Act of 1836 also made provision, in Section 12, for the filing of a caveat, and for notification to the caveator of a conflicting application.

The Act of March 2, 1861, Section 9, further enlarged the 12th Section of the Act of 1836.

These provisions were repeated in the Act of 1870, Section 40, and are now embodied in Section 4902 of the Revised Statutes.

## 3. RULES OF THE PATENT OFFICE.

The Act of 1839, Section 12, conferred on the Commissioner of Patents the authority required for the making of regulations in respect to the taking of evidence to be used in contested cases before him ; this power was further enlarged by the Act of March 2, 1861, Section 1.

These provisions were re-enacted in Section 43 of the Act of 1870, and are now embodied in Section 4905 of the Revised Statutes.

The Act of March 2, 1861, Section 2, established a board of examiners-in-chief, and provided that they should be governed in their action by the rules to be prescribed by the Commissioner of Patents.

The Act of 1870 greatly enlarged this power, and in its 19th Section authorized the Commissioner, subject to the approval of the Secretary of the Interior, to establish rules and regulations for the conduct of proceedings in the Patent Office.

It is from this enactment, repeated in Section 483 of the Revised Statutes, that the accompanying rules derive their force.

The conclusiveness of the Patent Office Rules has been considered in:

Arnold v. Bishop, 1841, Cranch Ch. J. 1 Mac A., Pat. Cases 27.
Nichols v. Harris, 1854, Morsell, J. Ibid 302.
O'Hara v. Hawes, 1859, Morsell, J. Law's Digest 96.
Dyson, *ex parte* 1860, Dunlop, J. Ibid 96.

The various Sections of the Revised Statutes relating to interference cases, other than those of conflicting patents, are as follows:

SEC. 4902. Any citizen of the United States who makes any new invention or discovery, and desires further time to mature the same, may, on payment of the fees required by law, file in the Patent Office a caveat setting forth the design thereof, and of its distinguishing characteristics, and praying protection of his right until he shall have matured his invention. Such caveat shall be filed in the confidential archives of the office and preserved in secrecy, and shall be operative for the term of one year from the filing thereof; and if application is made within the year by any other person for a patent with which such caveat would in any manner interfere, the Commissioner shall deposit the description, specification, drawings, and model of such application in like manner in the confidential archives of the office, and give notice thereof, by mail, to the person by whom the caveat was filed. If such person desires to avail himself of his caveat, he shall file his description, specifications, drawings, and model within three months from the time of placing the notice in the post-office in Washington, with the usual time required for transmitting it to the caveator added thereto; which time shall be indorsed on the notice. An alien shall have the privilege herein granted, if he has resi-

ded in the United States one year next preceding the filing of his caveat, and has made oath of his intention to become a citizen.

SEC. 4904. Whenever an application is made for a patent which in the opinion of the Commissioner, would interfere with any pending application, or with any unexpired patent, he shall give notice thereof to the applicants, or applicant and patentee, as the case may be, and shall direct the primary examiner to proceed to determine the question of priority of invention. And the Commissioner may issue a patent to the party who is adjudged the prior inventor, unless the adverse party appeals from the decision of the primary examiner, or of the board of examiners-in-chief, as the case may be, within such time, not less than twenty days, as the Commissioner shall prescribe.

SEC. 4905. The Commissioner of Patents may establish rules for taking affidavits and depositions required in cases pending in the Patent Office, and such affidavits and depositions may be taken before any officer authorized by law to take depositions to be used in the courts of the United States or of the State where the officer resides.

SEC. 4906. The clerk of any court of the United States, for any district or Territory wherein testimony is to be taken for use in any contested case pending in the Patent Office, shall, upon the application of any party thereto, or of his agent or attorney, issue a subpœna for any witness residing or being within such district or Territory, commanding him to appear and testify before any officer in such district or Territory authorized to take depositions and affidavits, at any time and place in the subpœna stated. But no witness shall be required to attend at any place more than forty miles from the place where the subpœna is served upon him.

SEC. 4909. Every applicant for a patent or for the re-issue of a patent, any of the claims of which have been twice rejected, and every party to an interference, may appeal from the decision of the primary examiner, or of the examiner in charge of interferences in such case, to the board of examiners-in-chief; having once paid the fee for such appeal.

SEC. 4910. If such party is dissatisfied with the decision of the examiners-in-chief, he may, on payment of the fee prescribed, appeal to the Commissioner in person.

SEC. 4911. If such party, except a party to an interference, is dissatisfied with the decision of the Commissioner, he may appeal to the Supreme Court of the District of Columbia, sitting in banc.

SEC. 4915. Whenever a patent on application is refused, either by the Commissioner of Patents or by the Supreme Court of the District of Columbia upon appeal from the Commissioner, the applicant may have remedy by bill in equity; and the court having cognizance thereof, on notice to adverse parties and other due proceedings had, may adjudge that such applicant is entitled, according to law, to receive a patent for his invention, as specified in his claim, or for any part thereof, as the facts in the case may appear. And such adjudication, if it be in favor of the right of the applicant, shall authorize the Commissioner to issue such patent on the applicant filing in the Patent Office a copy of the adjudication, and otherwise complying with the requirements of law. In all cases, where there is no opposing party, a copy of the bill shall be served on the Commissioner; and all the expenses of the proceedings shall be paid by the applicant, whether the final decision is in his favor or not. [See §629.]

## 4. EDITIONS OF THE RULES.

It is said that in 1820 the Secretary of State issued a set of instructions relating to applications for patents, and as early as 1828 we find in the Franklin Journal 2d Sr., Vol. 2, p. 332, directions of a semi-official nature for the guidance of persons applying for patents; but the first official publication of Patent Office Rules is undoubtedly that of 1836, which appeared simultaneously with, and was based upon, the new law of the same year. From then on various editions have been issued with which we are not concerned; that of November, 1869, being the last prior to the passage of the Act of July, 1870.

Simultaneously with the promulgation of the Act of 1870 came the first edition of the Rules referred to in this volume, that of July 15, 1870.

The edition of the following year introduced some slight changes, but the rules remained the same with but little material modification, even subsequent to the Revised Statutes in 1874, until the edition of December 1, 1879, which effected a complete revision of the rules. This Revision went into effect on the first of January, 1880, and was continued substantially

unaltered through subsequent editions, until the edition of April 18, 1888, which is now in force, and which embodies several changes. Generally speaking, the principal changes in the Rules relating to interferences, have been in phraseology, rather than in substance, and the great increase in number, eleven in the edition of July, 1870, as against forty in that of April 1888, is in appearance only ; each rule of 1870 treating in separate paragraphs of several subjects, to each of which a separate rule and number has been allotted in the revision now in force.

## TRADE MARKS.

A brief appendix relating to Trade Mark Interference Practice has been added.

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The rules as given in the edition of April 18, 1888, are those to which the notes have been made ; for the sake of convenience these have been traced backward and their changes noted as far as the Rules of July 15, 1870. All references to those of November 1869, have been omitted, because they are entirely obsolete, having arisen under the law as it was prior to the Act of 1870, but notes to the decisions rendered under them have been added in their proper places under existing rules, in order to cover all published decisions.

The decisions are only those rendered by the Commissioner of Patents, and his substitute, the Acting or Assistant Commissioner, and published in the Official Gazette of the Patent Office, and the annual volume of the Commissioner's Decisions. References to a number of MS. decisions have been added from the valuable and carefully prepared monthly digest edited by David A. Gourick, Esq., of Washington, D. C.

The decisions annotated and referred to are on questions of Practice only, and no reference has been made to questions of priority and evidence, as to which the rules are well established by the decisions of the Federal Courts.

The work having been printed as the signatures were set up, so that additions could not be made to it while going through the press, a supplement of additional notes and cases, classified as in the body of the book, has been added, down to Jan. 1, 1891.

Attention is also called to the various Indexes and Tables appended.

Jan. 1, 1891. WOODBURY LOWERY.

Washington, D. C.

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Pattee, L. C., *ex parte*, 1872, 72 C. D. 255; 2 O. G. 618.
Patterson v. Colby, May 9, 1890, Fisher, Asst. Com., MS., 2 G. 35.
Pearl v. Sawyer, 74 C. D. 58; 5 O. G. 695.
Pearson v. Lister v. Reixach, 83 C. D. 119; 24 O. G. 1175.
Perkins, *ex parte*, June 28, 1890, Fisher, Asst. Com., MS,, 2 G. 43.
Perley & Orr v. Pallett, 74 C. D. 26. 5 O. G. 457.
Perrine v. Goldsworthy, 1876, 76 C. D. 236; 10 O. G. 980.
Petithomme v. Bedbury, 90 C. D. —; 52 O. G. 605.
Pitney v. Smith & Egge, 1889, 89 C. D. 193; 49 O. G. 129.
Practice in Interference Cases, 1877, 77 C. D. 121; 12 O. G. 949.
Pugh v. Hamilton, 1870, 70 C. D. 153.
Pugh v. Hamilton, 1871, 71 C. D. 119.
Quimby v. Randall, 1878, 78 C. D. 111; 14 O. G. 748.
Ransome, Bessemer & Ransome v. Norris, Jr., 72 C. D. 209; 2 O. G. 295.
Redmond v. Parham, 1879, 79 C. D. 169; 16 O. G. 359.
Reed v. Jordan, 1887, 87 C. D. 14; 38 O. G. 661.
Reynolds v. Haberman, 1889, 89 C. D. 195; 49 O. G. 130.
Rice v. Burt, 79 C. D. 291; 16 O. G. 1050.
Rice v. Burt, 80 C. D. 119; 17 O. G, 799.
Richardson v. Denza, 70 C. D. 156.

Richmond v. Hibbard, 1879, 79 C. D. 254; 16 O. G. 908.
Ricker v. Merril, July 24, 1890, Fisher Asst. Com. 2 G. 51.
Ritchel v. De Sanno, 1876, 76 C. D. 203; 10 O. G. 941.
Robinson v. Seymour, 1885, 85 C. D. 98; 33 O. G. 113.
Roe, 74 C. D. 30; 5 O. G. 397.
Rogers v. Bear, 79 C. C. 253; 16 O. G. 908.
Rogers v. Winsainger, April 5, 1890, Mitchell, MS., 2 G. 28.
Rumpff & Graessler v. Korhler & Krugener, 83 C. D. 29; 23 O. G. 1831.
Rumpff & Graessler v. Koehler v. Krungener, 83 C. D. 111, 23 O. G. 1832.
Sargent v. Burge, 1876, 76 C. D. 175; 10 O. G. 285.
Sargent v. Burge, 1877, 77 C. D. 62; 11 O. G. 1055.
Sawyer & Mann v. Edison, 1883, 83 C. D. 80; 25 O. G. 597.
Schenck v. Rider, 1870, 70 C. D. 136.
Schmiedl v. Walden, Dec. 23, 1890, Fisher Asst. Com. 2 G. 91.
Schurz, Sec., 79 C. D. 346; 16 O. G. 955.
Scotford v. Sawyer & Force, 37, MS., Dec. 120.
Scott v. Ford, 78 C. D. 106; 14 O. G. 413.
Sellers & Bancroft v. Walter & Walter, 1886, 86 C. D. 41; 37 O. G. 1001.
Sellon v. Hochhausen, 1885, 85 C. D. 103; 33 O. G. 995.
Shaw v. Keith, Shaw & Videto, 76 C. D. 69; 9 O. G. 641.
Sherwood v. Searles, 1869, 69 C. D. 112.
Shinn v. McElroy, Feb. 21, 1890, Mitchell, MS.
Shinn v. McElroy, May 12, 1890, Fisher, Asst. Com., MS., 2 G. 35.
Simpson v. Wright, 78 C. D. 126; 15 O. G. 293,
Slade v. Blair, 79 C. D. 39; 15 O. G. 830.
Slade v. Blair, 80 C. D. 25; 17 O. G. 261.
Smith v. Dimond, 81 C. D. 34; 20 O. G. 742.
Smith, *ex parte*, 1880, 80 C. D. 77; 17 O. G. 447.
Smith v. Barter, 1875, 75 C. D. 5; 7 O. G. 1.
Smith v. Bentley, April 9, 1890, Mitchell, MS., 2 G. 27.
Smith v. Burlew, 1870, 70 C. D. 41.
Smith v. Perry, 1876, 76 C. D. 12; 9 O. G. 688.
Smith & Thomas v. Cowles, 1885, 85 C. D. 12; 30 O. G. 343.
Smith v. Winchell & Patric, 1878, 78 C. D. 75; 13 O. G. 1127.
Spaulding v. Winchester, 1871, 71 C. D. 94.
Spear, J., *ex parte*, 1874, 74 C. D. 25; 5 O. G. 201.
Spencer & Saylor v. Trafford, 71 C. D. 119.
Sprague v. Van Depoele v. Hunter v. Knight, April 17, 1890, Fisher, Asst. Com., MS., 2 G. 28.
Sprague v. Van Depoele v. Hunter v. Knight, July 24, 1890, 2 G. 50.
Starr & Peyton v. Farmer, 83 C. D. 34; 23 O. G. 2325.
Stearns v. Prescot, 78 C. D. 24; 13 O. G. 121.
Stearns v. Wingfield, 1871, 71 C. D. 67.
Stephens v. Bailey, 1878, 78 C. D. 7; 13 O. G, 45.
Stevens v. Putnam, 1880, 80 C. D. 160; 18 O. G. 519.
Steward v. Ellis v. Lee v. Howe, 1889, 89 C. D. 243; 49 O. G. 1982.
Stockwell v. Haines, 77 C. D. 82; 12 O. G. 137.
Stone v. Greaves, 1880, 80 C. D. 23; 17 O. G. 260.
Stone v. Greaves, 1880, 80 C. D. 70; 17 O. G. 397.
Strause v. Cook, May 3, 1890, Fisher, Asst. Com., MS., 2 G. 35.
Strong *et al* v. Cruikshank, 77 C. C. 87; 12 O. G. 138.
Swift v. Rochow, 1880, 80 C. D. 83; 17 O. G. 450.
Tavener v. Thomson, 1890, 90 C. D. —; 51 O. G. 1465.

Taylor v. Bourguignon, 1879, 79 C. D. 262; 16 O. G. 958.
Taylor v. Martin, 1879, 79 C. D. 112; 16 O. G. 138.
Taylor v. Shreffler, 1883, 83 C. D. 63; 24 O. G. 1175.
Tegmeyer, *in re.*, 1871, 71 C. D. 285.
Thomas v. Gutman, 1879, 79 C. D. 248; 16 O. G. 857.
Thomas v. Reese, 1879, 79 C. D. 335; 16 O. G. 1234.
Thomas v. Reese, 1880, 80 C. D. 12; 17 O. G. 195.
Thomson v. Waterhouse, 85 C. D. 2; 30 O. G. 177.
Tingley v. Carpenter, 71 C. D. 236.
Towers v. Pease, 78 C. D. 6; 13 O. G. 176.
Traut v. Disston, 1870, 70 C. D. 99.
Tucker v. Kahler, 1879, 79 C. D. 71; 15 O. G. 966.
Ungar v. Saxlehner, 35, MS., 43.
Upton, *ex parte*, 1884, 84 C. D. 26; 27 O. G. 99.
Vinton v. Pierce, 73 C. D. 89; 3 O. G. 629.
Van Depoele v. Deecke, April 7, 1890, Fisher, Asst. Com,, MS. 2 G. 28.
Voelker v. Gray, 1885, 85 C. D. 16; 30 O. G. 1091.
Von Alteneck v. Thomson, 80 C. D. 109; 17 O. G. 571.
Von Welsbach v. Lungren, 1889, 89 C. D. 177; 48 O. G. 537.
Walpuski v. Jacobson & Faber, 1876, 76 C, D. 114; 9 O. G. 964.
Walsh v. Shinn. 79 C. D. 279; 16 O. G. 1006.
Walton v. Dennis, 1879, 79 C. D. 265; 16 O. G. 959.
Ward *ex parte* 89 C. D. 104; 46 O. G. 1513.
Ware v. Bullock, 1875, 75 C. D. 11; 7 O. G. 39.
Waring v. Wilkerson, 1878, 78 C. D. 120; 15 O. G. 246.
Warnant v. Warnant, 1880, 80 C. D. 36; 17 O. G. 265.
Waters, Farrington & Powell v. Yost & Wallace, 75 C. D. 59; 8 O. G. 517.
Webster & Drew v. Boyer & Ham, Jan. 11, 1890, Mitchell, MS., 2 G. 25.
Weitling v. Cabell, 1872, 72 C. D. 185; 2 O. G. 223.
Wells v. Boyle, 1888, 88 C. D. 36; 43 O. G. 753.
Welpton, 73 C. D. 21; 3 O. G. 440.
Weston v. Hunt, 1871, 71 C. D. 69.
Wheat, J. W., *ex parte*, 1878, 78 C. D. 110; 14 O. G. 787.
Wheeler *ex parte*, 83 C. D. 12; 23 O. G. 1031.
Wheeler v. Chenowith & Merril, 69 C. D. 43.
Wheeler, Jr. v. Peters, 70 C. D. 141.
Wheeler v. Rank. 70 C. D. 119.
Wherry v. Heck, 1889, 89 C. D. 201; 49 O. G. 559.
White v. Demarest, 1887, 87 C. D. 133; 41 O. G. 1161.
White v. Farmer, 1874, 74 C. D. 19; 5 O. G. 338.
White v. Purdy, 1870, 70 C. D. 115.
Whiteley v. McCormick, 1876, 76 C. D. 228; 10 O. G. 826.
Wicks v. Du Bois, 77 C. D. 22; 11 O. G. 244.
Wicks v. McAvoy, 1880, 80 C. D. 190; 18 O. G. 859.
Wicks & Wyman v. Knowles, 1877, 77 C. D. 13; 11 O. G. 196.
Wild v. Smith, 79 C. D. 17; 15 O. G. 513.
Wilson & Matthews v. Yakel & Rodgers, 1876, 76 C. D. 245; 10 O. G. 944.
Wiselogel v. Morse, Nov. 10, 1890, Mitchell, 2 G. 83.
Withington v. Gordon, 1880, 80 C. D. 53; 17 O. G. 329.
Withington v. Locke, 1877, 77 C. D. 27; 11 O. G. 417.
Withington v. Locke, 1878, 78 C. D. 147; 15 O. G. 426.
Withrow v. Roberts, May 23, 1890, Mitchell, MS., 2 G. 36.
Wood v. Crowell, 69 C. D. 107.

Wood v. Eames, 1880, 80 C. D. 106; 17 O. G. 512.
Wood v. Morris, 1873, 73 C. D. 39; 3 O. G. 239.
Wood v. Morris, 1873, 73 C. D. 121; 4 O. G. 131.
Woodward v. Reist, 1869, 69 C. D. 34.
Workman v. McNaught, 1879, 79 C. D. 139; 16 O G. 216.
Wright, E. S., *ex parte* 1870, 70 C. D. 60.
Wright & Bryant v. Reese, 1877, 77 C. D. 16; 11 O. G. 329.
Wright v. Daggett, 88 C. D. 116; 44 O. G. 943.
Wright v. Clay, 1870, 70 C. D. 11.
Wyman v. Knowles, 1878, 78 C. D. 35; 13 O. G. 320.
Yost v. Heston, 71 C. D. 226.
Yost & Warner v. Powell, 1878, 78 C. D. 23; 13 O. G, 122.
Young & Hoard, 1870, 70 C: D. 59.
Young v. Rogers, 80 C. D. 178. 18 O. G. 733.
Zay, *ex parte*, 1881, 81 C. D. 20; 19 O. G. 1496.
Zweitusch v. Stockheim, 90 C. D. —; 53 O. G. 755.

# ANNOTATED RULES OF PRACTICE
## IN CASES OF INTERFERENCE
# IN THE UNITED STATES PATENT OFFICE.
### REVISED APRIL 18, 1888.

Abbreviations: Official Gazette—O. G.
Commissioner's Decisions—C. D.
Manuscript Decisions—M. S.
Gourick's Washington Digest—G.

93. An interference is a proceeding instituted for the purpose of determining the question of priority of invention between two or more parties claiming substantially the same patentable invention. The fact that one of the parties has already obtained a patent will not prevent an interference, for, although the Commissioner has no power to cancel a patent, he may grant another patent for the same invention to a person who proves to be the prior inventor.

1887—92. Rev. Stat., sec. 4904. Interference defined.

HISTORY OF RULE

92 of XXII, XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 93 of April 18, 1888.

51. Aug., 1878. An "interference" is a proceeding instituted for the purpose of determining the question of *priority of invention* between two or more parties claiming the same patentable subject matter.

52. Aug., 1878. The fact that one of the parties has already obtained a patent will not prevent an interference, for, although the Commissioner has no power to cancel a patent already issued, he may, if he finds that another person was the prior inventor, give him a patent also, and thus place both parties on an equal footing before the courts and the public.

51 of X, IX, VII, like 51, Aug., 1878.

51, Sept., 1875, like 51, Aug., 1878, and adds "It may also be resorted to for the purpose of procuring evidence, relating to the alleged abandonment or the public use of an invention.

51 of VI, V, IV, III, II, like 51 of Sept., 1875.

51 of July, 1870. An interference is an interlocutory proceeding for the purpose of determining which of two or more persons, each or either of whom claims to be the first inventor of a given device or combination, really made the invention first.

52 of X, IX, VIII, VII, VI, V, IV, III, II, I, like 52 of Aug., 1878.

**No interference will be declared:**

——Between two applications for patents for foreign inventions not patented abroad. The first applicant is entitled to a patent. Lauder v. Crowell, 1879, C. D. 177; 16 O. G. 405.

——Between a patent and a patented division containing subordinate, non-conflicting claims withdrawn from the interfering original application, or between the patent and the re-issue application of said divisional patent. Disclaimer required. Lacroix v. Welsh, 1873, C. D. 155; 4 O. G. 526.

——With an improper divisional application. Holt *ex parte* 1884, C. D. 43; 29 O. G. 171.

——Between conflicting patents. Wilson v. Yakel, 1876, C. D. 245; 10 O. G. 944.
Haish v. Rosado v. Aishton, May 31, 1890, MS., Mitchell (exception), 2 G. 26.

——Where the instruments are different in mode of operation. Gray v. Robertson, 1889, C. D. —; 50 O. G. 165, Mitchell.

——Where the claims are virtually for different devices. Fletcher v. Abraham, 1870, C. D. 26.
Young v. Hoard, 1870, C. D. 59.

——Where neither applicant is entitled to a claim broad enough to make an issue. Bovey v. Graham, 1870, C. D. 129.

——Where one of the applications (rejected by the Board of Examiners in Chief) has passed beyond primary examiner's jurisdiction. Duthie *in re*, 1871, C. D. 85.

——Between a patent and an unpatentable application. Meucci *ex parte*, 1890, C. D. —; 51 O. G. 299, Mitchell.

——Between process and apparatus. Crane v. Meriam, 1890, C. D. —; 51 O. G. 1782, Mitchell.

——With a forfeited application. Spear J. *ex parte*, 1874, C. D. 25; 5 O. G. 201.
Practice in Interference, 1877, C. D. 121; 12 O. G. 949.

**When a 2d interference with a successful party will NOT be declared**

——Hovey v. Muller, 1873, C. D. 26; 3 O. G. 149.
Wright & Bryant v. Reese, 1877, C. D. 16; 11 O. G. 329.
Practice in Interference Cases, 1877, C. D. 121; 12 O. G. 949.

**Consolidation of interferences:**

——Bell v. Gray, 1879, C. D. 42; 15 O. G. 776.
Wilson & Matthews v. Yakel & Rodgers, 1876, C. D. 245; 10 O. G. 944.

**The issue in interference cases is solely that of priority of invention:**

——Foster v. Fowle, 1869, C. D. 35.
Pugh v. Hamilton, 1870, C. D. 153.
Crane & Rogers, 1871, C. D. 230.
Dana v. Greenleaf & Adams, 1876, C. D. 9; 9 O. G. 198.
Smith v. Perry, 1876, C. D. 12; 9 O. G. 688.
Little v. Lillie *et al*, 1876, C. D. 207; 10 O. G. 543.
Miller v. Miles, 1877, C. D. 15; 11 O. G. 197.
Lauder v. Crowell, 1879, C. D. 177; 16 O. G. 405.
Laverty v. Flagg, 1879, C. D. 303; 16 O. G. 1141.
Hicks v. Keating, 1887, C. D. 40; 40 O. G. 343.
Strause v. Cook, May 3, 1890, MS., Fisher, Asst. Com., 2 G. 35.

——It is not as to false suggestions in patentee's oath.
Gillen *ex parte*, 1877, C. D. 20; 11 O. G. 419.

——It is not for the enforcement or determination of title.
Swift v. Rochow, 1880, C. D. 83; 17 O. G. 450.
Hicks v. Keating, 1887, C. D. 40; 40 O. G. 343.

——It is not prospective infringement, where the conflicting claims do not cover the same subject matter.
Hotchkiss v. Smith & Post, June 25, 1890, Fisher, Asst. Com., 2 G. 42

**Relation of the conflicting inventions:**

——They must sustain a hostile relation to each other.
Bell v. Gray, 1879, C. D. 42; 15 O. G. 776.

——Must be that of (1) identity, or (2) equivalence, or (3) specific difference, or (4) generic difference.
Banks v. Snediker, 1880, C. D. 95; 17 O. G. 508.

——Mere formal and non-essential differences must be disregarded.
Drawbaugh v. Blake, 1883, C. D. 17; 23 O. G. 1221.

——The device in interference must be operative.
Voelker v. Gray, 1885, C. D. 16; 30 O. G. 1091.

——It is a question of priority, rather than of title.
Hicks v. Keating, 1887, C. D. 40; 40 O. G. 343.

——The ground of an interference is that each claims substantially the same invention; and not that the claims of one party would be subordinate to those of the other.
Edison v. Heysinger, April 17, 1890, MS., Fisher, Asst. Com., 2 G. 27.

——Subjects of interferences are not words but things, and the same words must mean the same things.
Greenough v. Drummond, 1879, C. D. 213; 16 O. G. 586.
Nicholson v. Bennett, 1879, C. D. 218; 16 O. G. 631.
Drummond v. Greenough, 1879, C. D. 267; 16 O. G. 959.
Drawbaugh v. Blake, 1885, C. D. 7; 30 O. G. 259.
Gray v. Robertson, 1889, C. D. —; 50 O. G. 165, Mitchell.
Bissell v. Robert, 1890, C. D. —; 51 O. G. 1618.

——Conflicting combinations.
Withington v. Locke, 1877, C. D. 27; 11 O. G. 417.
Hoe v. Scott, 1878, C. D. 108; 14 O. G. 447.
Banks v. Snediker, 1880, C. D. 95; 17 O. G. 508.

——Conflicting process and product.
Finley v. Chapman, 1872, C. D. 53; 1 O. G. 277.

——Conflicting processes.
Beach v. Fowler, 1889, C. D. —; 48 O. G. 821.

——Art and apparatus in conflict with certain constituent elements.
Voelker v. Gray, 1885, C. D. 16; 30 O. G. 1091.

——Apparatus not in conflict with art.
Crane v. Meriam, 1890, C. D. —; 51 O. G. 1782.

——Species with genus.
Sherwood v. Searles, 1869, C. D. 112.
Gardner *ex parte*, 1880, C. D. 110; 17 O. G. 626.
Upton *ex parte*, 1884, C. D. 26; 27 O. G. 99.
Dewey v. Thomson, April 23, 1890, Mitchell, MS., 2 G. 27.

——Application for mechanical invention and Design Patent.
Collender v. Griffith, 1873, C. D. 14; 3 O. G. 91.
Collender v. Griffith, 1873, C. D. 43; 3 O. G. 267.
Crosette v. Flagg, May 21, 1880, MS., Marble.

NOTE.—The practice of declaring an interference between a design and a mechanical invention has been discontinued since 1883, on the ground that they are statutorily different subjects-matter.—*L.*

**Construction of the issue:**

——Particular issues construed.
Duthie v. Casilear, 1872, C. D. 50; 1 O. G. 255.
Finley v. Chapman, 1872, C. D. 53; 1 O. G. 277.
Wyman v. Knowles, 1878, C. D. 35; 13 O. G. 320.
Berliner v. Gower, 1879, C. D. 96; 15 O. G. 1055.
Thomas v. Gutman, 1879, C. D. 248; 16 O. G. 857.
Locke v. Levalley v. Ewart, 1881, C. D. 26; 20 O. G. 671.
Hull v. Lowden, 1881, C. D. 30; 20 O. G. 741.

——When the construction of the issue has been acquiesced in and acted upon, it must be held complete.
Gray *ex parte*, 1889, C. D. —; 46 O. G. 1277.

NOTE.—See notes under Rule 122, April 18, 1868.

1887—93.
When declared. 94. Interferences will be declared in the following cases, when all the parties claim substantially the same patentable invention:

Original applications. (1) Between two or more original applications containing conflicting claims.

Original applications and unexpired patents. (2) Between an original application and an unexpired patent containing conflicting claims, when the applicant, having been rejected on the patent, shall file an affidavit that he made the invention before the patentee's application was filed.

(3) Between an original application and an application for the re-issue of a patent granted during the pendency of such original application. Original and reissue applications.

(4) Between an original application and a re-issue application, when the original applicant shall file an affidavit showing that he made the invention before the patentee's original application was filed. Original and reissue applications.

(5) Between two or more applications for the re-issue of patents granted on applications pending at the same time. Reissue applications.

(6) Between two or more applications for the re-issue of patents granted on applications not pending at the same time, when the applicant for re-issue of the later patent shall file an affidavit showing that he made the invention before the application was filed on which the earlier patent was granted. Reissue applications.

(7) Between a re-issue application and an unexpired patent, if the original applications were pending at the same time, and the re-issue applicant shall file an affidavit showing that he made the invention before the original application of the other patentee was filed. Reissue application and unexpired patent.

(8) Between an application for re-issue of a later unexpired patent and an earlier unexpired patent granted before the original application of the later patent was filed, if the re-issue applicant shall file an affidavit showing that he made the invention before the original application of the earlier patent was filed. Reissue application and unexpired patent.

## HISTORY OF RULE, ¶ (1).

93. March 9, 1887. (1) Between two or more original applications.

93. ¶ 1 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 93 of March 9, 1887.

51. Aug., 1878. "*First.* When two or more parties have applications pending before the office at the same time, and their respective claims conflict in whole or in part. *Second.* When two or more applications are pending at the same time, in each of which a like patentable invention is shown or described. and claimed in one, though not specifically claimed in all of them."

51 of X, IX, VIII, VII, VI, V, IV, III, like 51 of Aug., 1878.

51. Aug., 1871. "*First.* When the parties have pending applications before the office at the same time, both or all the parties claiming to be the first inventor of the same thing. *Second.* When two applications are pending at the same time, which describe the same device, but in only one of which it is specifically claimed, it may still become necessary to declare an interference. *Third.* When an invention is claimed in a renewed application which is shown or claimed in an application filed or patent granted prior to the filing of such renewed application."

51. July 15, 1870. "*First.* When the parties have pending applications before the office at the same time, both or all the parties claiming to be the inventor of the same thing. *Second.* When an applicant having been rejected upon the prior unexpired patent or the prior application of another claims to have made the invention before the prior applicant or patentee. *Third.* (As in 51 of Aug., 1871.) *Sixth.* The office reserves to itself the right, when two applications are pending at the same time, in one of which a device may be described which is claimed in the other to declare an interference to determine with whom is priority of invention, without reference to the order in which such applications may have been filed.

——Between conflicting applications. Abraham v. Fletcher, 1869, C. D. 50.

——Between a renewed application of an abandoned application and an application filed intermediate the abandonment and renewal. Golding, *ex parte*, 1875, C. D. 98; 8 O. G. 141.

——Between two or more pending applications. Little v. Lillie, 1876, C. D. 207; 10 O. G. 543.

——Between a renewal of a forfeited application and a new successful party filed intermediate the forfeiture and renewal. Practice in Interference Case, 1877, C. D. 121; 12 O. G. 949.

——Between pending applications, one showing, the other claiming, the invention. Bell v. Gray, 1879, C. D. 42; 15 O. G. 776.
Smith *ex parte*, 1880, C. D. 77; 17 O. G. 447.

——Between two pending applications, where the invention in one case was made abroad and imported for public use. Thomas v. Reese, 1880, C. D. 12; 17 O. G. 195.

——Between conflicting applications, declared *nunc pro tunc.* Marston, *ex parte*, 1882, C. D. 1; 21 O. G. 633.

——Between conflicting applications—Broad claim. Bacheller v. Porter, 1869, C. D. 64; Sherwood v. Searles, 1869, C. D. 112.
Sawyer & Man v. Edison, 1883, C. D. 80; 25 O. G. 597.
Upton, *ex parte*, 1884, C. D. 26; 27 O. G. 99.

——Between conflicting claims. Schenck v. Rider. 1870, C. D. 136.

——Between a broad claim to a single element and claim to some element in combination. Boon v. Hinman, 1870, C. D. 7.

——Application executed abroad. Thomas v. Reese, 1880, C. D. 12; 17 O. G. 195.

Nagel, *ex parte*, 1880, C. D. 17; 17 O. G. 198.

## HISTORY OF ¶ 2.

93. March 9, 1887. (2) Between an original application and an unexpired patent, when the applicant having been rejected on the patent, shall file an affidavit showing that he made the invention before the patentee's application was filed.

93. ¶ (2) of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 93 of March 9, 1887.

51. Aug., 1878. ¶ (3) Third. When an applicant, having been rejected upon any unexpired patent, claims to have made the invention before the patentee.

51. ¶ 3 of X, IX, VIII, like 51 of Aug., 1878.

51. Sept. 1, 1875, ¶ 3. When an applicant, having been rejected upon an unexpired patent, etc., (like 51 of Aug., 1878.)

51. ¶ 3 of VI, V, IV, III, like 51 of Sept. 1, 1875.

51. Aug., 1871, ¶ 2. Second. When an applicant having been rejected upon a prior unexpired patent, claims to have made the invention before the prior patentee.

51. July 15, 1870, ¶ 2. Second. When an applicant having been rejected upon the prior unexpired patent or the prior application of another, claims to have made the invention before the prior applicant or patentee. Third. When an invention is claimed in a renewed application which is shown or claimed in an application filed or unexpired patent granted prior to the filing of such renewed application.

——Between a patent prematurely or inadvertently issued to one applicant and an application pending at the same time.
Frick, Wm., *ex parte*, 1872, C. D. 124: 1 O. G. 574.
Brookfield & Hemingray v. Brooke, 1873, C. D. 107; 4 O. G. 81.
Smith v. Baxter, 1875, C. D. 5; 7 O. G. 1.
Marston, *ex parte*, 1882, C. D. 1; 21 O. G. 633.
Bechman v. Johnson, 1889, C. D. —; 48 O. G. 673.
Boyer, *ex parte*, 1889, C. D. —; 49 O. G. 1985.

——Between an original application and an unexpired patent which shows but does not claim the invention.
Wright v. Clay, 1870, C. D. 11.
Wright, C. S., *ex parte*, 1870, C. D. 60.

Nicholson v. Bennett, 1879, C. D. 218; 16 O. G. 632.
Bell v. Gray, 1879, C. D. 42; 15 O. G. 776.
Bland, *ex parte*, 1879, C. D. 104; 16 O. G. 47.
Nagel, *ex parte*, 1880, C. D. 17; 17 O. G. 198.

——Applicant's invention must first be found patentable, but the grantee of patent is not bound.
Bland, *ex parte*, 1879, C. D. 104; 16 O. G. 47.

——Application in conflict with two or more patents.
Wilson & Matthews v. Yakel & Rodgers, 1876, C. D. 245; 10 O. G. 944.

——Original patent and not its re-issue involved in interference.
Zay, *ex parte*, 1881, C. D. 21; 19 O. G. 1496.

——Purpose of the declaration.
Beardslee v. Moeslein, 1889, C. D. —; 46 O. G. 1640.

——Relation as to claims between applicant and patentee authorizing an interference.
Withrow v. Robert, May 23, 1890, MS., Mitchell, 2 G. 36.

——Applicant must have been rejected on the patent.
Massicks & Crooke, *ex parte*, 1887, C. D. 20; 38 O. G. 1489.

——Proper course not to declare interference until applicant has been rejected on the patent, and the required affidavit is made. (Case of improper declaration).
Tavener v. Thomson, 1890, C. D. —; 51 O. G. 1465.

——Request for interference with patent on which applicant is not rejected: proper affidavit.
Boyer, *ex parte*, 1889, C. D. —; 49 O. G. 1985.

——Affidavit required.
Nagel, *ex parte*, 1880, C. D. 17; 17 O. G. 198.
Gasser, *ex parte*, 1880, C. D. 94; 17 O. G. 507.
Graydon, *ex parte*, 1883, C. D. 71; 25 O. G. 192.
Boyer, *ex parte*, 1889, C. D. —; 49 O. G. 1985.
Tavener v. Thomson, 1890, C. D. —; 51 O. G. 1465.

——The affidavit is not open to inspection at any time (see Rule 111 of April 18, 1888.)
Gasser, *ex parte*, 1880, C. D. 94; 17 O. G. 507.

## HISTORY OF ¶ 3.

93. ¶ 3 of XXII, XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 94, ¶ (3), April 18, 1888.

Editions of Aug., 1878, (XI,) X, IX, contain no clause relative to interferences with re-issues, applications or re-issued patents.

51. Nov. 1, 1876. Applications for re-issue of patents are included in the above classification, and will be put into interference with subsequent as well as prior patents when in conflict therewith. (The classification referred to, include conflicting applications. (1) Whose claims conflict in whole or in part; (2) One showing and the other claiming the device; (3) Applicant rejected upon unexpired patent.—*L.*)

Edition of Sept. 1, 1875, (VIII,) contains no provision whatever relating to re-issue interferences.

51. April 1, 1875. Fourth. When an applicant for a re-issue embraces in his amended specification any new or additional description of his invention, or enlarges his claim, or makes a new one, and thereby includes therein anything which has been claimed or shown in any patent granted subsequent to the date of his original application, or in any pending application; provided there is reason to suppose that such subsequent applicant or patentee may be the first inventor.

51. ¶ 4 of V, IV, and ¶ 3 of III, and ¶ 4 of II, like 51, ¶ 4, Apr. 1, 1875.

51. July 15, 1870. Fourth. When an applicant for a re-issue embraces in his amended specification any new or additional description of his invention, or enlarges his claim, or makes a new one, and thereby includes therein anything which has been claimed in any patent granted subsequent to the date of his original application, as the invention of another person,

an interference will be declared between the application and any such unexpired patent or pending application. If the re-issue application claims only what was granted in the original patent, it may be put into interference with any pending application in which the same thing is shown, provided the latter applicant claims to be the prior inventor and is not barred a patent by public use or abandonment.

——Between an original application and a re-issue application of a patent granted during the pending of the original application.

Wright, S. S., *ex parte*, 1870, C. D. 60.
Mahnken, *ex parte*, 1887, C. D. 83; 40 O. G. 915.

## HISTORY OF ¶ 4.

93. ¶ 4 of XXII, XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 94, ¶ 4, April 18, 1888.

For rule in edition of Aug., 1878, and prior editions, see notes under Rule 94 ¶ 3, April 18, 1888.

## HISTORY OF ¶ 5.

93. ¶ 5 of XXII, XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII like 94, ¶ 5, April, 1888.

For rule in edition of Aug., 1878, and prior editions, see notes under Rule 94, ¶ 3, April 18, 1888.

——Between conflicting re-issue applications of patents on simultaneously pending applications.

Sargent v. Burge, 1876, C. D. 175; 10 O. G. 285.

## HISTORY OF ¶ 6.

93. ¶ 6 of XXII, XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 94, ¶ 6, April, 1888.

For rule in edition of Aug., 1878, and prior editions, see notes under Rule 94 ¶ 3, April 18, 1888.

——Between re-issue applications of patents granted on applications, not pending at the same time.

Parris v. Bussey, 1875, C. D. 143; 8 O. G. 859.

## HISTORY OF ¶ 7.

93. ¶ 7 of XXII, XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 94, ¶ 7, April, 1888.

For rule in editions of Aug., 1878, and prior editions, see notes under Rule 94 ¶ 3, April 18, 1888.

## HISTORY OF ¶ 8.

93. ¶ 8 of XXII, XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII. like 94, ¶ 8, April, 1888.

For rule in edition of Aug., 1878, and prior editions, see notes under Rule 94, ¶ 3, April 18, 1888.

——Between a re-issue application of a later patent and an earlier patent prior to the date of the original application of the later patent.

Carroll v. Morse, 1876, C. D. 61; 9 O. G. 453.

——Between a subsequent patent and a conflicting re-issue of a prior patent.

Mayall v. Murphy, 1874, C. D. 17; 5 O. G. 339.

Becker v. Throop, 1875, C. D. 87; 8 O. G. 1.

1887—95. Preparation for interference.

95. Before the declaration of interference all preliminary questions must be settled by the primary examiner, and the issue must be clearly defined; the invention which is to form the subject of the controversy must be decided to be patentable, and the claims of the respective parties must be put in such condition that they will not require alteration after the interference shall have been finally decided, unless the testimony adduced upon the trial shall necessitate or justify such change.

## HISTORY OF RULE.

95 of XXII, XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, like 95 of April 18, 1888.

95. Dec. 1, 1879. Before the declaration of interference all preliminary questions must be settled by the principal examiner, etc., (as in 95 of April 18, 1888.)

51. Aug., 1878. Before the declaration of an interference it is desirable that all preliminary questions shall be settled by the primary examiner, and the issue must be clearly defined; the invention which is to form the subject of the controversy must be decided to be patentable, and the claims of the respective parties should be put in such condition that they will not require alteration after the interference shall have been finally decided, unless the testimony adduced upon the trial should necessitate such change.

51 of X, IX, VIII, like 51 of Aug., 1878.

51. Sept 1, 1875. Before the declaration of an interference all preliminary questions must be, etc., (like 95 of April 18, 1888, except words "or justify" in last line, which are omitted.)

51 of VI, V, IV, like 51 of Sept. 1, 1875.

Rules of Aug. 1, 1871, and July 15, 1870, contain no such provision.

——Before the declaration of interference all preliminary questions must be settled by the primary examiner.

Anson v. Woodbury, 1877, C. D. 4; 11 O. G. 243.

Abbey, *ex parte*, March 14, 1890, MS., Mitchell, 2 G. 19.

——The question of novelty should be settled.

Wood v. Morris, 1873, C. D. 39; 3 O. G. 239.

——And of patentability.

Bland, *ex parte*, 1879, C. D. 104; 16 O. G. 47.

**Construction of the issue:**

——The subject-matter should be carefully set forth by the examiner.
Dod v. Cobb, 1876, C. D. 232; 10 O. G. 826.
Stephens v. Bailey, 1878, C. D. 7; 13 O. G. 45.

——Issue susceptible of various constructions should be construed to sustain the interference.
Locke v. Levalley v. Ewart, 1881, C. D. 26; 20 O. G. 671.
Hull v. Lowden, 1881, C. D. 30; 20 O. G. 741.

——Ambiguous issue.
Thomas v. Gutman, 1879, C. D. 248; 16 O. G. 857.

——Stipulation to remand and substitute three new issues where it appeared that issue would not determine the case from the testimony.
Miller v. Stark v. Phelps, Feb. 21, 1890, Fisher, Asst. Com., MS., 2 G. 11.

1887—96. Failure to prepare for interference.

96. When, however, a party who is required to put his application in a condition proper for an interference fails to do so within a reasonable time specified, the declaration of interference will not be delayed. After final judgment of priority the application of such party will be held for revision and restriction, subject to interferences with other applications. (See Rule 94.)

HISTORY OF RULE.

96. March 9, 1887. When, however, etc., (as in 96 of April 18, 1883, * * * subject to interferences with other applications or new references.

96 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like Rule 96 of March 9, 1887.

51. Aug., 1878. Where a party who is required to put his case in proper shape for the purposes of an interference delays doing so beyond a reasonable time specified, the interference will at once proceed. After final judgment, etc., (like Rule 96 of March 9, 1887.)

51 of X, IX, VIII, like 51 of Aug., 1878.

Rules of Sept. 1, 1875, and prior editions, contain no such provision.

——Unreasonable delay in getting case into condition for declaration is no excuse for passing case to issue without declaring the interference. This rule (96) must be followed.
Perkins, *ex parte*, June 28, 1890, Fisher, Asst. Com., MS., 2 G. 43.

1887—97. Notices of interference drafted and forwarded to examiner of interferences.

97. When an interference is found to exist and the applications are prepared therefor, the primary examiner will forward to the examiner of interferences the files and drawings; notices of interference for all the parties (as specified in Rule 103) disclosing the name and residence of each party and that of his attorney, and, if any party be a patentee, the date and number of the patent; the ordinals of

the conflicting claims and the invention claimed; and the issue which shall be clearly and concisely defined, in so many counts or branches as may be necessary in order to include all interfering claims. The primary examiner shall also forward to the examiner of interferences for his use a statement disclosing the applications involved in interference, fully identified, and arranged in the inverse chronological order of their filing as completed applications, and also disclosing the issue or issues and the ordinals of the conflicting claims.

*Conflicting parties having the same counsel notified.*

(2) Whenever it shall be found that two or more parties whose interests are in conflict are represented by the same attorney, the examiner will notify each of said principal parties, and also the attorney, of this fact.

HISTORY OF RULE, ¶ 1.

97. March 9, 1887. When an interference is found to exist and the applications are prepared therefor, the Primary Examiner will forward to the Examiner of Interferences, *together with the files and drawings*, notices of interference for all the parties, as specified in Rule 102,* which will disclose the name and residence of each party and that of his attorney, *and if any party, as such, be a patentee, the date and number of the patent, and* the date of its application, the ordinals of conflicting claims, and the invention claimed, which shall be clearly and concisely defined, in so many counts or branches as may be necessary in order to include all interfering claims.

97 of XXI, XX, XIX, like 97 of March 9, 1887.

97. Aug. 12th, 1884. When an interference is found to exist and the applications are prepared therefor, the primary examiner will forward to the examiner of interferences notices of interference for all the parties, as specified in Rule 102,* which will disclose the name and residence of each party, and that of his attorney, the date of the filing of his application, and, if his case be a patent, its date and number, the date of its application, the ordinals, etc., (as in 97 of March 9, 1887.)

*For Rule 102 of March 9, 1887, and August 12, 1884, see under Rule 103, of April 18, 1888.

97 of XVII, XVI, XV, XIV, XIII, XII, like 97 of Aug. 12, 1884.

53. Aug. 1878. Before the declaration of an interference proper a preliminary interference will be declared, in which the primary examiner will briefly and concisely define the interfering subject matter, and specify the claims embracing the same, and also notify the respective parties when the applications of the other parties were filed, together with their names and residences.

53 of X, IX, VIII, like 53 of Aug., 1878.

53. Sept. 1, 1875. Before the declaration, etc., (as in 53 of Aug., 1878), * * * the primary examiner will notify the respective parties when the applications, etc., (as in 53 of Aug., 1878.)

53 of VI, V, IV, III, II, like 53 of Sept. 1, 1875.

Edition of July 15, 1870, contains no such provision.

## HISTORY OF ¶ 2.

97 of XXII, XXI, XX, XIX, like 97 of April 18, 1888.

102 of Aug. 12, 1884, (XVIII,) XVII, XVI, XV, XIV, XIII, XII, like 97 of April 18, 1888.

Edition of Aug., 1878, and prior editions, contain no such provision.

1887—98. Revision of notices by examiner of interferences.

98. Upon receipt of the notices of interference, the examiner of interferences will make an examination thereof, in order to ascertain whether the issue between the parties has been clearly defined, and whether they are otherwise correct. If he be of the opinion that the notices are ambiguous, or are defective in any material point, he will transmit his objections to the primary examiner, who will promptly notify the examiner of interferences of his decision to amend or not to amend them.

## HISTORY OF RULE.

98. March 9, 1887. Upon receipt of the notices of interference, the examiner of interferences will make an examination thereof, in order to ascertain whether the issue between the parties has been clearly defined, and whether it is otherwise correct. If he be of the opinion, upon such examination, that the notices are ambiguous in this particular, or are imperfect in any material point, he will transmit his objections to the primary examiner, who will promptly notify him of his decision to amend or not to amend them.

98 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 98 of March 9, 1887.

53. Aug. 1878. At the time of the examination of the preliminary statements the examiner of interferences will also make an examination of the preliminary declaration instituted by the primary examiner, in order to ascertain whether or not the issue between the parties has been clearly defined. If it be found, upon such examination, that the preliminary declaration is ambiguous in this particular, the interference will be suspended and the case returned to the primary examiner for amendment.

53 of X, IX, VIII, VII, VI, V, IV, III, like 53 of Aug., 1878.

Editions of Aug. 1, 1871, and July 15, 1870, contain no such provision.

1887—99. Reference Commissioner.

99. In case of a material disagreement between the examiner of interferences and the primary examiner, the points

of difference shall be referred to the Commissioner for decision.

HISTORY OF RULE.

99. March 9, 1887. In case of a material disagreement between the examiner of interferences and the primary examiner, they shall refer the points of difference to the Commissioner for decision.

99 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 99 of March 9, 1887.

Edition of Aug., 1878, and prior editions, contain no such provision.

Primary examiner retains jurisdiction.

100. The primary examiner will retain jurisdiction of the case until the declaration of interference is made.

HISTORY OF RULE.

100 of XXII, XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 100 of April 18, 1888.

Edition of Aug., 1878, and prior editions, contain no such provision.

Jurisdiction of examiner of interferences.

101. Upon the institution and declaration of the interference, as provided in Rule 102, the examiner of interferences will take jurisdiction of the same, which will then become a contested case; but the primary examiner will determine the motions mentioned in Rule 122, as therein provided.

1887—103. Primary examiner to determine certain motions.

HISTORY OF RULE.

103. March 9, 1887. Upon the institution, etc., * * * as provided in Rule 101,‡ etc., * * * mentioned in Rule 116,† etc., (as in 101 of April 18, 1888.)

103 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 103 of March 9, 1887.

For rule in edition of Aug., 1878, and prior thereto, see notes under Rule 122 of April 18, 1888.

**The Examiner of Interferences:**

——His authority to dissolve an interference in the absence of patentability.
Lynch v. Dryden, 1873, C. D. 73; 3 O. G. 407.

——He has no authority to decide the question of novelty.
Neubocker v. Schafhaus, 1873, C. D. 138; 4 O. G. 319.

——He is the tribunal before whom the interference is originally to be heard.

Farnsworth v. Andrews, 1876, C. D. 3; 9 O. G. 195.

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‡ For Rule 101 of March 9, 1887, see notes under Rule 102 of April 18, 1888, pp. 15 and 16.

† For Rule 116 of March 9, 1887, see notes under Rule 122 of April 18, 1888.

——He has no jurisdiction over the question of patentability, but is confined to contested cases involving the question of priority of invention and matters incidental thereto.

Little v. Lillie, 1876, C. D. 207; 10 O. G. 543.

——His judgment unappealed from is binding upon all parties concerned.
Whiteley v. McCormick, 1876, C. D. 223; 10 O. G. 826.

——His jurisdiction over the matter of patentability is limited to the making of a report in his decision on the merits.
Anson v. Woodbury, 1877, C. D. 4; 11 O. G. 243.

——The Primary Examiner mentioned in Section 4904, R. S., is the Examiner of Interferences.
Faure v. Bradley, 1887, C. D. 33; 40 O. G. 243.

——He has no jurisdiction over the question of patentability or the declaration, but he has exclusive jurisdiction of the trial of the issues when declared.
Faure v. Bradley, v. Cowles, 1888, C. D. 120; 44 O. G. 945.

——His decision in disposing of interlocutory motions will not be disturbed except in case of abuse of discretion or of disregard of some rule or law.
Daniels v. Morgan, 32, MS., 73.
(Mills v. McDonald, 34, MS., 228.
(Scotford v. Sawyer & Force, 37, MS., 120.
(Adams v. House & House, Jr., 40, MS., 130) all cited in
Reynolds v. Haberman, 1889, C. D. —; 49 O. G. 130.

102. When the notices of interference are in proper form the examiner of interferences will add thereto a designation the time within which the preliminary statements required by Rule 110 must be filed, and will, *pro forma*, institute and declare the interference by forwarding the notices to the several parties to the proceeding.

Institution and declaration of interference. 1887—101. Rev. Stat., sec. 4904.

## HISTORY OF RULE.

101. March 9, 1887. When the notices of interference have been settled, the examiner of interferences will add thereto a designation of the time within which the statements required by Rule 105* must be filed, and will, *pro forma*, institute and declare the interference by forwarding the notices to the several parties to the interference.

101 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 101 of March 9, 1887.

For rule in edition of Aug., 1878 and in prior editions, see notes under Rule 97 of Apr. 18, 1888, and 103 of same.

52. Aug., 1878. When a patent is involved in an interference the assignees, as well as the inventor, will be notified.

52 of X, IX, VIII, like 52 of Aug., 1878.

Edition of Sept. 1, 1875, and prior editions contain no provision similar to 52 of Aug., 1878.

*For Rule 105, March 9, 1887, see under Rule 110 of April 18, 1888.

1887—102. Notices to parties.

103. The notices of interference will be forwarded by the examiner of interferences to all the parties, in care of their attorneys, if they have attorneys, and, if the application or patent in interference has been assigned, to the assignees. When one of the parties has received a patent, a notice will will be sent to the patentee and to his attorney of record.

Publication in Official Gazette

(¶ 2.) When the notices sent in the interest of a patent are returned to the office undelivered, or when one of the parties resides abroad, and his agent in the United States is unknown, additional notice may be given by publication in the Official Gazette for such period of time as the Commissioner may direct.

HISTORY OF RULE, ¶ 1.

102. March 9, 1887. Notices of interference will be forwarded by the examiner of interferences to all the parties, or to their attorneys, or in case the application or patent in interference has been assigned, &c., (as in 103 of Apr. 18, 1888).

102 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 102 of March 9, 1887.

56. Aug., 1878. When an interference is declared, notice will be given to both parties or to their attorneys; or in case the application or patent in interference has been assigned, then notices will be sent to the assignees. When one of the parties has received a patent, duplicate notices will be sent to the patentee and to his attorney of record.

56 of X, IX, like 56 of Aug., 1878.

56. Nov. 1, 1876. When an interference is declared, notice will be given to both parties, or to their attorneys. When one of the parties has received a patent, duplicate notices will be sent to the patentee and to his attorney of record.

56 of VII, VI, V, IV, III, II, like 56 of Nov. 1, 1876.

56. July 15, 1870. When an interference is declared notice will be give to both parties, or to their attorneys. When one of the parties has filed a caveat or already received a patent, duplicate notices will be sent to the patentee or caveator and to his attorney of record.

HISTORY OF ¶ 2.

102. March 9, 1887, ¶ 2. When one of the parties resides abroad and has no known agent in the United States, notice, in addition to that sent by mail, may be given by publication, in the Official Gazette for such period of time as the Commissioner may direct.

102 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 102 of March 9, 1887.

56. Aug., 1878. Where one of the parties resides abroad and has no known agent in the United States, in addition to the notice sent by mail,

notice may be given by publication in the Official Gazette.

56 of X, IX, like 56 Aug., 1878.

56. Nov. 1, 1876. Where one of the parties, etc., (as in 56 of August, 1878,) * * * by publication in a newspaper of general circulation in the City of Washington once in a week for three successive weeks.

56 of VII, VI, V, IV, III, II. I, like 56 of Nov. 1, 1876.

104. If either party require a postponement of the time for filing his preliminary statement, he will present his motion duly served on the other parties, with his reasons therefor, supported by affidavit, and such motion should be made, if possible, prior to the day previously fixed upon. But the Examiner of Interferences may, in his discretion, dispense with service of notice of such motion.

1887—109. Motion for postponement of time for filing.

HISTORY OF RULE.

109. March 9, 1887. If either party require a postponement of the time for filing the statements, he will present his motion duly served on the other parties, with his reasons therefor, supported by affidavit, prior to the day previously fixed upon. But the Examiner of Interferences may, in his discretion, dispense with service of notice of such motion.

109 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 109 of March 9, 1887.

53. Aug., 1878. If either party requires a postponement of the time for filing the preliminary statements, he must present his reasons therefor, in the form of an affidavit, prior to the day previously fixed upon.

53 of X, IX, VIII, VII, VI, V, IV, III, II, I, like 53 of Aug., 1878.

105. When an application is involved in an interference in which a part only of the invention is included in the issue, the applicant may file certified copies of the part or parts of the specification, claims, and drawings which cover the interfering matter, and such copies may be used in the proceeding in place of the original application.

Certified copies used in interference proceedings.

HISTORY OF RULE.

Edition of March 9, 1887, and prior editions, contain no such provision. (See Rule 106 of April 18, 1888, and notes thereunder.)

106. When a part only of an application is involved in an interference, the applicant may withdraw from his application the subject-matter adjudged not to interfere, and file

1887—125. New application for claims not in interference.

a new application therefor, or he may file a divisional application for the subject-matter involved, if the invention can be legitimately divided: *Provided*, That no claim shall be made in either application broad enough to include matter claimed in the other.

HISTORY OF RULE.

125. March 9, 1887. When a part only of the claims of an application are involved in an interference, the applicant may withdraw from his application the claims adjudged not to interfere, and file a new application therefor, if the application can be legitimately divided, and if no more of the devices claimed in one is shown or described in the other than is necessary to an intelligent understanding of the invention claimed in the latter: *Provided*, That no claim shall be made in the second application broad enough to include matter claimed in the first application as amended. (See Rule 42.)

125 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 125 of March 9, 1887.

61. Aug., 1878. When an application is adjudged to interfere with a part only of another pending application, the interfering parties will be permitted to see or obtain copies of so much only of the specifications as refers to the interfering claims. And either party may, if he so elect, withdraw from his application the claims adjudged not to interfere, and file a new application therefor: *Provided*, That the claims so withdrawn cover inventions which do not involve the devices in interference: *And provided also*, That the devices in interference are eliminated from the new application. In such case the latter will be examined without reference to the interference from which it was withdrawn.

61 of X, IX, VIII, VII, VI, V, IV, III, II, I, like 61 of Aug., 1878.

**Divisional applications in interference:**

——Disclaimer required.

Lacroix v. Welch, 1873, C. D. 155; 4 O. G. 526.

——Interference will not be declared with an improper divisional application.

Holt, *ex parte*, 1884, C. D. 43; 29 O. G. 171.

——Transfer of claims.

Hermance v. Bussey, 1871, C. D. 216.

Weiswanger, *ex parte*, 1890, C. D. —; 50 O. G. 1132, Fisher, Asst. Com.

——What is a divisional application? Authorities:

Forbes v. Thomson, 1890, C. D. —; 51 O. G. 297, Mitchell.

1887—104. Disclaimer to avoid interference.

107. An applicant involved in an interference may, with the written consent of the assignee, when there has been an assignment, before the date fixed for the filing of his preliminary statement (See Rule 110), in order to avoid the continuance of the interference, disclaim under his own signature, attested by two witnesses, the invention of the particular matter in issue, and upon such disclaimer and the cancellation of any claims involving such interfering matter judgment shall be rendered against him, and a copy of the disclaimer shall be embodied in and form part of his specification. (See Rule 196. †) But if the interference shall have been declared between an application having a generic claim and one having a subordinate specific claim, the applicant making the specific claim may disclaim the matter in issue, as hereinbefore provided, without canceling his claim. The files and records shall then be returned by the Examiner of Interferences to the primary examiner. If the Primary Examiner shall find that the interfering claims stand so related to each other (as generic and specific, respectively), and that the disclaimer filed is suitable to the case, he shall dissolve the interference; otherwise not. His decision shall be subject to appeal as in other cases of dissolution. (Rule 122.)

Signature to

HISTORY OF RULE.

104. March 9, 1887. An applicant involved in an interference may, *with the written consent of the assignee, when there has been an assignment*, before the date fixed for the filing of his statement, (see Rule 105,*) in order to avoid the continuance of the interference, disclaim under his own signature, attested by two witnesses, the invention of the particular matter in issue, and upon such disclaimer and the cancellation of any claims involving such interfering matter, judgment shall be rendered against him, and the

† Rule 196, April 18, 1888. Such disclaimer must be distinguished from those which are embodied in original or reissue applications, as first filed or subsequently amended, referring to matter shown or described, but to which the disclaimant does not choose to claim title, and also from those made to avoid the continuance of an interference. Such disclaimers must be signed by the applicant in person and duly witnessed, and require no fee. (See Rule 107. For forms of disclaimers, see Appendix, Forms 27, 28.)

* For Rule 105, March 9, 1887, see p. 27, under Rule 110, April 18, 1888.

disclaimer shall be embodied in and form part of his specification. (See Rules 187, 188.‡)

104 of XXI, XX, XIX, like 104 of March 9, 1887.

104. Aug. 12, 1884. An applicant involved in an interference may, before the date fixed for the filing, etc., (as in 104 of March 9, 1887.)

104 of XVII, XVI, XV, XIV, XIII, XII, like 104 of Aug. 12, 1884.

51. Aug., 1878. Where a preliminary interference is declared on matter shown but not claimed in the application last filed, the applicant must, in order to avoid the continuance of the interference, disclaim the invention of the particular matter so shown.

51 of X, IX, VIII, like 51 of Aug., 1878.

(See notes under Rule 125 of April 18, 1888.)

Edition of Sept. 1, 1875, and editions prior thereto, contain no such provision.

‡ Rule 187, March 9, 1887. Whenever, through inadvertence, accident, or mistake, and without any fraudulent or deceptive intention, a patentee has claimed more than that of which he was the original or first inventor or discoverer, his patent shall be valid for all that part which is truly and justly his own, provided the same is a material or substantial part of the thing patented; and any such patentee, his heirs or assigns, whether of the whole or any sectional interest therein, may, on payment of the fee required by law, make disclaimer of such parts of the thing patented as he or they shall not choose to claim or to hold by virtue of the patent or assignment, stating therein the extent of his interest in such patent. Such disclaimer shall be in writing, attested by one or more witnesses, and recorded in the patent office; and it shall thereafter be considered as part of the original specification to the extent of the interest possessed by the claimant and by those claiming under him after the record thereof. But no such disclaimer shall effect any action pending at the time of filing the same, except as to the question of unreasonable neglect or delay in filing it.

‡ Rule 188, March 9, 1887. Such disclaimers must be distinguished from those which are embodied in original or reissue applications, as at first filed or subsequently amended, referring to matter shown or described, but to which the disclaimant does not choose to claim title, and also from those made to avoid the continuance of interferences, which require no fee, but must, like all other disclaimers, be signed by the applicants in person and duly witnessed. (See Rule 104. For forms of disclaimers, see Appendix, Forms 27, 28.)

Disclaimer:

——The withdrawal of a disclaimer should be objected to at the outset by motion to dissolve; failure to do so an estoppel.
Daniels v. Chesterman, 1878, C. D. 26; 13 O. G. 4.

——Disclaimer under this rule an estoppel from reinserting the matter disclaimed in a re-issue.
Lee v. Walsh, 1879, C. D. 29; 15 O. G. 563.

——After judgment by concession, matter disclaimed prior to interference cannot be restored.
Cobb, *ex parte*, 1879, C. D. 123; 16 O. G. 175.

——Disclaimer under this rule discussed; it is not a motion (requiring notice), and not an amendment.
Shinn, *ex parte*, 1879, C. D. 192; 16 O. G. 458.

——It cannot operate as a preliminary statement.
Laverty v. Flagg, 1879, C. D. 303; 16 O. G. 1141.

——Disclaimer of inventor of sub-combination.
Banks v. Snediker, 1880, C. D. 95; 17 O. G. 508.

——Effect of the rule. Cannot be extended by implication.
Firm, *ex parte*, 1887, C. D. 27; 39 O. G. 1199.

——No distinction in interferences under this rule in respect to period within which disclaimers may be filed.
Clark v. Lord v. Grimes, 1890, C. D. —; 51 O. G. 1943.

——Mutual concession as to generic claim in one party, and specific claim in the other party, by concession of priority on the specific claim, accompanied in the latter by disclaimer under this rule of generic claim.
McCollum v. Snediker, Dec. 13, 1887, M. S. Hall.

——Disclaimer tendered by party prior to date fixed for filing preliminary statement under this rule requires no motion or notice; but if accompanied by motion, notice required.
Diescher v. Walker v. Diescher & McGill, 1890, C. D. —; 52 O. G. 459.

——When a disclaimer filed prior to date of filing preliminary statement may refer to a patent embraced in the interference.
Diescher, *ex parte*, June 24, 1890, Mitchell, MS., 2 G. 43.

108. When applications are declared to be in interference, the interfering parties will be permitted to see or obtain copies of each other's file-wrappers, and so much of their contents as relate to the interference, after the preliminary statements referred to in Rule 110 have been received and approved; but information of an application will not be furnished by the office to an opposing party, except as provided in Rules 97 and 103, until after the approval of such statement.

1887—126. Inspection of claims of opposing parties.

HISTORY OF RULE.

126. March 9, 1887. When applications are declared to be in interference, the interfering parties will be permitted to see or obtain copies of the interfering claims, and of so much of the specifications as relate thereto, *after the statements referred to in Rule* 105* *have been received and approved; but no information of an application will be furnished by the Office to an opposing party, except as provided in Rules* 97† *and* 102‡ *until after the approval of such statement.*

* 126 of XXI, XX, XIX, like 126 of March 9, 1887.

126. Aug. 12, 1884. When applications are declared to be in interference, the interfering parties will be permitted to see or obtain copies of the interfering claims, and of so much of the specifications as relate thereto.

126 of XVII, XVI, XV, XIV, XIII, XII, like 126 of Aug. 12, 1884.

61. Aug., 1878. When an application is adjudged to interfere with a part only of another pending application, the interfering parties will be permitted to see or obtain copies of so much only of the specifications as refers to the interfering claims.

61 of X, IX, VIII, VII, VI, V, IV, III, II, I, like 61 of Aug., 1878.

——On grant of a motion to dissolve, to include an earlier application, inspection cannot be had.
White v. Demarest, 1887, C. D. 133; 41 O. G. 1161.

——Adverse party may have access to papers, but no other parties.
Fischer, *ex parte*, 1887, C. D. 18; 38 O. G. 1237.

——Before the files are open to inspection, affidavits under Rule 74, 1880, that applicant made invention before, etc., must be removed or sealed up.
Gasser, *ex parte*, 1880, C. D. 94; 17 O. G. 507.

——Particulars refused contestant until after filing of preliminary statement.
Spaulding v. Winchester, 1871, C. D. 94.

1887—94. Invention shown, but not claimed in application.

109. When an application is involved in an interference in part and shows and describes, without claiming, a patentable invention claimed by another party thereto, the applicant may, at any time within twenty days after the preliminary statements (referred to in Rule 110) of the parties have been

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* For Rule 105, March 9, 1887, see p. 27, under Rule 110, April 18, 1888.
† For Rule 97, March 9, 1887, see p. 12, under Rule 97, April 18, 1888.
‡ For Rule 102, March 9, 1887, see p. 16, under Rule 103, April 18, 1888.

received and approved, on motion duly made, as provided in Rule 153*, file an amendment of his application duly claiming such invention, and on the admission of such amendment the invention shall be included in the interference. Such motion must be accompanied by the proposed amendment, and when in proper form will be transmitted by the Examiner of Interferences to the Primary Examiner for his determination. In case the amendment shall be admitted, the Primary Examiner will re-declare the interference, prepare new notices, and forward the papers and files to the Examiner of Interferences, who will proceed in accordance with Rule 103. The decision of the Primary Examiner will be binding upon the Examiner of Interferences, unless reversed or modified on appeal, as provided in Rule 124.

## HISTORY OF RULE.

94. March 9, 1887. No interference will be declared between pending applications, nor between a pending application and an unexpired patent, unless there are conflicting claims; but where an application is involved in an interference in part and shows and describes, without claiming, a patentable invention claimed by another party thereto, the applicant may, at any time *within twenty days after the statements of the parties have been received and approved*, on motion duly made, as provided in Rule 149†, file an amendment of his application duly claiming such invention, and on the admission of such amendment the invention shall be included in the interference. Such motion must be accompanied by the proposed amendment, and when in proper form will be transmitted by the Examiner of Interferences to the Primary Examiner for his determination. Upon the final determination of such motion the papers and files will be returned to the Examiner of Interferences, and in case the amendment shall be admitted the Primary Examiner will re-declare the interference, and prepare and forward to the Examiner of Interferences new notices of the interference, as provided in Rule 97‡, and the Examiner of Interferences will proceed in accordance with Rule 102§. The decision of the Primary Examiner will be binding upon the Examiner of Interferences, unless reversed or modified upon appeal, as provided in Rule 118.‖

94 of XXI, XX, XIX, like 94 of March 9, 1887.

94, Aug. 12, 1884, omits matter in italics, otherwise like 94 of March 9, 1887.

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* Rule 153, April 18, 1888

† Rule 149 of March 9, 1887, is like 153 of April 18, 1888.

‡ For Rule 97, March 9, 1887, and March 1, 1884, etc., see p. 12, under Rule 97, April 18, 1888.

§ For Rule 102, March 9, 1887, and March 1, 1884, etc., see p. 16, under Rule 103, April 18, 1888.

For Rule 118, March 9, 1887, see p. —, under Rule 124, April 18, 1888.

94. March 1, 1884. No interference will be declared between pending applications nor between a pending application and an unexpired patent unless there are conflicting claims; but where an application is involved in an interference in part and shows and describes without claiming a patentable invention claimed by another party thereto, the applicant may at any time before the time fixed for filing the statement provided for in Rule 105§§, on motion duly made as provided in Rule 149†, file an amendment of his application duly claiming such invention, and on the admission of such amendment the invention shall be included in the interference. Such motion must be accompanied by the proposed amendment, and when in proper form will be transmitted by the Examiner of Interferences to the Primary Examiner for his determination. Upon the final determination of such motion the papers and files will be returned to the Examiner of Interferences, and in case the amendment shall be admitted the Primary Examiner will re-declare the interference and prepare and forward to the Examiner of Interferences new notices of interference, as provided in Rules 97,‡ 101 †† and 102.§ The decision of the Primary Examiner will be binding upon the Examiner of Interferences unless reversed and modified upon appeal, as provided in Rule 118.‖

94 of XVI, XV, XIV, like 94 of March 1, 1884.

94. Sept., 1880. When two or more pending applications show, but only one claims, an invention, the information provided for in Rule 97,‡ so far as it may be applicable to the case, will be sent to each applicant not claiming the invention; and if any such applicant shall, within the time limited by the examiner, file an amendment of his application duly claiming the invention, he will be made a party to an interference to be declared, but not otherwise. Whenever an interference is found to exist, under Rule 93,‡‡ between two or more parties claiming an invention, applicants having pending applications showing, but not claiming, the invention, will be furnished with information provided for in Rules 97‡ and 101,†† and if such applicants shall, within the time fixed for filing the preliminary statements, file amendments of their applications, duly claiming the invention, together with such statements, they will be made parties to the interference, but not otherwise.

When a patent shows, without claiming, an invention claimed in a pending application, and the requirements of Rule 74‖‖ have been complied with, the patentee will be furnished with the information provided for in Rule 97;‡ and if he shall, within the time limited by the examiner, file a reissue application duly claiming the invention, he will be made a party to an interference to be declared; but otherwise he will be excluded therefrom, without prejudice to his right of reissue; but if an interference is found to exist between other parties, he will be furnished with the information provided for by Rules 97‡ and 101,†† and if he shall file his preliminary statement, together with a reissue application claiming the invention, within the time

†† For Rule 101, March 1, 1884, etc., see p. 15, under Rule 102, April 18, 1888.
‡‡ For Rule 93, Sept., 1880, see p. 5, under Rule 94, April 18, 1888.
§§ For Rule 105, Dec. 1, 1879, see pp. 27 and 30, under Rules 110 and 111, April 18, 1888.

limited for filing such statements, he will be made a party to the interference, but not otherwise. (See Rules 74 ‖ ‖ and 171.‡‡‡)

94. Dec. 1, 1879. The notices provided for in Rules 97 ‡ and 102 § will be sent to all applicants having pending applications showing but not claiming the invention, and if such applicants shall, within the time fixed for filing the statements provided for in Rules 101 ‡ and 105 §, file such statements, together with amendments of their applications duly claiming the invention, they shall be made parties to the interference, but otherwise shall be excluded therefrom.

The notice provided for in Rules 97 ‡ and 102 § will be sent to all grantees of unexpired patents showing, but not claiming, the invention, and if such patentees shall, within the time limited for filing the statements provided for in Rules 101 †† and 105, §§ file such statements, together with reissue applications duly claiming the invention, they shall be made parties to the interference; but otherwise they shall be excluded therefrom without prejudice to their right of reissue. (See Rule 74. †††)

Edition of Aug., 1878, and prior editions, contain no such provision.

——Only an amendment claiming an "invention claimed by another party thereto" is authorized by this rule.
Hunter v. Knight, April 3, 1890, MS., Mitchell, 2 G. 27.

——Words "claimed by another party" refer to allowed claims, and not to claims rejected for want of patentability.
Crandall v. Sholes, May 27, 1890, MS., Mitchell, 2 G. 36.

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‖ ‖ Rule 74, Sept. 1, 1880. When an original or reissue application is rejected on reference to an expired or unexpired domestic patent, which substantially shows or describes but does not claim the rejected invention, or to a foreign patent, or to a printed publication, and the applicant shall make oath to facts showing a completion of the invention before the filing of the application for the domestic patent, or before the date of the foreign patent, or before the date at which the printed publication was made, and shall also make oath that he does not know and does not believe that the invention has been in public use or on sale in this country for more than two years prior to his application, and that he has never abandoned the invention, then the patent or publication cited will not bar the grant of a patent to the applicant, except upon interference, as provided for in Rule 94.

††† Rule 74 of Dec. 1, 1879, like 74 of Sept. 1, 1880, above.

‡‡‡ Rule 171, Sept. 1, 1880. Forfeited and abandoned applications will not be cited as references. But when an applicant makes claim to an invention previously claimed by and allowed to another, whose application has become forfeited by reason of the non-payment of the final fee within six months from the date of the letter of allowance, he will be notified that unless he shall file an affidavit, showing that he made the invention before such previously allowed application was filed, his own application will not be passed to issue.

Where more than one such subsequent applicant claims the invention thus previously allowed, each will be required to file the affidavit above mentioned within a reasonable specified time, before an interference can be declared between such later applications.

1887—105. Preliminary statements

110. [¶ 1]. Each party to the interference will be required to file a concise preliminary statement, under oath, on or before a date to be fixed by the office, showing the following facts:

Requirements of.

(1) The date of original conception of the invention set forth in the declaration of interference.

(2) The date upon which a drawing of the invention was made.

(3) The date upon which a model of the invention was made.

(4) The date upon which the invention was first disclosed to others.

(5) The date of the reduction to practice of the invention.

(6) A statement showing the extent of use of the invention.

[¶ 2.] If a drawing or model has not been made, or if the invention has not been reduced to practice or disclosed to others or used to any extent, the statement must specifically disclose these facts.

[¶ 3.] When the invention was made abroad the statement should set forth:

(1) That applicant made the invention set forth in the declaration of interference.

(2) Whether or not the invention was ever patented; if so, when and where, giving the date and number of each patent.

(3) Whether or not the invention was ever described in a printed publication; if so, when and where, giving the title, place, and date of such publication.

(4) Whether or not the invention was ever introduced into this country; if so, giving the circumstances, with the dates connected therewith, which are relied upon to establish the fact.

[¶ 4.] The preliminary statements should be carefully prepared, as the parties will be strictly held in their proofs to the dates set up therein.

[¶ 5.] The statement must be sealed up before filing (to be opened only by the Examiner of Interferences, see Rule 111), and the name of the party filing it, the title of the case, and the subject of the invention indicated on the envelope. The envelope should contain nothing but this statement. Sealed up.

## HISTORY OF RULE, ¶ 1.

105. March 9, 1887. Each party to the interference will be required to file a concise statement, under oath, showing the date of his original conception of the invention, *of the making of a drawing, of the making of a model*, of its disclosure to others, of its *reduction to practice*, and of the extent of its use.

105 of XXI, XX, XIX, like 105 of March 9, 1887.

105. Aug. 12, 1884. Each party to the interference will be required to file a concise statement, under oath, showing the date of his original conception of the invention, of its illustration by drawing or model, of its disclosure to others, of its completion, and of the extent of its use.

105 of XVII, XVI, XV, XIV, XIII, XII, like 105 of Aug. 12, 1884.

53. Aug., 1878. Each party to the interference will be required to file a brief statement under oath, showing the date of the original conception, the date that the invention was reduced to drawings or model, the date of its completion, and the extent of use.

53 of X, IX, VIII, like 53 of Aug., 1878.

53. Sept 1, 1875. Each party to the interference will be required to file a statement under oath, giving a detailed history of the invention, showing the date of the original conception, etc., (as in 53 of Aug., 1878,) * * * and the extent and character of use.

53 of VI, V, IV, III, like 53 of Sept. 1, 1875.

53. Aug. 1, 1871. Before the declaration of an interference proper a preliminary interference will be declared, in which each party, without the name of the other party being made known to him, will be required to file a statement under oath, giving a detailed history of the invention, describing its original conception, the successive experiments, the extent and character of use, and the various forms of embodiment, and giving, so far as practicable, the exact dates of each step in its development.

53. July 18, 1870. Upon the declaration of an interference each party will be required, before any time is set for the taking of testimony, to file a statement under oath giving the date and a detailed history of the invention; showing the successive experiments, steps of development, extent and character of use, and forms of embodiment.

HISTORY OF ¶ 2.

Edition of March 9, 1887, and prior editions, contain no such provision.

HISTORY OF ¶ 3.

105. March 9, 1887. *When the invention was made abroad the statement should set forth when and where, if ever, the invention was patented, (giving the date and number of the patent), and when, if ever, it was described in a printed publication, (giving the title, date, and place of publication,) and when, if ever, it was introduced, or knowledge of it was introduced, into this country, (giving the circumstances which are thought to establish the facts thereof.)*

105 of XXI, XX, XIX, like 105 of March 9, 1887.

Edition of Aug. 12, 1884, and prior editions, contain no such provision.

**Preliminary statement:**

——The practice of requiring it discussed.
Guest v. Finch, 1876, C. D. 144; 10 O. G. 165.

——The rule is not inconsistent with the law.
Smith & Thomas v. Cowles, 1885, C. D. 12; 30 O. G. 343.

——Preliminary statement executed by one of two joint-inventors; its effect.
Warnant v. Warnant, 1880, C. D. 36; 17 O. G. 265.
Webster & Drew v. Boyer & Ham, Jan. 11, 1890, MS., Mitchell, 2 G. 5.

——Sufficiency of preliminary statement.
Dermondy v. Pennock, 1878. C. D. 93; 14 O. G. 202.
Connor v. Williams, 1878, C. D. 137; 15 O. G. 386.
Laverty v. Flagg, 1879. C. D. 303; 16 O. G. 1141.

HISTORY OF ¶ 4.

105. March 9, 1887. The parties will be strictly held in their proof to the dates set up in their statements.

105 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 105 of Nov. 16, 1885.

53 of XI, X, IX, VIII, VII, VI, V, IV, III, like 105 of Nov. 16, 1885.

Editions of Aug. 1, 1871, and July 15, 1870, contain no such provision.

**"Parties will be strictly held in their proofs to the date set up:"**

——The testimony must conform to the preliminary statement.
Schenck v. Rider, 1870, C. D. 136.
Kenyon v. Wesson, 1871, C. D. 91.
Togmeyer, *in re.*, 1871, C. D. 285.
Allen & Moody v. Gilman, 1872, C. D. 204; 2 O. G. 293.
Hovey v. Hufeland, 1872, C. D. 229; 2 O. G. 493.

Brooks, S. D., *ex parte*, 1874, C. D. 84; 6 O. G. 296.
McCulloch v. Watkins, 1875, C. D. 129; 8 O. G. 1074.
Walpuski v. Jacobsen & Faber, 1876, C. D. 114; 9 O. G. 964.
Merrill & Merrill v. Glidden, 1877, C. D. 11; 11 O. G. 196.
Martin, *et al.*, v. Patrie, 1877, C. D. 106; 12 O. G. 625.
Bering v. Haworth, 1878, C. D. 84; 14 O. G. 117.
Connor v. Williams, 1878, C. D. 137; 15 O. G. 386.

——Practice as to testimony prior to rule requiring preliminary statement.

Cheseborough v. Toppan, 1872, C. D. 100; 1 O. G. 464.

——Permissible variation.

*White v. Farmer, 1874, C. D. 19; 5 O. G. 338.*
Connor v. Williams, 1878, C. D. 137; 15 O. G. 386.

## HISTORY OF ¶ 5.

105. March 9, 1887. The statement must be sealed up before filing (to be opened only by the Examiner of Interferences,) and the name of the party filing it, the title of the case, and the subject of the invention indicated on the envelope.

105 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 105 of March 9, 1887.

53. Aug., 1878. This statement must be sealed up before filing, (to be opened only by the examiner of interferences,) and the name of the party filing it and the subject of the invention indicated upon the envelope.

53 of X, IX, VIII, VII, VI, V, IV, III, II, like 53 of Aug., 1878.

Edition of July 15, 1870, contains no such provision.

111. [¶ 1.] The preliminary statements shall not be opened to the inspection of the opposing parties until each one shall have been filed, or the time for such filing, with any extension thereof, shall have expired, and not then unless they have been examined by the proper officer and found to be satisfactory. 1887—105. Opened to inspection.

[¶ 2.] Any party in default in filing his preliminary statement shall not have access to the preliminary statement or statements of his opponent or opponents until he has either filed his statement or waived his right thereto, and agreed to stand upon his record date. In default.

HISTORY OF RULE, ¶ 1.

105. March 9, 1887. The statements shall not be opened to the inspection of the opposing parties until both shall have been filed, or the time for filing both with any extension thereof shall have expired, nor then, unless they have been examined by the proper officer, and found to be satisfactory.

105 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 105 of March 9, 1887.

53 Aug., 1878. These statements shall not be opened to the inspection of the opposing parties until both have been filed, or until the time for filing both has expired, nor then, until they have been examined by the proper officer and found to be satisfactory.

53 of X, like 53 of Aug., 1878.

53. Aug., 1877. These statements shall not be opened to the inspection of the opposing parties until the testimony has been taken and filed in the office, or until the interference has been decided.

53. Nov. 1, 1876, like 53 of Aug., 1878.

53 of VII, VI, V, IV, III, like 53 of Aug., 1878.

53. Aug. 1, 1871. These preliminary statements shall not be open to the inspection of the opposing parties until both have been filed or until the time for filing both has expired; nor then, until they have been examined by the proper officer, and found to be sufficiently definite as regards their declaration of dates.

53. July 15, 1870. Such statement shall not be open to inspection by the other party, until both are filed, or until the time for filing both has expired.

HISTORY OF ¶ 2.

Edition of March 7, 1887, and prior editions, contain no such provision.

1887—106. Notice to amend.

112. If, on examination, a statement is found to be defective in any particular, the party shall be notified of the defect and wherein it consists, and a time assigned within which he must cure the same by an amended statement; but in no case will the original or amended statement be returned to the party after it has been filed. If a party shall refuse to file an amended statement, he will be restricted to his record date in the further proceedings in the interference.

HISTORY OF RULE

106. March 9, 1887. If, on such examination, a statement is found to be defective in any particular, the party shall be notified of the defect, and a time assigned within which he must cure such defect by an amended statement; but in no case will any original or amended statement be returned after it has been once filed. *If a party shall refuse to file the amended statement herein referred to, he will be restricted to his record date in the further proceedings in the case.*

106 of XXI, XX, XIX, like 106 of March 9, 1887.

106. Aug. 12, 1884. If, on such examination, etc., (like 106 of March 9, 1887,) * * * be returned after it has been once filed.

106 of XVII, XVI, XV, XIV, XIII, XII, like 106 of Aug. 12, 1884.

Edition of Aug., 1878, and prior editions, contain no such provision.

——Practice as to examination of preliminary statement by examiner of interferences.

Schenck v. Rider, 1870, C. D. 136.

113. In case of material error arising through inadvertence or mistake, the statement may be corrected on motion (see Rule 153), upon showing to the satisfaction of the Commissioner that the correction is essential to the ends of justice. 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.

1887—110. Motion to amend.

HISTORY OF RULE.

110. March 9, 1887. In case of material error in the statement, arising through inadvertence or mistake, it may be corrected on motion (see Rule 149*) upon showing, etc., (like 113 of April 18, 1888.)

110 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 110 of March 9, 1887.

53. Aug., 1878. In case of material error in the preliminary statement, arising through inadvertence or mistake, it may be corrected upon showing to the satisfaction of the Commissioner that its correction is essential to the ends of justice.

The motion to correct the said statement must be made before the taking of the testimony relating to the alleged error, and as soon as practicable after the discovery thereof; and it must be accompanied by notice to the adverse party or parties.

53 of X, IX, like 53 of Aug., 1878.

Edition of Nov. 1, 1876, and prior editions, contain no such provision.

* Rule 149 of March 9, 1887, is like 153 of April 18, 1888.

**Amendments to preliminary statements are not permitted:**

——After testimony has been taken.
Cutting v. Kaylor, 1872, C. D. 265; 2 O. G. 704.
Guest v. Finch, 1876, C. D. 141; 10 O. G. 165.
Oliver v. Zeller, 1876, C. D. 187; 10 O. G. 416.
Hopkins v. Le Roy, 1880, C. D. 188; 18 O. G. 859.
Donnelan v. Berry, 1887, C. D. 140; 41 O. G. 1499.

——To set back dates of reduction to practice abroad.
Boulton v. Illingworth, 1888, C. D. 32; 43 O. G. 508.

**Amendments to preliminary statement are permitted:**

——On proof that the party was not of sound mind when made.
Brooks, W. D., *ex parte*, 1874, C. D. 84; 6 O. G. 296.

——Where the mistake has arisen through inadvertence or mistake, and not through negligence.
Moore v. Brown, 1882, C. D. 20; 22 O. G. 1882.
Smith & Thomas v. Cowles, 1885, C. D. 12; 30 O. G. 343.
Robinson v. Seymour, 1885, C. D. 98; 33 O. G. 113.
Clemson v. Fowler, 1886, C. D. 35; 37 O. G. 671.
Hicks v. Keating, 1887, C. D. 40; 40 O. G. 343.
Heermans v. Eichbaum, Dec. 12, 1889, MS., Fisher, Asst. Com.

1887—107. Failure to file preliminary statement. Failure to overcome *prima facie* case.

114. [¶ 1.] If the junior party to an interference, or if any party thereto other than the senior party, fail to file a statement, or if his statement fail to overcome the *prima facie* case made by the respective dates of application, judgment against such party may be rendered upon the record, and the interference will proceed between the remaining parties.

[¶ 2.] Within the period fixed as a limit of appeal from such judgment, said party may bring any of the motions permitted by the rules, provided he has not waived his right of appeal. The filing of such a motion, noticed for hearing within the limit of appeal, will operate to stay the running of the time so limited until the final determination of the motion.

## HISTORY OF RULE, ¶ 1.

107. March 9, 1887. If *the junior* party to an interference fail to file a statement, or if *his* statement fail to overcome the *prima facie* case made by the respective dates of application, the other may demand an immediate ajudication of the case upon the record. Where there are more than two

parties to the interference, and any one of them fails to file his statement, judgment may be rendered upon the record as to the *party failing to file his statement, unless he be the senior party, and the interference will proceed between the remaining parties.*

107 of XXI, XX, XIX, like 107 of March 9, 1887.

107. Aug. 12, 1884. If either party to an interference fail to file a statement, or if the statement of either party fail to overcome the *prima facie* case made by the respective dates of application, the other may demand an immediate adjudication of the case upon the record. Where there are more than two parties to the interference, and any of them fail to file their statements, judgment may be rendered upon the record as to such parties, and the interference will proceed between the remaining parties.

107 of XVII, XVI, XV, XIV, XIII, XII, like 107 of Aug. 12, 1884.

53. Aug., 1878. If the party upon whom rests the burden of proof fails to file a preliminary statement, or if his statement fails to overcome the *prima facie* case made by the respective dates of application, the other party will be entitled to an immediate adjudication of the case upon the record. Or where there are more than two parties to the interference, and any of them fail to file a preliminary statement, judgment may be rendered against such parties, and the interference proceed between the remaining parties.

53 of X, like 53 of Aug., 1878.

53. Aug., 1877. If either party, etc., (like 53 of Aug., 1878,) * * * immediate adjudication of the case upon the record.

53 of VIII, like 53 of Aug., 1877.

53. Sept. 1, 1875. If the party upon whom rests the burden of proof fails to file a preliminary statement, or if his statement fails to overcome the *prima facie* case made by the respective dates of application, or if it shows that he has abandoned his invention, or that it has been in public use more than two years before his application, the other party will be entitled to an immediate adjudication of the case upon the record, unless a presumption is created that his right to a patent is affected by the alleged public use of the invention, in which case the interference may be proceeded with.

53 of VI, V, IV, III, II, like 53 of Sept. 1, 1875.

53. July 15, 1870. In default of such filing by either party, or if the statement of either fails to overcome the *prima facie* case made by the respective dates of application, or if it shows that the invention has been abandoned or that it has been in public use for more than two years prior to the application of affiant, the other party shall be entitled to an adjudication by default upon the case as it stands upon the record.

HISTORY OF ¶ 2.

Edition of March 9, 1887, and prior editions, contain no such provision.

**Failure to file preliminary statement, effect:**

Schenck v. Rider, 1870, C. D. 136.
Spaulding v. Winchester, 1871, C. D. 94.
Evans v. Bussell & Vose, 1873, C. D. 36; 3 O. G. 180.
Lauder v. Crowell, 1879, C. D. 177; 16 O. G. 405.
Hopkins v. Le Roy, 1880, C. D. 188; 18 O. G. 859.
Sellon v. Hockhausen, 1885, C. D. 103; 33 O. G. 995.

——A party is only required to overcome by his preliminary statement the dates of the application actually included.
Freeman v. Hunter v. Zippernowsky & Deri v. Edison, May 24, 1890, MS., Fisher, Asst. Com., 2 G. 36.

**Judgment of the record granted:**

——Where party on whom rested burden of proof introduced testimony having no reference to the issue.
Dod v. Cobb, 1876, C. D. 232; 10 O. G. 826.

——On motion made, after notice from Examiner of Interference, that on examination of preliminary statement he finds no junior applicant claims a date prior to that of earliest applicant.
Booth v. Lyman, 1880, C. D. 62; 17 O. G. 393.

——Where an earlier application of the junior party is upon its face an application in behalf of the same person who filed the application immediately in interference.
Oliver v. Everett, 1889, C. D. —; 49 O. G. 731, Mitchell.

——Against the party last in the office who does not in his preliminary statement allege a conception earlier than the record date of the party first to file his application.
Huntly v. Smith, 1880, C. D. 182; 18 O. G. 795.

——As between two reissue applications whose patents both show but do not claim the device, and in the absence of testimony on either side the prior patent of one prevents award of priority to the other who had made no preliminary statement.
Loring v. Hall, 1879, C. D. —; 15 O. G. 471.

——Motion for adjudication upon the record which calls for notice, *i. e.*, a contested case.
Booth v. Lyman, 1880, C. D. 62; 17 O. G. 393.

——Correction of blunder in awarding judgment on record may be by appeal to Examiners-in-Chief, or by motion to vacate before the Examiner of Interferences.
Rogers v. Winssinger, April 5, 1890, MS., Mitchell, 2 G. 28.

1887—108. Failure to file, testimony excluded setting up invention prior to application date.

115. If a party to an interference fail to file a statement, testimony will not be received subsequently from him to prove that he made the invention at a date prior to his application.

HISTORY OF RULE.

108. March 9, 1887. If any party to an interference fail to file a statement, no testimony will subsequently be received from him to prove that he made the invention at a date prior to his application.

108 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 108 of March 9, 1887.

53. Aug., 1878. If the earlier applicant fails to file a preliminary statement, no testimony will subsequently be received from him going to prove that he made the invention at a date prior to his application.

53 of X, IX, VIII, VII, VI, V, IV, III, II, like 53 of Aug., 1878.

Edition of July 15, 1870, has no such provision.

116. In original proceedings in cases of interference the several parties will be presumed to have made the invention in the chronological order in which they filed their completed applications for patents clearly illustrating and describing the invention; and the burden of proof will rest upon the party who shall seek to establish a different state of facts.

1887—111. Presumption as to order of invention

HISTORY OF RULE.

111 of XXII, XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 116 of April 18, 1888.

57. Aug., 1878. In cases of interference the party who first filed so much of his application for a patent as is required by Rule 7,* will be deemed the first inventor in the absence of all proof to the contrary.

57 of X, IX, VIII, VII, VI, like 57 of Aug., 1878.

57. Sept. 1, 1873. In cases of interference the party who first filed so much of his application for a patent as illustrates his invention will be deemed the first inventor in the absence of all proof to the contrary.

57 of IV, III. II, I, like 57 of Sept. 1, 1873.

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* Rule 7, Aug., 1878. No application for a patent will be regarded as complete or be placed upon the files for examination until the fee is paid, the specification, the petition and the oath, properly signed, are filed, and the drawings and a model or specimens (when required) are furnished. * * *

**Burden of proof:**

——As between a senior and a junior applicant, the burden of proof is on the latter.
Smith v. Burlew, 1870, C. D. 41.
Johnston v. Pimlott, 1870, C. D. 44.
Leonard v. Runyon & Ingersoll, 1870, C. D. 56.
Earle v. Dunderdale, 1871, C. D. 174.
Evans v. Bussell & Vose, 1873, C. D. 36; 3 O. G. 180.
Hussey v. Van Wagenen, 1876, C. D. 199; 10 O. G. 942.
Dwyer and Carter v. Dickey, 1876, C. D. 214; 10 O. G. 585.
Perrine v. Goldsworthy, 1876, C. D. 236; 10 O. G. 980.
Millward v. Barnes & Barnes, 1877, C. D. 34; 11 O. G. 1060.
Bell v. Brooks, 1881, C. D. 4; 19 O. G. 290.

——As between a patent and a subsequently filed application, the burden of proof is upon the latter.
Hunt v. Wool, 1869, C. D. 34.
Black v. Lock & Ulrich, 1869, C. D. 13.
Wheeler v. Chenowith & Murrill, 1869, C. D. 43.
Wood v. Crowell, 1869, C. D. 107.
Mowbray v. Shaffman, 1870, C. D. 35.
Smith v. Burlew, 1870, C. D. 41.
Bingham v. Watkins, 1870, C. D. 42.
Bradley v. Rafel, 1870, C. D. 50.
Wheeler v. Runk, 1870, C. D. 119.
McClure v. Miller, 1870, C. D. 122.
De Lill v. Avery & De Lill, 1870, C. D. 128.
Richardson v. Denza, 1870, C. D. 156.
Chapman v. Candee & Taylor, 1872, C. D. 190; 2 O. G. 245.
Kendal & Tresten v. Scrymgeour, 1872, C. D. 259; 2 O. G. 705.
Vinton v. Pierce, 1873, C. D. 89; 3 O. G. 629.
Hammond v. Laird, 1875, C. D. 27; 7 O. G. 170.
Case v. Hastings, 1875, C. D. 37; 7 O. G. 557.
Chase v. Witter, 1876, C. D. 72; 9 O. G. 593.
Cushman v. Parham, 1876, C. D. 130; 9 O. G. 1108.
Wicks v. Du Bois, 1877, C. D. 22; 11 O. G. 244.
Leighton v. Barker, 1878, C. D. 96; 14 O. G. 199.
Fulgham v. Westcott, 1879, C. D. 278; 16 O. G. 1005.

——Application filed three days before issue of conflicting patent, burden of proof held to be on applicant.
Towers v. Pease, 1878, C. D. 6; 13 O. G. 176.

——As between a re-issue application and a re-issued patent, where both parties had previously been applicants at the same time, they were treated as applicants as to the burden of proof.
Davis v. Scharffe, 1878, C. D. 63; 14 O. G. 354.

——Burden of proof, where pending an application, a patent has been inadvertently issued, established by the dates of the respective applications.
Gordon v. Withington, 1876, C. D. 40; 9 O. G. 1009.

——Where, pending an application, a patent is inadvertently issued to another, they both stand before the Office as applicants.
Frick, Wm., *ex parte*, 1872, C. D. 124; 1 O. G. 574.
Brookfield & Hemingray v. Brooke, 1873, C. D. 107; 4 O. G. 81.
Smith v. Baxter, 1875, C. D. 5; 7 O. G. 1.
Marston, *ex parte*, 1882, C. D. 1; 21 O. G. 633.
Bechman v. Johnson, 1889, C. D. —; 48 O. G. 673.
Boyer, *ex parte*, 1889, C. D. —; 49 O. G. 1985.

**Burden of proof. Testimony—by whom first taken.**

——Under Rules 7, 1878, and 57, 1878, the first to file a complete application and first fee is deemed first inventor, and the testimony of the other parties is to be taken first.
Lapham v. Bettendorf. 1879, C. D. 118; 16 O. G. 137.

——Where the application in interference is a division of one previously filed, the date of the original must be considered to determine on whom rests the burden of proof.
Huntley v. Smith, 1880, C. D. 182; 18 O. G. 795.
Henderson v. Keese, 1883, C. D. 67; 25 O. G. 191.

——Reasons for determining on whom rests the burden of proof in case of two applications.
Oliver v. Everitt, 1889, C. D. —; 49 O. G. 731, Mitchell.

——Where the last to file his application asserts that he communicated to the first to file how to construct the machine, and was using due diligence, etc., the burden of proof rested upon the last to file. How discharged.
Wherry v. Heck, 1889, C. D. —; 49 O. G. 559, Mitchell.

——Burden of proof is on applicant for mechanical patent, although his design patent first shows the invention.
Collender v. Griffith, 1873, C. D. 43; 3 O. G. 267.

——Where A had two applications in interference, in one of which he was senior and in the other junior applicant, and in his preliminary statement set up public use to bar all parties, *held* that A take evidence first and then B follow.
Clark v. La Dow, 1888, C. D. 22; 43 O. G. 248.

——Burden of proof where junior applicant accuses senior applicant of theft.
Bruce v. Traver, June 10, 1890, Mitchell, MS., 2 G. 42.

**117. The preliminary statement can in no case be used as evidence in behalf of the party making it.** 1887—108. Statement not evidence.

HISTORY OF RULE.

108. March 9, 1887. The statement can in no case be used as evidence in behalf of the party making it.

108 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 108 of March 9, 1887.

53 of XI, X, IX, VIII, VII, VI, V, IV, III, II, like 117 of April 18, 1898.

Edition of July 15, 1870, has no such provision.

**The preliminary statement cannot be used as evidence in behalf of the party making it:**

Schenck v. Rider, 1870, C. D. 136.
Kenyon v. Wesson, 1871, C. D. 91.
Hovey v. Hufeland, 1874, C. D. 69; 6 O. G. 31.
Lauder v. Crowell, 1879, C. D. 177; 16 O. G. 405.
Warnant v. Warnant, 1880, C. D. 36; 17 O. G. 265.

1887—112. Time for taking testimony

118. Times will be assigned in which the junior applicant shall complete his testimony in chief, and in which the other party shall complete the testimony on his side, and a further time in which the junior applicant may take rebutting testimony; but he shall take no other testimony. If there be more than two parties to the interference, the times for taking testimony will be so arranged that each shall have an opportunity to prove his case against prior applicants and to rebut their evidence, and also to meet the evidence of junior applicants.

## HISTORY OF RULE.

112. March 9, 1887. A time will be assigned in which the junior applicant shall complete his testimony in chief, and a further time in which the other party shall complete the testimony on his side, and a further time in which the junior applicant may take rebutting testimony, but shall take no other. If there be more than two parties, either patentees or applicants, the times for taking testimony will be so arranged that each shall have an opportunity to prove his case against prior applicants and to rebut their evidence, and also to meet the evidence of junior applicants.

112 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 112 of March 9, 1887.

57. Aug., 1878. A time will be assigned in which the other party shall complete his direct testimony, and a further time in which the adverse party shall complete the testimony on his side; and a further time in which the party who first took testimony may take rebutting testimony, but shall take no other. If there are more than two parties, the times for taking testimony will be so arranged that each shall have a like opportunity in his turn, each being held to go forward and prove his case against those who filed their application before him.

57 of X, IX, VIII, VII, VI, V, IV, III, II, I, like 57 of Aug., 1878.

## TESTIMONY.

**Time for taking testimony:**

——Testimony taken in disregard of the time fixed by the provisions of rule disregarded.
Neal v. Daniels, 1871, C. D. 176.
Connor v. Williams, 1878, C. D. 137; 15 O. G. 386.

——Where junior applicant claims in his preliminary statement a date prior to that of the earliest application, this rule must be followed.
Booth v. Lyman, 1880, C. D. 62; 17 O. G. 393.

——Notice to take testimony, requiring day and night travel, not reasonable.
Hoag v. Abbott, 1879, C. D. 3; 15 O. G. 471.

——Objections to testimony not noticed by Office unless signed at hearing. *Ibid.*

——Testimony should conform to the issue of priority.
Smith v. Perry, 1876, C. D. 12; 9 O. G. 688.

——Commissioner's decision as to competency of witnesses in interference cases not subject to review by Secretary of Interior.
Workman v. McNaught, 1879, C. D. 139; 16 O. G. 216.

1887—113. Failure to take testimony.

119. Whenever the time for taking the testimony of a party to an interference shall have expired, and no testimony shall have been taken by such party, any senior party may, by motion based on a showing properly verified and served on such party in default, have an order entering judgment against such defaulting party, unless the latter shall, at a day set, and not less than ten days after the hearing of the motion, show good and sufficient cause why the judgment shall not be entered.

### HISTORY OF RULE.

113. March 9, 1887. If either party fail to take his testimony within the time assigned to him, all junior applicants having duly taken theirs, the case may, on motion duly made and served on such party, be set for hearing at any time not less than ten days after the hearing of the motion.

113 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 113 of March 9, 1887.

54. Aug., 1878. Where no testimony is taken by the applicant upon whom rests the burden of proof, or where testimony has been taken by such applicant, but not by the other party during the time assigned to the latter, the case will be considered closed; upon motion duly made at the

expiration of the time assigned to such parties, respectively, the case may be set for hearing at any time not less than ten days thereafter.

54 of X, IX, VIII, like 51 of Aug., 1878.

54. Sept. 1, 1875. Where no testimony is taken, etc., (as in 54 of Aug., 1878,) * * * closed, and, upon motion duly made at the expiration of the time assigned to such parties, respectively, may be set for hearing at any time not less than ten days thereafter.

54 of VI, V, IV, III, like 54 of Sept. 1, 1875.

54. July 15, 1870. Where no testimony is taken, etc., (as in 54 of Aug., 1878,) * * * closed, and may, at the expiration of the time assigned to such parties respectively, be set down for hearing, at any time, not less than ten days thereafter.

1887—114. Postponement of hearing.

120. If either party desire to have the hearing continued, he will make application for such postponement by motion (see Rule 153,) and will show sufficient reason therefor by affidavit.

HISTORY OF RULE.

114. March 9, 1887. If either party desire to have the hearing postponed, he will make application for such postponement by motion, (see Rule 149,*) and will show sufficient reason therefor by affidavit.

114 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 114 of March 9, 1887.

58. Aug., 1878. If it becomes necessary for either party to have the time for taking his testimony, or for the hearing, postponed, he must make application for such postponement, and must show sufficient reason for it by affidavit, as provided in Rule 113,† filed before the time previously appointed has elapsed, if practicable, and must also furnish his opponent with copies of his affidavits and with reasonable notice of the time of hearing his motion.

58 of X, IX, VIII, VII, VI, V, IV, III, like 58 of Aug., 1878.

58 of II and I, like 58 of Aug., 1878, omitting "as provided in Rule 113."

1887—115. Enlargement of time for taking testimony.

121. If either party desire an extension of the time assigned to him for taking testimony, he will make application therefor, as provided in Rule 154 (5).

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* For Rule 149, March 9, 1887, see notes under Rule 109, of April, 18, 1888.

† Rule 113, Aug., 1878, refers to the taking of testimony substantially as in Rules 154-163 of April 18, 1888.

## HISTORY OF RULE.

115. March 9, 1887. If either party desire an enlargement of the time assigned to him for taking testimony, he will make application therefor, as provided for in Rule 150* (5).

115 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 115 of March 9, 1887.

58. Aug., 1878. If it becomes necessary for either party to have the time for taking his testimony, or for the hearing, postponed, he must make application for such postponement, and must show sufficient reason for it by affidavit, as provided in Rule 113†, filed before the time previously appointed has elapsed, if practicable, and must also furnish his opponent with copies of his affidavits and with reasonable notice of the time of hearing his motion.

(See notes under Rule 120, April 18, 1888, Rule 58 of Aug., 1878.)

**Extension of time for taking testimony refused:**

——For taking rebutting testimony because of failure to notify opponent, when he could have explained.
Neracher v. Cain, 1879, C. D. 128; 16 O. G. 229.

——Where party had failed to examine his own witness, and opponent contended it was immaterial. Conditional extension.
Kenerson v. Brown & Brown, 1879, C. D. 249; 16 O. G. 857.

——Where testimony was merely cumulative, covered by previous admissions and *res adjudicata*.
Lomont v. Kromer, 1879, C. D. 308; 16 O. G. 1141.

——Where the same patent was involved in two interferences, to make the time for taking testimony in both cases coincident.
Keith v. Faure, 1883, C. D. 72; 25 O. G. 289.

——When procured by fraud, etc.
Osgood v. Badger v. Bennett, 1888, C. D. 125; 44 O. G. 1065.

——Where there was intentional neglect in filing preliminary statement, and to take testimony within time fixed by Office.
Spaulding v. Winchester, 1871, C. D. 94.

——Where party had ordered a copy of the decision, but had failed to receive it.
Parry & Parry v. Black, June 17, 1890, Fisher, Asst. Com., MS., 2 G. 43.

**Extension of time for taking testimony; when granted:**

——Good faith and diligence required.
Osgood v. Badger v. Bennett, 1888, C. D. 125; 44 O. G. 1065.

——It is addressed to the sound discretion of the Examiner of Interferences.
Patterson v. Colby, May 9, 1890, MS., Fisher, Asst. Com., 2 G. 35.

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* For Rule 150, March 9, 1887, see Rule 154 of April 18, 1888.

† Rule 113, Aug., 1878, refers to the taking of testimony substantially as in Rules 154-163 of April 18, 1888.

1887—116. Motion to dissolve for irregularity, non patentability, etc.

122. Motions to dissolve an interference upon the ground that no interference in fact exists, or that there has been such irregularity in declaring the same as will preclude a proper determination of the question of priority, or which deny the patentability of an applicant's claim, or his right to make the claim, should, if possible, be made not later than the twentieth day after the statements of the parties have been received and approved. Such motions, when in proper form, will be transmitted by the Examiner of Interferences, with the files and papers, to the proper Primary Examiner, for his determination.

When the motion has been decided by the Primary Examiner, if no appeal has been taken therefrom, at the expiration of the time limited for appeal, the examiner will return the files and papers, with his decision, to the Examiner of Interferences. Such decision will be binding on the Examiner of Interferences unless reversed or modified on appeal. (Rule 124.)

HISTORY OF RULE.

116. March 9, 1887. Motions to dissolve an interference upon the ground that no interference in fact exists, or that there has been such irregularity in declaring the same as will preclude a proper determination of the question of priority between the parties, or which deny the patentability of an applicant's claim, or his right to make the claim, should, if possible, be made *within twenty days after the statements of the parties have been received and approved*. Such motions, when in proper form, will be transmitted by the Examiner of Interferences, with the files and papers, to the *proper* Primary Examiner for *his* determination, and he will return the files and papers to the Examiner of Interferences, with his decision, at the expiration of the time limited for appeal if no appeal shall have been taken, or sooner if the party entitled to an appeal shall file a waiver in writing of his right of appeal, and such decision will be binding on the Examiner of Interferences unless reversed or modified on appeal. (See Rule 118.*)

116 of XXI, XX, XIX, like 116 of March 9, 1887.

116. March 3, 1885. Motions to dissolve, etc., (like 116 of March 9, 1887,) * * * should, if possible, be made before the day fixed for filing the statements provided for in Rules 97,† 101 ‡ and 102.§ Such motions, when in proper form, will be transmitted by the Examiner of Interferences, with

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* For Rule 118, March 9, 1887, see under Rule 124, of April 18, 1888.

† For Rules 97 of March 3, 1885, and Dec. 1, 1879, see p. 12, under Rule 97, April 18, 1888.

‡ For Rule 101, March 3, 1885, see p. 15, under Rule 102, April 18, 1888.

§ For Rules 102 of March 3, 1885, and Dec. 1, 1870, see p. 16, under Rule 103, April 18, 1888.

the files and papers, to the primary examiners for their determination, and he will return the files, etc., (as in 116 of March 9, 1887.)

116 of XVII, XVI, XV, XIV, XIII, like 116 of March 3, 1885.

116. Dec. 1, 1879. Motions to dissolve an interference which deny the patentability of an applicant's claim, or his right to make the claim, will be submitted to the Examiner of Interferences before the day fixed for filing the statements provided for in Rules 97† and 102§, and will be transmitted by him to the Primary Examiner, who will take jurisdiction of the case for the determination of such motions, and will return the files and papers to the Examiner of Interferences with his decision, at the expiration of the time limited for appeal, if no appeal shall have been taken, or sooner if the party entitled to appeal shall file a waiver in writing of his right to appeal; and such decision will be binding upon the Examiner of Interferences unless revered or modified on appeal.

(See also 117, Dec. 1, 1879, under notes on Rule 123 of April 18, 1888.)

59. Aug., 1878. After the declaration of the interference and before the time for filing the preliminary statements has expired, motions to dissolve the same on the grounds of lack of novelty, or that no interference in fact exists, or that there has been such other irregularity in declaring the same as will preclude the proper determination of the question of right between the parties, must be made before the examiner by whom the interference was instituted. After the declaration of interference such motion must be made before the tribunal having jurisdiction at the time.

59 of X, IX, like 59 of Aug., 1878.

59. Nov. 1, 1876. After the declaration, etc., (like 59 of Aug., 1878,) * * * by whom the interference was instituted.

59. Sept. 1, 1875. If after being declared it is found that no interference in fact exists, or that there has been such irregularity in declaring the same as will preclude a proper determination of the question of right between the parties, *it will be dissolved, and an appeal may be taken to the Commissioner in person.*

59 of VI, like 59 of Sept. 1, 1875.

59. Sept. 1, 1873. And when once declared, it will not be dissolved without judgment of priority, unless it be found that neither party is entitled to a patent, or that no interference in fact exists, or that there has been such irregularity in declaring the same as will preclude the proper determination of the question of right between the parties, *when it will be dissolved*, etc.

A motion for a dissolution of an interference on the ground that it was improperly declared, if made before the taking of testimony, will be heard by the Primary Examiner who declared the interference. Upon such hearing the Primary Examiner will recommend the granting or refusal of such motion, and the Examiner in charge of Interferences will order accordingly.

59. July 1, 1873. A motion, etc., (as in 59 of Sept. 1, 1873,) * * * who declared the interference.

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†, § See corresponding foot notes, page 41.

59. March 1, 1873. And when once declared, it must not be dissolved without judgment of priority, unless it be found that neither party is entitled to a patent, or that no interference in fact exists, or that there has been such irregularity in declaring the same as will preclude the proper determination of the question of right between the parties, when it will be dissolved.

A motion for a dissolution of an interference on the ground that it was improperly declared, if made before the taking of testimony, will be heard by the Primary Examiner who declared the interference.

59. Aug. 1, 1871. * * * And when once declared it will not be dissolved without judgment of priority, unless it be found that neither party is entitled to a patent, or that no interference in fact exists.

A motion for a dissolution of an interference, on the ground that it was improperly declared, if made before the taking of testimony, will be heard by the Primary Examiner who declared the interference.

Edition of July 15, 1870, contains no such provision.

——Ground for dissolution first suggested on hearing before Commissioner not considered.
Englemann v. Vester, 1879, C. D. 111; 16 O. G. 96.

——Motion to dissolve refused. Practice.
Fowler v. Benton, 1880, C. D. 39; 17 O. G. 266.

——Motion must be based on grounds appearing in record before testimony taken.
Cook v. Leach, March 24, 1890, Fisher, Asst. Com., MS., 2 G. 20.

---Two motions for dissolution based on the same ground cannot be entertained; remedy by appeal or rehearing.
Banks v. Snediker, 1880, C. D. 95; 17 O. G. 508.

——*After declaration interference can only be dissolved by order of the* Examiner of Interferences, the Board or the Commissioner.
Traut v. Disston, 1870, C. D. 99.

——Motion to dissolve made by S, after judgment of priority against him *on record allowed. Why?*
Sprague v. Van Depoele v. Hunter v. Knight, April 17, 1890, Fisher, Asst. Com., MS., 2 G. 28.

——Motion to dissolve the proper practice to vacate a judgment upon the record.
Rogers v. Winssinger, April 5, 1890, Mitchell, MS., 2 G. 28.

——When motion to dissolve—*must* be transmitted.
Green v. Hall, 1886, C. D. 43; 37 O. G. 1475.
Edison, *et al*, v. Phelps, 1887, C. D. 11; 38 O. G. 539.
Hicks v. Keating, 1887, C. D. 40; 40 O. G. 343.
Laurent-Cély v. Payen, 1890, C. D. —; 51 O. G. 621, Mitchell.

——Notice of motion to adverse party required.
Gray v. Bell, 1879, C. D. 42; 15 O. G. 385.
Green v. Hall, 1886, C. D. 43; 37 O. G. 1475.
Bechman v. Johnson, 1889, C. D. —; 48 O. G. 673.

**Motion to dissolve based on:**

——Statement in *preliminary statement* that joint patentees were not joint inventors.
Walton v. Dennis, 1879, C. D. 265; 16 O. G. 959.

——Anything found in *preliminary statement*.
Faure v. Bradley v. Cowles, 1888, C. D. 120; 44 O. G. 945.

——Estoppel by oath to *preliminary statement* in a prior interference where applicant was joint inventor.
Mead v. Brown, 1889, C. D. —; 48 O. G. 397.

——Interrelation of *joint patentees*.
Kolher v. Kolher & Chambers, 1888, C. D. 19; 43 O. G. 247.

——Interrelation of *joint inventors*.
Taylor v. Martin, 1879, C. D. 112; 16 O. G. 138.
Walton v. Dennis, 1879, C. D. 265; 16 O. G. 959.
Sawyer & Man v. Edison, 1883, C. D. 80; 25 O. G. 597.
Mead v. Brown, 1889, C. D. —; 48 O. G. 397.

**Patentability:**

——Motion to dissolve based on lack of patentability.
Jackson v. Nichols, 1871, C. D. 281.
Lynch v. Dryden, 1873, C. D. 73; 3 O. G. 407.
Bennage v. Phillippi, 1876, C. D. 135; 9 O. G. 1159.
Blackman v. Morray, 1878, C. D. 8; 13 O. G. 175.
Fowler v. Benton, 1880, C. D. 39; 17 O. G. 266.
Stone v. Greaves, 1880, C. D. 70; 17 O. G. 397.
Barney v. Kellogg, 1880, C. D. 134; 17 O. G. 1096.
Hockhausen v. Weston, 1880, C. D. 185; 18 O. G. 857.
Reynolds v. Haberman, 1889, C. D. —; 49 O. G. 130, Mitchell.
Doremus v. Taylor, Feb. 1, 1890, Mitchell, MS., 2 G. 11.

**Novelty:**

——Motion to dissolve based on lack of novelty.
Woodward v. Reist, 1869, C. D. 34.
Kafer v. Dennison, 1869, C. D. 14.
Pugh v. Hamilton, 1871, C. D. 119.
Jackson v. Nichols, 1871, C. D. 281.
Wood v. Morris, 1873, C. D. 39; 3 O. G. 239.
Dunton v. Young & McFerran, 1876, C. D. 167; 10 O. G. 243.
Blinn v. Gale, 1879, C. D. 174; 16 O. G. 459.
Knox, *ex parte*, 1879, C. D. 285; 16 O. G. 1048.
Banks v. Snediker, 1879, C. D. 304; 16 O. G. 1036.

**Irregularity:**

——Motion to dissolve on ground of irregularity.
Duthie v. Casilear, 1870, C. D. 99.
Jenkins v. Putnam, 1870, C. D. 156.

Banks v. Snediker, 1879, C. D. 304; 16 O. G. 1096.
Barney v. Kellogg, 1880, C. D. 134; 17 O. G. 1096.
Mead v. Brown, 1889, C. D. —; 48 O. G. 397.
Steward v. Ellis v. Lee v. Howe, 1889, C. D. —; 49 O. G. 1983, Mitchell.

**Motion to dissolve based on statutory bar:**

——Statutory bars.
Young v. Hoard, 1870, C. D. 59.
Thomas v. Reese, 1879, C. D. 335; 16 O. G. 1234.
Hicks v. Keating, 1887, C. D. 40; 40 O. G. 343.
Cook v. Leach, March 24, 1890, Fisher, Asst. Com., MS., 2 G. 20.

——Public use.
Young v. Hoard, 1870, C. D. 59.
Hedges v. Daniels, 1880, C. D. 9; 17 O. G. 152.
Von Hefner-Alteneck, 1883, C. D. 33; 23 O. G. 2233.
Holton & Malsch v. Merrow, Dec. 26, 1889, Mitchell, MS.
Doremus v. Taylor, Feb. 1, 1890, Mitchell, MS., 2 G. 11.

**Motion to dissolve based on:**

——Prior adjudication on the same question between the same parties is properly raised by such motion.
Abraham v. Fletcher, 1869, C. D. 50.
Harlow v. Guernsey, 1875, C. D. 47.
Ritchel v. De Sanno, 1876, C. D. 203.
Whiteley v. McCormick, 1876, C. D. 228.
(Ungar v. Saxlehner, 35, MS., 430, is a special case, all cited in,)
Hunter v. Knight, April 3, 1890, Mitchell, MS., 2 G. 27.
Smith v. Bentley, April 9, 1890, Mitchell, MS., 2 G. 27.

——New matter introduced in application two and a half years after filing.
Steward v. Ellis v. Lee v. Howe, 1889, C. D. —; 49 O. G. 1983, Mitchell.

——Some of the claims set up void, and no conflict between remainder.
Evans v. Bussell & Vose, 1873, C. D. 36; 3 O. G. 180.

——Re-issue application claims, and patent subsequently granted.
Mayall v. Murphy, 1874, C. D. 17; 5 O. G. 339.
Becker v. Throop, 1875, C. D. 87; 8 O. G. 1.

——Abandonment of application by one of the parties.
Adler v. Van Wagener, 1875, C. D. 123; 8 O. G. 728.

——Res adjudicata.
Ritchel v. De Sanno, 1876, C. D. 203; 10 O. G. 941.

——Error on part of examiner in executive capacity.
Little v. Lillie, *et al*, 1876, C. D. 207; 10 O. G. 543.

——Subject-matter of claim not shown or described in the other application.
Dod v. Cobb, 1876, C. D. 232; 10 O. G. 826.

——Device shown not within class to which issue restricted.
Smith v. Winchell & Patric, 1878, C. D. 75; 13 O. G. 1122.

——A reissue claim not identical with original combination and an unexpired patent.
Redmond v. Parham, 1879, C. D. 169; 16 O. G. 359.

——Inoperativeness of one device.
Fuller v. Brush, 1879, C. D. 328; 16 O. G. 1188.

——Introduction of earlier application of a contestant.
White v. Demarest, 1887, C. D. 133; 41 O. G. 1161.

——Relation of contestant's domestic and foreign patents.
Faure v. Bradley & Croker v. Cowles, 1888, C. D. 120; 44 O. G. 945.

——Disclaimer to matter in dispute made *pendente lite*.
Waring v. Wilkerson, 1878, C. D. 120; 15 O. G. 246.

——Disclaimer to matter in dispute.
Laverty v. Flagg, 1879, C. D. 303; 16 O. G. 1141.

——Inventions not substantially identical.
Sawyer & Man v. Edison, 1883, C. D. 80; 25 O. G. 597.

——Non-interference.
Barton v. Babcock, 1869, C. D. 67.
Jenkins v. Putnam, 1870, C. D. 156.
Stearns v. Wingfield, 1871, C. D. 67.
Ives v. Swan, 1871, C. D. 167.
Martin v. Olney, 1876, C. D. 124; 9 O. G. 1107.
Banks v. Snediker, 1879, C. D. 304; 16 O. G. 1096.
Barney v. Kellogg, 1880, C. D. 134; 17 O. G. 1096.
Gray v. Robertson, 1889, C. D. —; 50 O. G. 165, Mitchell.
Bissel v. Robet, 18( ), C. D. —; 51 O. G. 1618.
Crane v. Merriam, 1890, C. D. —, 51 O. G. 1782. Process and apparatus.

——Withdrawal of the reissue application in interference.
Eames v. McDougall, 1871, C. D. 206.

——Amendment by striking out interfering claim.
Hawkins v. Lambert, 1871, C. D. 273.

——Interference improperly declared between two patents and an application. Refused.
Haish v. Rosado v. Aishton, May 31, 1890, Mitchell, MS., 2 G. 36.

**Time when motion to dissolve can be made:**

——At any stage of the proceedings.
Banks v. Snediker, 1879, C. D. 304; 16 O. G. 1096.

——Motions made more than twenty days after approval of preliminary statement.
Green v. Hall, 1886, C. D. 43; 37 O. G. 1475.
Reynolds v. Haberman, 1889, C. D. —; 49 O. G. 130, Mitchell.

——Motion to dissolve based on request to withdraw from issue and remand to Primary Examiner for error in declaration in including a certain patent should be made within twenty days' limit, or sufficient reason shown for delay. Proceeding by petition irregular.
Parry & Parry v. Black, June 17, 1890, Fisher, Asst. Com., MS., 2 G. 43.

——Motions made within twenty days from approval.
Laurent-Cély v. Payen, 1890, C. D. —; 51 O. G. 621, Mitchell.

——Should be made at the outset of proceedings.
Flinn v. Gale, 1879, C. D. 174; 16 O. G. 459.

NOTE.—See notes under Rule 93, April 18, 1888, p. 1.

1887—117. Motions to effect stay of proceedings.

123. All lawful motions, except those mentioned in Rule 122, will be made before and determined by the tribunal having jurisdiction at the time. The filing of motions will not operate as a stay of proceedings in any case. To effect this, motion should be made before the tribunal having jurisdiction of the interference, who will, sufficient grounds appearing therefor, order a suspension of the interference pending the determination of such motion.

HISTORY OF RULE.

117 of March 9, 1887. All lawful motions, except those mentioned in Rule 116,* etc., (like 123 of April 18, 1888.)

117 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, like 117 of March 9, 1887.

117. Dec. 1, 1879. Motions to dissolve an interference upon the ground that no interference in fact exists, or that there has been such irregularity in declaring the same as will preclude the proper determination of the question of priority between the parties, and all other lawful motions, except those mentioned in Rule 116,* will be made before the tribunal having jurisdiction at the time. Such motions should, if practicable, be made before the taking of testimony, and it must always appear that they are made in good faith, and immediately after the discovery of the grounds on which they are based. If grounds for such a motion are discovered at a time when it cannot properly be made, they may on due notice be urged at the hearing before, and will be disposed of by, the tribunal considering the case, as provided in Rule 120.†

59, Aug., 1878, and prior editions, see notes under Rule 122 of April 18, 1888.

——Stay of proceedings should be requested on motions.
Du Bois v. McCloskey, 1880, C. D. 142; 17 O. G. 1158.

——A motion must not only be filed, but must designate a day of hearing within the limit of appeal in order to operate of itself "to stay the running of the time limited." If hearing is fixed beyond limit, examiner has no jurisdiction, unless he extends the limit.
Holton & Malsch v. Merrow, Dec. 26, 1889, Mitchell, MS., 1 G. 91.

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* For Rules 116, March 9, 1887, and Dec. 1, 1879, see under Rule 122, April 18, 1888, pp. 41 and 42.

† For Rule 120, Dec. 1, 1879, see under Rule 126, April 18, 1888.

——The Examiner of Interferences has jurisdiction where notice to reopen is filed on last day of limit of appeal, and the hearing noticed for "the *same* day" is extended by stipulation. The "day fixed" in Holton & Malsch is the day designated in the motion.
Shinn v. McElroy, Feb. 21, 1890, Mitchell, MS.

**Motion:**

——To strike out views of Examiner of Interferences and Examiners-in-Chief in arriving at certain judgment. Refused.
Marshall v. Fish, 1879, C. D. 121; 16 O. G. 139.

——A repetition of a previous motion absolutely denied cannot be made without leave.
Clemson v. Fowler, 1886, C. D. 35; 37 O. G. 671.

——The decision of the Examiner of Interferences in interlocutory motions will not be disturbed except in case of abuse. Authorities.
Reynolds v. Haberman, 1889, C. D. —; 49 O. G. 130, Mitchell.

——A repetition of a previous motion absolutely denied, and unappealed from, should be refused.
Little v. Lillie, 1876, C. D. 207; 10 O. G. 543,

— All motions made after declaration of "preliminary interference" require notice.
Bell v. Gray, 1879, C. D. 42; 15 O. G. 776.
Shinn, *ex parte*, 1879, C. D. 192; 16 O. G. 458.
Green v. Hall, 1886, C. D. 43; 37 O. G. 1475.
Bechman v. Johnson, 1889, C. D. —; 48 O. G. 673.

——Motion to vacate judgment when permitted.
Booth, *ex parte*, 1889, C. D. —; 49 O. G. 1841, Fisher, Asst. Com.

——Circumstances where a motion for adjudication upon the record calls for notice.
Booth v. Lyman, 1880, C. D. 62; 17 O. G. 393.

**Motion made to remand to Primary Examiner to admit new claims:**

——At final hearing.
Yost & Warner v. Powell, 1878, C. D. 23; 13 O. G. 122.

——After final hearing and before decision, and to reject old claims.
Kirchner v. Blair, 1878, C. D. 47; 13 O. G. 364.

124. Appeal may be taken directly to the Commissioner from decisions on all motions except the following: (1) On motions to dissolve which deny the patentability of applicant's claim; (2) on motions to dissolve which deny the right of an applicant to make the claim; (3) on motions involving the merits of the invention. These motions, when appealable, go to the examiners-in-chief, and upon such appeals the party only whose claim is affected shall have the right to appear and be heard. 1887—118. Appeal to Commissioner. To examiners-in-chief.

[¶ 2.] From a decision affirming the patentability of the claim or the applicant's right to make the same no appeal can be taken.

## HISTORY OF RULE, ¶ 1.

118. March 9, 1887. Appeal may be taken directly to the Commissioner from decisions on all motions, except motions to dissolve interferences denying the patentability of applicant's claims, or their right to make the claims, and other lawful motions involving the merits of the case, which, when appealable, may be appealed to the Board of Examiners-in-Chief.

118 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, like 118 of March 9, 1887.

118. December 1, 1889. Appeal may be taken, etc., (like 118 of March 9, 1887) * * to the board of Examiners-in-Chief. See Rule 116.*

55. August, 1878. In cases of interference appeals may be taken to the Examiners-in-Chief and to the Commissioner, in the manner provided in Rule 48.

59. August, 1878. [On motions to dissolve for lack of novelty, no interference in fact, irregularity in declaring] appeal may be taken to the Commissioner in person. * * *

55 and 59 of X, IX, like 55, and 59 of August, 1878.

55 of VIII, VII, VI, V, IV, III, II, like 55 of August, 1878.

59. Nov. 1, 1876. [Where it is found that no interference in fact exists, or there has been such irregularity in declaring it], *it will be dissolved, and an appeal may be taken to the Commissioner in person.*

59 of VII, VI, like 59 of Nov. 1, 1876.

59. September 1, 1873. [Where it is found that neither party is entitled to a patent, no interference in fact exists, or that there has been such irregularity, etc.,] *it will be dissolved, and an appeal may be taken to the Commissioner in person.*

59 of IV, III, like 59 of September 1, 1873.
Editions of August 1, 1871, and July 15, 1870, contain no provision corresponding to Rule 59 of VIII.

55. July 15, 1870. In cases of interference, parties have the same remedies by appeal as other applicants, to the Examiners-in-Chief, and to the Commissioner, but no appeal lies, in such cases from the decisions of the Commissioner. Appeals in interference cases should be accompanied by a brief statement of the reasons thereof.

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*For Rule 116, December 1, 1870, see p. —, under Rule 122, April 18, 1888.

†For Rule 48, August, 1878, see under Rule 146, April 18, 1888.

## HISTORY OF ¶ 2.

118. March 9, 1887. From a decision affirming the patentability of the claim or the applicant's right to make the same no appeal can be taken.

118 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, like 118, ¶ 2, of March 9, 1887.

Edition of December 1, 1879, contains no such provision.

59. August, 1878. * * * ; but if the examiner should decide that the subject-matter is not patentable in view of the state of the art, the interference will be dissolved, and the matter decided upon can be proceeded with *ex parte*.

59 X, IX, VIII, like 59 of August, 1878.

Edition of September 1, 1875, and prior editions, contain no such provision.

——An appeal from the Examiner of Interferences refusing the prior inventor his patent because of public use and sale, brings up question of abandonment and not priority.
Jenkins v. Barney & Berry, 1873, C. D. 19; 3 O. G. 119.

——To raise the question of priority, adverse party must appeal.—*Ibid.*

——On examiner's decision of forfeiture by negligence to opponent firs to reduce to practice, appeal brings up both questions.—*Ibid.*

—— On appeal to Examiners-in-Chief, presumption is in favor of finding of Examiner of Interferences; on appeal to Commissioner in favor of concurrent findings.
Packard v. Sanford, 1879, C. D. 314; 16 O. G. 1182.

——Allowance of reasonable time to appeal before dissolution, on rejection of claim in view of new references by Primary Examiner.
Stone v. Greaves, 1880, C. D. 23; 17 O. G. 260.

——When dissatisfied with decision on motion for dissolution, remedy is by appeal or motion for rehearing, not a new motion on same grounds
Banks v. Snediker, 1880, C. D. 95; 17 O. G. 508.

——Duty of Commissioner on appeal in view of concurrent finding. awarding priority to a patentee.
Sellers & Bancroft v. Walter, 1886, C. D. 41; 37 O. G. 1001.

**An appeal lies:**

——From decision of Examiners-in-Chief or Examiner of Interferences on motion to dissolve, based on non-interference or irregularity, to the Commissioner.
Duthie v. Casilear, 1870, C. D. 90.
Banks v. Snediker, 1879, C. D. 304; 16 O. G. 1096.

——From a decision of the Office to the Supreme Court (D. C.) upon any question arising upon an interference except priority.
Weitling v. Cabell, 1872, C. D. 185; 2 O. G. 223.

——From the Examiner of Interferences dissolving a second interference between the same parties on the same question to the Commissioner. Ground.
Marsh v. Dodge, 1872, C. D. 245; 2 O. G. 643.

——To the Commissioner, from a dissolution based merely on the grounds that the inventions are different and no other.
Fuller v. Brush, 1879, C. D. 328; 16 O. G. 1188.

——First to the Examiners-in-Chief, then to the Commissioner, when the question is as to the operativeness (the merits).—*Ibid.*

——By protest to the Commissioner from decision of Primary Examiner affirming patentability on motion to dissolve.
Fowler v. Benton, 1880, C. D. 39; 17 O. G. 266.

——To Board of Examiners-in-Chief from decision of Examiner of Interferences finding neither party original inventor. Both parties may appeal.
Wood v. Eames, 1880, C. D. 106; 17 O. G. 512.

——To Commissioner from decision of Examiner of Interferences refusing to dissolve on any of the grounds in Rule 116, of July 13, 1886.
Green v. Hall, 1886, C. D. 43; 37 O. G. 1475.

——To the Commissioner from a decision of the Primary Examiner granting or denying a motion to dissolve on the ground that no interference in fact exists.
Von Welsbach v. Lungren, 1889, C. D. —; 48 O. G. 537.

**No appeal can be taken:**

——To the Commissioner upon motions denying the patentability of the subject matter.
Barney v. Kellogg, 1880, C. D. 134; 17, O. G. 1096.

——From the decision of the Examiners-in-Chief affirming the patentability.—*Ibid.*

——From the decision of the Primary Examiner denying the patentability or the right to make the claim, when the interference has been remanded and dissolved under rules 116, and 120, July 13, 1886.
Faure v. Bradley, 1887, C. D. 33; 40 O. G. 243.

——From the decision of the Examiner of Interferences, remanding a motion to dissolve for want of patentability. Why?
Reynolds v. Haberman, 1889 C. D. —; 49 O. G 130, Mitchell.

——To the Commissioner from a decision of the examiner upon a motion to dissolve involving the right to make the claim in issue.
Steward v. Ellis v. Lee v. Howe, 1889, C. D. —; 49 O. G. 1983. Mitchell.

——To the Commissioner from a decision upon a motion to dissolve except upon the ground that there is no interference, in fact, or irregularity.
Manny v. Easley v. Greenwood, Jr., 1889, C. D. —; 48 O. G. 538.

——From the decision of the Commissioner in interference cases since Act July 8, 1870.
Little v. Lillie, 1876, C. D. 207; 10 O. G. 543.

——The faultiness of certain combination claims stating certain elements in general language in order to secure an interference, *held* sufficient warrant to dismiss an appeal.
Sargent v. Burge, 1877, C. D. 62; 11 O. G. 1055.

——By inventor who had assigned his entire interest.
Martin v. Olney, 1876, C. D. 124; 9 O. G. 1107.

——To the Commissioner from Primary Examiner dissolving an interference because English patent produced in evidence of prior date is inoperative; it lies to Examiners-in-Chief.
Tavener v. Thomson, 1890, C. D. —; 51 O. G. 1465.

——Where one of grounds of motion to dissolve was that applicant had no right to make the claim, the Commissioner refused to hear it on appeal.
Bissell v. Roberts, 1890, C. D. —; 51 O. G. 1618.

——Limit of appeal where last day is a holiday.
Dean & Robie v. Troendle, March 1, 1890. Fisher, Asst. Com., MS., 2 G. 21.

——Statement of reasons of appeal required under Rule 147, April 18, 1888.
Pitney v. Smith & Egge, 1889, C. D. —; 49 O. G. 129, Mitchell.

——Signing of appeal *nunc pro tunc*, by attorney having failed to file his power—*Ibid.*

——The Examiner of Interferences has jurisdiction where notice to re-open is filed on last day of limit of appeal. The "day fixed" for the hearing is that designated in the motion and not the day on which actually had.
Shinn v. McElroy, February 21, 1890. Mitchell, MS., 2 G., 35.

1887—119. Determination.

125. After the interference is finally declared, it will not, except as herein otherwise provided, be determined without judgment of priority founded either upon the testimony, or upon a written concession of priority by one of the parties, signed by the inventor himself, (and by the assignee, if any,) or upon a written declaration of abandonment of the application, as provided by Rule 171.*

Concession of priority.

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* Rule 171, April 18, 1888. An abandoned application is one which has not been completed and prepared for examination within two years after the filing of the petition, or which the applicant has failed to prosecute within two years after any action therein, of which notice has been duly given (see Rules 31 and 77), or which the applicant has expressly abandoned by filing in the office a written declaration of abandonment, signed by himself (and assignee, if any), identifying his application by title of invention, serial number, and date of filing. (See Rule 60.)

Prosecution of an application to save it from abandonment must include such proper action as the condition of the case may require.

## HISTORY OF RULE.

119. March 9, 1887. After the interference is, etc., (like 125 of April, 18, 1888) * * inventor himself, and also, in the case of an assignment, by the assignee, or upon a written declaration of abandonment of the application, as provided by Rule 165.*

119 of XXI, XX, XIX, like 119 of March 19, 1887.

119. August 12, 1884. After the interference is finally declared, it will not, etc., (like 119 of March 19, 1887) * * by the assignee.

119 of XVII, XVI, XV, XIV, XIII, like 119 of August 12, 1884.

119. December 1, 1879. After the interference is finally declared, it will not be determined without judgment of priority, founded upon the testimony, except as otherwise herein provided.

59. August, 1878. After the declaration of the interference proper, it will not be determined without judgment of priority, founded upon the testimony or the written concession of one of the parties.

59 of X, IX, VIII, like 59 of August, 1878.

59. September 1, 1875. If judgment be based upon a concession of priority by either of the parties, such concession must be in writing, and under the signature of the inventor himself; and if there has been an assignment, the assignee must join in the concession.

59 of VI, V, IV, III, II, like 59 of September 1, 1875.

59. July 15, 1870. Cases of interference will, when the issue is made up and the testimony taken, be tried before the examiner in charge of interferences. If an interference has been properly declared, it will not be dissolved without judgment of priority, founded upon the testimony or the written concession of one of the parties, unless the invention is found not to be patentable, or to have been abandoned, or that it has been in public use for more than two years prior to the application of either party, or that no interference in fact exists.

**Concession of Priority. What is not:**

——A stipulation not valid unless signed by party himself.
Tucker v. Kahler, 1879, C. D. 71; 15 O. G. 966.

——Stipulations of priority have no effect as estoppels.
Packard v. Sandford, 1879, C. D. 314; 16 O. G. 1182.

**Concession of priority:**

——It operates as an estoppel from declaring an interference on the same subject-matter.
Harlow v. Guernsey, 1875, C. D. 47; 7 O. G. 513.

——A claim stricken out by disclaimer under Rule 51, 1878 (107, April 18, 1888), cannot after judgment by concession be restored.
Cobb, *ex parte*, 1879, C. D. 123; 16 O. G. 175.

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* Rule 165, March 9, 1887, like 171, April 18, 1888, above.

——It is binding upon all parties.
Cochran, *in re*, 1871, C. D., 78.
Burgess v. Wetmore, 1879, C. D. 237; 16 O. G. 765.

——A concession of priority in an instrument relating to a prior interfer ence held binding.
Jeffers v. Duchemin, 1870, C. D. 1893.

1887—120. Statutory bar suggested.

126. The examiner of interferences or the examiners-in-chief may, either before or in their decision on the question of priority, direct the attention of the Commissioner to any matter not relating to priority which may have come to their notice, and which, in their opinion, establishes the fact that no interference exists, or that there has been irregularity in declaring the same (Rule 122), or which amounts to a statutory bar to the grant of a patent to either of the parties for the claim or claims in interference. The Commissioner may, before judgment on the question of priority, suspend the interference and remand the case to the primary examiner for his consideration of the matters to which attention has been directed. From the decision of the examiner appeal may be taken as in other cases. If the case shall not be so remanded, the primary examiner will, after judgment, consider any matter affecting the rights of either party to a patent which may have been called to his attention, unless the same shall have been previously disposed of by the Commissioner.

How determined.

## HISTORY OF RULE.

120. March 9, 1887. In their decision of the question of priority, or before such decision, the Examiner of Interferences and the Examiners-in-Chief will direct the attention of the Commissioner to any matter not relating to priority which may have come to their notice, and which, in their opinion, establishes the fact that no interference exists, or that there has been irregularity in declaring the same (Rule 116*), or which amounts to a statutory bar to the grant of a patent to either of the parties for the claim or claims in interference. The Commissioner may, before judgment on the question of priority of invention, suspend the interference and remand the case to the Primary Examiner for his consideration of the matters to which attention has been directed, and his decision will be subject to appeal, as in other cases. If the case shall not be so remanded, the Primary Examiner will, after judgment, consider any matter affecting the rights of either party to a patent which may have been called to his attention, unless the same same shall have been previously disposed of by the Commissioner.

120 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, like 120 of March 9, 1887.

120. December 1, 1879. In their decision of the question of priority, or before such decision, the Examiner of Interferences and the Examiners-in-Chief will direct the attention of the Commissioner to any fact not relating to priority, which may have been brought to their notice (by motion or otherwise,) and which, in their opinion, amounts to a statutory bar to the grant of a patent to either of the parties for the claim or claims in interference. The Commissioner may, before judgment on the question of priority of invention, suspend the interference, and remand the case to the Primary Examiner for the consideration of the statutory bar so suggested, subject to appeal to the Examiners-in-Chief, as in other cases. If the case shall not be so remanded, the Primary Examiner will, after judgment, consider and determine the same, unless it shall have been previously disposed of by the Commissioner.

59. August, 1878. In their decision of the question of priority, or before such decision, the Examiner of Interferences or the Examiners-in-Chief, as the case may be, will direct the attention of the Commissioner to any fact not relating to priority which may have come to their attention (by motion or otherwise), and which in their opinion amounts to a statutory bar to the grant of a patent to either or both parties. After final judgment the Primary Examiner will consider and determine any such matter not previously disposed of by the Commissioner.

59 of X, IX, like 59 of August, 1878.

59. November 1, 1876. In their decision of the question of priority the Examiner of Interferences, or the Examiners-in-Chief, etc., * * (as in 59 of August, 1878.)

59. September 1, 1875. If during the continuance of an interference, it shall appear that neither party is entitled to a patent by reason of abandonment, public use, or any other statutory bar, the Examiner of Interferences, or Examiners-in-Chief, as the case may be, will direct the attention of the Commissioner to the facts, either by a report, if before the hearing, or in the decision of the question of priority, if the interference comes to a regular hearing. The Commissioner, if in his judgment it is necessary, will then suspend the interference and remand the cases to the principal examiner for the determination of any of these questions.

59 of VI, like 59 of September 1, 1875.

Edition of September 1, 1873, and prior editions, contain no such provision.

**Suspension of interference to consider statutory bar:**

———Manny v. Smith v. Jones. Mitchell, 39 MS., 482.
Wicks & Wyman v. Knowles, 1877, C. D. 13; 11 O.G. 196.
Hedge v. Daniels, 1880, C. D. 9; 17 O. G. 152.
Barney v. Kellogg, 1880, C. D. 134; 17 O. G. 1096.
Hicks v. Keating, 1887, C. D. 40; 40 O. G. 343.
Cook v. Leach, March 24, 1890, C. D. —; Fisher, Asst. Com., MS.

———Public use.
Quimby v. Randall, 1878, C. D. 111; 14 O. G. 748.
Finch v. Bailey & Talbot, 1883, C. D. 69; 25 O. G. 191.
Finch, *ex parte*, 1887, C. D. 96; 40 O. G. 1027.

**Novelty:**

——Where there is reason to doubt the novelty of the invention, it will be remanded to the examiner and the proceedings suspended.
Hovey v. Hufeland, 1872, C. D. 229; 2 O. G. 493.
Lloyd v. Engeman, 1872, C. D. 253; 2 O. G. 674.
Wood v. Morris, 1873, C. D. 121; 4 O. G. 131.
Dwyer & Carter v. Dickey & Perry, 1876, C. D. 214; 10 O. G. 585.
Anson v. Woodbury, 1877, C. D. 4; 11 O. G. 243.

——Practice under the Rule, etc., effect, etc.
Hicks v. Keating, 1887, C. D. 40; 40 O. G. 343.
Faure v. Bradley, 1887, C. D. 33; 40 O. G. 243.

——Remanding to Examiner of Interferences to explicitly state issue of abandonment or forfeiture.
Jenkins v. Barney & Berry, 1873, C. D. 19; 3 O. G. 19.

——Refusal to suspend and remand pending controversy as to ownership.
Keith v. Faure, 1883, C. D. 72; 25 O. G. 289.

——Refusal to suspend and remand to admit new claim and determine patentability.
Yost & Warner v. Powell, 1878, C. D. 23; 13 O. G. 122.
Kirchner v. Blair, 1878, C. D. 47; 13 O. G. 364.

——Duty of Board of Examiners in case of non-interference to call attention by statement *annexed.*
Brown v. LaDow, 1880, C. D. 199; 18 O. G. 1049.

**Patentability:**

——Interferences will be suspended to determine the question of patentability.
Lynch v. Dryden, 1873, C. D. 73; 3 O. G. 407.
Little v. Lillie, *et al*, 1876, C. D. 207; 10 O. G. 543.
Anson v. Woodbury, 1877, C. D. 4; 11 O. G. 243.

——When not.
Motion to suspend and remand to determine patentability refused.
Yost & Warner v. Powell, 1878, C. D. 23; 13 O. G. 122.

**By whom and why demanded:**

——By the Primary Examiner, to consider new references.
Anson v. Woodbury, 1877, C. D. 4; 11 O. G. 243.
Banks v. Snediker, 1879, C. D. 304; 16 O. G. 1096.
Stone v. Greaves, 1880, C. D. 23; 17 O. G. 260.

——By the Primary Examiner, to consider patentability.
Little v. Lillie, *et al*, 1876, C. D. 207; 10, O. G. 543.

——By the Examiner of Interferences, to decide patentability or novelty.
Neubocker v. Schafhaus, 1873, C. D. 138; 4 O. G. 319.
Anson v. Woodbury, 1877, C. D. 4; 11 O. G. 243.

——By the Commissioner.
Lloyd v. Engeman, 1872, C. D. 253; 2 O. G. 674.

1887—121.
Second interference.
Vacation of judgment.

127. A second interference will not be declared upon a new application for the same invention filed by either party.

A decision will not be set aside after judgment, except in accordance with the principles governing the granting of new trials.

HISTORY OF RULE.

121. March 9, 1887. A second interference will not be declared upon a new application on the same invention filed by either party, nor will a decision be set aside after judgment, except in accordance with the principles of new trials.

121 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 121 of March 9, 1887.

60. Aug., 1878. A second interference will not be declared upon a new application on the same invention filed by either party during the pendency of an interference, or after judgment, nor a rehearing be granted, unless it be shown to the satisfaction of the Commissioner that the party desiring a new interference or rehearing has new and material testimony which he could not have procured in time for the hearing, or unless other sufficient reasons be shown.

60 of X, IX, VIII, like 60 of Aug., 1878.

60. Sept. 1, 1875. A second interference, (as in 60 of Aug., 1878,) * * * to the satisfaction of the Commissioner (in person) that the party, etc., * * * reasons be shown, satisfactory to the Commissioner.

60 of VI V, IV, III, II, I, like 60 of Sept. 1, 1875.

A second interference will not be allowed :

——Between the same parties on the same question, except by order of the Commissioner.
Marsh v. Dodge, 1872, C. D. 245; 2 O. G. 643.

——The proper method of disposing of the question of a prior adjudication between the same parties on the same question is by a motion to dissolve.
Abraham v. Fletcher, 1869, C. D. 50.
Harlow v. Guernsey, 1875, C. D. 47 ; 7 O. G. 513.
Ritchel v. De Sanno, 1876, C. D. 203 ; 10 O. G. 491.
Whitely v. McCormick, 1876, C. D. 228 ; 10 O. G., 826, and notwithstanding.
Ungar v. Saxlehner, 35, MS., 430, a special case, all cited in Hunter v. Knight, April 3, 1890, Mitchell, MS., 2 G. 27.
Smith v. Bently, April 9, 1890, Mitchell, MS., 2 G. 27.

——Adjudication upon A's uncontested broad issue against him no estoppel to contest a narrower issue between A and one of the parties.
Smith v. Bently, April 9, 1890, Mitchell, MS., 2 G. 17.

Motion to vacate judgment:

——May be made in so far as it related to subject-matter not common to both parties.
Booth, *ex parte*, 1889, C. D. —; 49 O. G. 1841, Fisher, Asst. Com.

——Defeated party proceeds to vacate judgment by motion to dissolve. Absence of hearing insufficient reason.
Rogers v. Winssinger, April 5, 1890, Mitchell, MS., 2 G. 28.

——Office may of its own motion vacate judgment and reinstate party accidentally omitted by error of Office.
Freeman v. Hunter v. Zippernowsky & Deri v. Edison, May 24, 1890. MS., Fisher, Asst. Com., 2 G. 36.

The showing must be such as to entitle a mover to a new trial in a suit at law:
Marsh v. Dodge, 1872, C. D. 245; 2 O. G. 643.
Dod v. Cobb, 1876, C. D. 196; 10 O. G. 462.
Huttner v. Knox, 1879, C. D. 281; 16 O. G. 1046.
Stevens v. Putnam, 1880, C. D. 160; 18 O. G. 519.
Wicks v. McAvoy, 1880, C. D. 190; 18 O. G. 859.
Van Depoele v. Deecke, April 7, 1890, Fisher, Asst. Com., MS., 2 G. 28.

An interference will be re-opened:

A re-hearing will be granted:

——On *ex parte* motion of defeated applicant based on affidavits of newly discovered evidence.
Richmond v. Hibbard, 1879, C. D. 254; 16 O. G. 908.

——On proof of fraud and newly discovered evidence.
Hibbard v. Richmond, 1880, C. D. 136; 17 O. G. 1155.

——After expiration of time for taking testimony the case will be opened for the taking of further testimony on affidavit of newly discovered evidence of prior use.
Wood v. Morris, 1873, C. D. 39; 3 O. G. 239.

——On newly discovered evidence, on showing reason for failure to present it before.
Huttner v. Knox, 1879, C. D. 281; 16 O. G. 1046.

——Decision founded on erroneous conception of the issue.
Hall v. Lowdon, 1881, C. D. 39; 20 O. G. 741.

——Discretion of Commissioner to declare a second interference upon a re-issue application upon the same issues.
Wright, E. S., *ex parte*, 1870, C. D. 60.

——It is in the discretion of the Commissioner to declare a second interference, so long as no patent has issued.
Abraham v. Fletcher, 1869, C. D. 50.

——To show abandonment in view of newly-discovered evidence.
Disston v. Emerson, 1870, C. D. 84.

——Where testimony had been detained, case suspended and ordered to a hearing on testimony already in.
Hayden v. Phillips, 1871, C. D. 170.

——On application in good faith of assignees, whose assignor had failed to take testimony through the omission of his attorney to appoint a substitute.
Shinn v. McElroy, May 12, 1890, Fisher, Asst. Com., MS., 2 G. 35.

**An interference will not be re-opened:**

**A re-hearing will not be granted:**

——Because of a mistake of the Commissioner as to an admission on which the decision was not based.
Huttner v. Knox, 1879, C. D. 281; 16 O. G. 1046.

——Because testimony was taken pending a decision on a motion to dissolve for irregularity, although accompanied by request for suspension, but unacted on.
Du Bois v. McCloskey, 1880, C. D. 142; 17 O. G. 1158.

——For misstatements in arguments of counsel.
Wicks v. McEvoy, 1880, C. D. 190; 18 O. G. 859.

——Where there is unexplained delay of nearly two years amounting to laches.
Hamilton v. Fisher, 1871, C. D. 271.
Jones v. Greenleaf, 1879, C. D. 23; 15 O. G. 560.

**An interference will not be re-opened:**

**A re-hearing will not be granted on newly discovered evidence:**

——After a decision upon an interference, where it could have been obtained with ordinary diligence.
Pattee, L. C., *ex parte*, 1872, C. D. 255; 2 O. G. 618.

——Where it was in possession of the party from the beginning of the proceedings.
Gillen, 1877, C.D. 20; 11 O.G.41 .9

——Where party had been put on inquiry and did not show that he could not have procured it.
Josselyn v. Swezey v. Dart, 1879, C. D. 15; 15 O. G. 702.

——Where the testimony would not materially affect the result. *Ibid.*

——Where circumstances of case negative a general averment of diligence under oath.
*Withington* v. *Gordon*, 1880, C. D. 53; 17 O. G. 329.

——Where successful contestant subsequently discovers defeated party to be prior inventor, in the absence of diligence.
Jones v. Greenleaf & Adams, 1879, C. D. 23; 15 O. G. 560.

——Where there was delay and gross negligence.
Covel v. Maxim, 1869, C. D. 78.

——Where testimony was in the Office, and want of means held no excuse for the delay.
Hamilton v. Fisher, 1871, C. D. 271.

——Where party had been put on inquiry and was negligent.
Aldrich v. Bingham, 1870, C. D. 70.

——In the absence of reasonable attention and diligence in procuring it.
Van Depoele v. Deecke, April 7, 1890, Fisher, Asst. Com., MS., 2 G. 28.

——Where there is a refusal to take testimony until after final decision.
Farcot v. Rice, 1879, C. D. 30; 15 O. G. 563.
Beardslee v. Moeslein, 1889, C. D. —; 46 O. G. 1640.

——Between two patentees describing but not claiming the device in controversy.
Mason v. Imlay, 1872, C. D. 183; 2 O. G. 274.

——Where purchaser of patent without notice had no time to prepare for the hearing. *Ibid.*

——By party who has not appealed from the decision of the Examiner of Interferences. *Ibid.*

——On affidavits considered upon the hearing of a former motion for the same purpose. *Ibid.*

——For ignorance, inadvertence or mistake of party or counsel, usually.
Dod v. Cobb, 1876, C. D. 196; 10 O. G. 462.

——On motion to take testimony to impeach novelty, where affidavits on motion are insufficient. *Ibid.*

——That adversary's claim was broader, and therefore for a different subject-matter no ground for further testimony. *Ibid.*

——After expiration of limit of appeal, case gone to issue, and patent only to be delivered.
Wright, *et al.* v. Reese, 1877, C. D. 16; 11 O. G. 329.

——On stipulations of parties with others or with self as assignee.
Jones v. Greenleaf & Adams, 1879, C. D. 23; 15 O. G. 560.

——Question of fact on motion for rehearing is whether the original decision was in conformity with the evidence; not whether it was clearly correct.
Packard v. Sandford, 1879, C. D. 314; 16 O. G. 1182.
Gardner v. Dudley, 1880, C. D. 177; 18 O. G. 683.

——Sufficient allegations of newly discovered evidence on motion for rehearing.
Huttner & Scott v. Knox & Osborn, 1879, C. D. 281; 15 O. G. 294.

——Primary requirements as to diligence, bearing and character of newly discovered evidence to entitle to rehearing.
Stevens v. Putnam, 1880, C. D. 160; 18 O. G. 519.

——Motion for re-hearing, based on error in not requiring proof of inventorship, and preliminary statement.
Gessner v. Miller, 1890, C. D. —; 50 O. G. 433.

——Where notice to re-open is filed on last day of limit of appeal, Examiner of Interferences retains jurisdiction. The "day fixed" is that named in the motion.
Shinn v. McElroy, Feb. 21, 1890, Mitchell, MS., 2 G. 35.

1887—122. Suspension of interference for consideration of new references.

128. If at any time during the pendency of an interference the primary examiner shall discover new or additional references, he may request a suspension of the interference proceeding until the pertinency of such references shall be determined. Upon such determination being made, the files and papers will be returned to the examiner of interferences, and the interference dissolved or reinstated in accordance with such decision. The consideration of such references shall be *ex parte*.

## HISTORY OF RULE.

122. March 9, 1887. If at any time during the pendency of an interference the primary examiner discover new references, he may request a suspension of the interference for their consideration *ex parte* until their pertinency shall be determined, when the files and papers will be returned to the examiner of interferences and the interference dissolved or reinstated in accordance with such determination.

122 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 122 of March 9, 1887.

59. Aug., 1878. If at any time, etc., (as in 122 of March 9, 1887,) * * * for their consideration.

59 of X, IX, VIII, like 59 of Aug., 1878.
Edition of Sept. 1, 1875, and prior editions, contain no such provision.

**The Primary Examiner may request a suspension on the discovery of new references:**

Neubecker v. Schafhaus, 1873, C. D. 138; 4 O. G. 319.
Anson v. Woodbury, 1877, C. D. 4; 11 O. G. 243.
Banks v. Snediker, 1879, C. D. 304; 16 O. G. 1096.
Stone v. Greaves, 1880, C. D. 23; 17 O. G. 260.

1887—123. For addition of new parties.

129. If during the pendency of an interference an application be filed for the subject-matter in issue, the primary examiner shall request the suspension of the interference for the purpose of adding the new application; but new parties will not be added after the taking of testimony without the special order of the Commissioner, whose attention shall be promptly called to the matter by the examiner.

HISTORY OF RULE.

123. March 9, 1887. The primary examiner may request a suspension of an interference for the purpose of adding new parties; but no new parties will be added after the taking of testimony without the especial order of the Commissioner.

123 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 123 of March 9, 1887.

59. Aug., 1878. * * * but after testimony has been taken new parties will not be admitted into the interference.

59 of X, IX, VIII, like 59 of Aug., 1878.

Edition of Sept. 1, 1875, and prior editions, contain no such provision.

New parties:

——Suspension for admission of new parties.
Maloney v. Kidwell, 1879, C. D. 311; 16 O. G. 1139.
Reed v. Jordan, 1887; C. D. 14; 38 O. G. 661.
Holton & Malsch v. Merrow, Dec. 26, 1889, Mitchell, MS., 1 G. 91.

——On resumption of proceedings party omitted through error of office reinstated upon petition from him, without notice to others.
Freeman v. Hunter v. Zippernowsky & Deri v. Edison, May 24, 1890, Fisher, Asst. Com., MS., 2 G. 36.

130. Amendments to the specification will not be received during the pendency of an interference, except as provided in Rules 106, 107, 109.

1887—124. Amendments pending interference.

*HISTORY OF RULE.*

124. March 9, 1887. No amendments to the specification will be received during the pendency of an interference, except as provided in Rules 94*, 104, 135.

124 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, like 124 of March 9, 1887.

124 of XII omits reference to Rule 94, otherwise like 124 of March 9, 1887.

60. Aug., 1878. No amendments to the specification will be received during the pendency of an interference, except as provided in Section 61.†

60 of X, IX, like 60 of Aug., 1878.

60. Nov. 1, 1876. No amendments, etc., (as in 60 of Aug., 1878,) * * * in Section 61, nor will the reissue of a patent be allowed while the patent is in interference.

60 of VII, VI, V, IV, III, II, I, like 60 of Aug. 1878.

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* Rule 94, March 9, 1887, see p. 23, under Rule 109, 1888.
Rule 104, March 9, 1887, see p. 19, under Rule 107, 1888.
Rule 125, March 9, 1887, see p. 18, under Rule 106, 1888.
† Rule 61, Aug., 1878, see p. 18, under Rule 106, 1888.

**Amendments to application pending interference:**

Shinn, *ex parte*, 1879, C. D. 192; 16 O. G. 458.
Smith, *ex parte*, 1880, C. D. 77; 17 O. G. 447.
Mehren v. Wollensak, Sept. 20, 1887, Hall.
Bechman v. Johnson, 1889, C. D. —; 48 O. G. 673.
Crandall v. Sholes, May 27, 1890, Mitchell, MS., 2 G. 36.

1887—127. Prosecution or defense by assignee.

131. When, on motion duly made and upon satisfactory proof, it shall be shown that, by reason of the inability or refusal of the inventor to prosecute or defend an interference, or from other cause, the ends of justice require that an assignee of an undivided interest in the invention should be permitted to prosecute or defend the same, the Commissioner may so order.

HISTORY OF RULE.

127. March 9, 1887. When it shall appear, on motion duly made, and upon satisfactory proof, that by reason, etc., (as in 131 of April 18, 1888,) * * * the ends of justice shall require, etc., * * * in the invention be permitted, etc.

127 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 127 of March 9, 1887.

Edition of Aug., 1878, and prior editions, contain no such provision.

——Extent of the right of an assignee as a party to an interference, who is only entitled to a transfer of the patent after its issue.
Hammond v. Pratt, 1879, C. D. 337; 16 O. G. 1235.

Claims of defeated parties.

132. Whenever an award of priority has been rendered in an interference proceeding by any tribunal, and the limit of appeal from such decision has expired, and whenever an interference has been terminated by reason of the written concession, signed by the applicant in person, of priority of invention in favor of his opponent or opponents, the primary examiner shall advise the defeated or unsuccessful party or parties to the interference that their claim or claims which were so involved in the issue stand finally rejected.

HISTORY OF RULE.

Edition of March 9, 1887, and prior editions, contain no such provision.

——In respect to matter erroneously included in the declaration, a motion to vacate judgment is the proper practice, after final rejection under this rule.
Booth, *ex parte*, 1889, C. D. 242; 49 O. G. 1841.
Ehrlich, *ex parte*, Nov. 15, 1890, Mitchell, MS., 2 G. 83.

138. In contested cases the appellant shall have the right to make the opening and closing arguments, unless it shall be otherwise ordered by the tribunal having jurisdiction of the case.

1887—133. Right to open and close.

HISTORY OF RULE.

133 of XXII, XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 138 of April 18, 1888.

42. Aug., 1878. In contested cases the appellant shall have the right to make the opening and closing arguments.

42 of X, IX, VIII, like 42 of Aug., 1878.

Edition of Sept., 1875, and prior editions, contain no such provision.

- —A notice to a party specifying "Limit of appeal ten day" *held* uncertain.

Pearson v. Lister, v. Reixach, 1883, C. D. 119; 24 O. G. 1175. Teller. Sec.

143. Contested cases will be regarded as pending before a tribunal until the limit of appeal, which must be fixed, has expired, or until some action has been had which waives the appeal or carries into effect the decision from which appeal might have been taken.

1887—138. Jurisdiction.

*Ex parte* cases decided by an appellate tribunal will, after decision, be remanded at once to the primary examiner, subject to the applicant's right of appeal, or such action as will carry into effect the decision, or for such further action as the applicant is entitled to demand.

HISTORY OF RULE.

138 of March 9, 1887. Cases will be regarded as pending before a tribunal until appeal has been taken from its decision, or until the limit of appeal which must be fixed in contested cases has expired.

138 of XXI, XX, XIX, XVII, like 138 of March 9, 1887.

138. March 1, 1884. Cases will be, etc., (as in 138 of March 9, 1887, * * * limit of appeal, which must be fixed in each case has expired.

138 of XVI, XV, XIV, XIII, XII, like 138 of March 1, 1884.

45. Aug., 1878. Cases will be regarded as pending before a tribunal until appeal has been taken from its decision, or until the limit of appeal has expired.

45 of X, IX, VIII, like 45 of Aug., 1878.

Edition of Sept. 1, 1875, and prior editions contain no such provision.

**Interferences and extensions are the only "contested cases" recognized in the practice of the Patent Office:**

Little v. Lillie, *et al.*, 1876, C. D. 207; 10 O. G. 543.

1887—141.
Rev. Stat., secs. 4904, 4909, 4910, 4911.
Rev. Stat., secs. 4911, 4915.

146. In interference cases parties have the same remedy by appeal to the examiners-in-chief and to the Commissioner as in *ex parte* cases; but no appeal lies in such cases from the decision of the Commissioner. Defeated contestants in interferences may, however, have remedy by bill in equity.

## HISTORY OF RULE.

141. March 9, 1887. In cases of interference parties, etc., (as in 146 of April 18, 1888,) * * * of the Commissioner.

141 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 141 of March 9, 1887.

48 of XI, X, IX, VIII, VII, VI, V, IV, III, II, like 141 of March 9, 1887.

55. July 15, 1870. In cases of interference, parties have the same remedies by appeal as other applicants, to the examiners-in-chief and to the Commissioner, but no appeal lies in such cases from the decision of the Commissioner.

——The filing of a bill in equity by the defeated party will not operate to stay the issue of the patent to the successful contestant.
Wells v. Boyle, 1888, C. D. 36; 43 O. G. 753.

——On appeal in interference cases under Act 1836, § 8, jurisdiction of justice of the Supreme Court of the District of Columbia extended to the question of abandonment or public use.
Benson v. Bennett, 1870, C. D. 26.

——Conclusiveness of prior decision of appellate judge on a new interference, unless a different state of facts is shown.
White v. Purdy, 1870, C. D. 115.

——No appeal lies from the decision of the Commissioner in interference cases since Act, July 8, 1870.
Little v. Lillie, 1876, C. D. 207; 10 O. G. 543.

——A decree of the District Supreme Court on the question of patentability of applicant's device cannot touch the question of priority as between his and other pending applications.
Cruikshank v. Strong, 1880, C. D. 102; 17 O. G. 511.

1887—142.
Appeals in interference cases.
Reasons of appeal.
Printed briefs.

147. Appeals in interference cases must be accompanied by brief statements of the reasons therefor; and parties will be required to file briefs of their arguments before the day of hearing.

Printed briefs are required in all cases.

HISTORY OF RULE.

142. March 9, 1887. Appeals in interference cases must be accompanied with brief statements of the reasons therefor; and both parties will be required to file briefs of their arguments before the day of hearing. Printed briefs are in all cases preferred.

142 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 142 of March 9, 1887.

48. Aug., 1878. Appeals in interference cases should be accompanied, etc., (as in 142 of March 9, 1887,) * * * to file briefs of their arguments at least five days before the day of hearing. Printed briefs are in all cases preferred.

48 of X, IX, VIII, VII, VI, V, IV, III, II, like 48 of Aug., 1878.
Edition of July 15, 1870, has no such provision.

**Reasons of appeal:**

——The brief statement is not to be considered of the substance of the appeal.
Pitney v. Smith & Egge, 1889, C. D. —; 49 O. G. 129, Mitchell.
Holmes & Holmes v. Cober, 1890, C. D. —; 51 O. G. 1622.

## HEARINGS AND INTERVIEWS.

151. Hearings will be had by the Commissioner at ten o'clock a. m., and by the board of examiners-in-chief and the examiner of interferences at one o'clock p. m., on the day appointed, unless some other hour be specially designated. If either party in a contested case, or the appellant in an *ex parte* case, appear at the proper time, he will be heard. After the day of hearing a contested case will not be taken up for oral argument except by consent of all parties. If the engagements of the tribunal having jurisdiction are such as to prevent the case from being taken up on the day of hearing, a new assignment will be made, or the case will be continued from day to day until heard. Unless it shall be otherwise ordered before the hearing begins, oral arguments will be limited to one hour for each party. After a contested case has been argued, nothing further relating thereto will be heard unless upon request of the tribunal having jurisdiction of the case; and all interviews for this purpose with parties in interest or their attorneys will be invariably denied.

1887—146. Hour of hearing.

HISTORY OF RULE.

146. March 9, 1887. Hearings will be had by the Commissioner at ten o'clock a. m., and by the board of examiners-in-chief and the examiner of interferences at 1 o'clock p. m., on the day appointed, unless some other hour be specially designated. If either party in a contested case, or

the appellant in an *ex parte* case, appear at the proper time, he will be heard by the examiner of interferences or the examiners-in-chief; but a contested case will not be taken up for oral argument after the day of hearing, except by consent of both parties. If the engagements of the tribunal having jurisdiction of the case be such as to prevent it from being taken up on the day of hearing, a new assignment will be made, or the case will be continued from day to day until heard. Unless it shall be otherwise ordered before the hearing begins, oral arguments will be limited to one hour for each party. After a contested case has been argued, nothing further relating thereto will be heard unless upon request of the tribunal having jurisdiction of the case; and all interviews for this purpose with parties in interest or their attorneys will be invariably denied.

146 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 146 of March 9, 1887.

49. Aug., 1878. All cases pending before the Commissioner, the board of examiners-in-chief, or the examiner in charge of interferences, will stand for argument at 1 o'clock on the day of hearing, unless some other hour be specially designated. If either party in a contested case, or the appellant in an *ex parte* case, appears at that time, he will be heard, but a contested case will not be taken up for oral argument after the day of hearing, except by consent of both parties. If the engagements of the tribunal before whom the case is pending are such as to prevent it from being taken up on the day of hearing, a new assignment will be made, or the case will be continued from day to day until heard. Unless otherwise ordered before the hearing begins, oral arguments will be limited to one hour for each counsel. After any case has been argued, nothing further relating thereto will be heard unless requested by the tribunal having the decision of the case; and all interviews for this purpose, with parties in interest or their attorneys, will be invariably denied.

49 of X, IX, like 49 of Aug., 1878.

49, Nov. 1, 1876, like 49 of Aug., 1878, except that the hour of hearing is set at twelve o'clock.

49 of VII, VI, V, IV, III, like 49 of Nov. 1, 1876.

49 of Aug. 1, 1871, like 49 of Aug., 1878, omitting the last sentence beginning "After any case," etc.

49. July 15, 1870. All cases pending before the Commissioner will stand for argument at one o'clock on the day of hearing. If either party in a contested case, or the appellant in an *ex parte* case, appear at that time, he will be heard; but in contested cases no motions will be heard in the absence of the other party, except upon default after due notice; nor will a case be taken up for oral argument after the day of hearing, except by consent of both parties. If the engagements of the tribunal before whom the case is pending are such as to prevent its being taken up on the day of hearing, a new assignment will be made, or the case will be continued from day to day until heard. Unless otherwise ordered before the hearing begins, oral arguments will be limited to one hour for each counsel.

# MOTIONS.

153. In contested cases reasonable notice of all motions, and copies of motion-papers and affidavits, must be served, as provided in Rule 154 (2). Proof of such service must be made before the motion will be entertained by the office. Motions will not be heard in the absence of either party except upon default after due notice. Motions will be heard in the first instance by the officer or tribunal before whom the particular case may be pending; but an appeal from the decision rendered may be taken on questions involving the merits of the case to the board of examiners-in-chief; on other questions, directly to the Commissioner. In original hearings, on motions, the moving parties shall have the right to make the opening and closing arguments. In contested cases the practice on points to which the rules shall not be applicable will conform, as nearly as possible, to that of the United States courts in equity proceedings.

1887—149. Notice.

Proof of service.

Jurisdiction.

Right to open and close.

Equity practice in cases to which rules do not apply.

## HISTORY OF RULE.

149 of XXII, XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 153 of April 18, 1888.

50 of Aug., 1878. In contested cases, reasonable notice of all motions, and copies of motion-papers and affidavits, must be served upon the opposite party or his attorney. Proof of such service, etc., (as in 153 of April 18, 1888,) * * * but an appeal from the decision rendered may be taken to the Commissioner in person.

50 of X, IX, VIII, VII, VI, V, IV, III, II, like 50 of Aug., 1878.

50. July 15, 1870. Reasonable notice of all motions, and copies of the motion papers and affidavits, must be served upon the opposite party or his attorney.

——An interlocutory motion in a preliminary interference cannot be made by one party without notice to the other.
Bell v. Gray, 1879, C. D. 42; 15 O. G. 776.
Shinn, *ex parte*, 1879, C. D. 192; 16 O. G. 458.
Booth v. Lyman, 1880, C. D. 62; 17 O. G. 393.
Green v. Hall, 1886, C. D. 43; 37 O. G. 1475.
Beckman v. Johnson, 1889, C. D. —; 48 O. G. 673.

——Renewal of motion.
Clemson v. Fowler, 1886, C. D. 35; 37 O. G. 671.

## TESTIMONY IN EXTENSIONS, INTERFERENCES AND OTHER CONTESTED CASES.

1887—150. Rev. Stat., sec. 4905.

154. The following rules have been established for taking and transmitting testimony in extensions, interferences, and other contested cases:

Notice.

(1) Before the depositions of witnesses are taken by either party due notice shall be given to the opposing party, as hereinafter provided, of the time when and place where the depositions will be taken, of the cause or matter in which they are to be used, and of the names and residences of the witnesses to be examined, and the opposing party shall have full opportunity, either in person or by attorney, to cross-examine the witnesses. If the opposing party shall attend the examination of witnesses not named in the notice, and shall either cross-examine such witnesses or fail to object to their examination, he shall be deemed to have waived his right to object to such examination for want of notice. Neither party shall take testimony in more than one place at the same time, nor so nearly at the same time that reasonable opportunity for travel from one place of examination to the other can not be had.

Waiver.

Reasonable time for travel.

Service of notice.

(2) The notice for taking testimony or for motions must be served (unless otherwise stipulated in an instrument in writing filed in the case) upon the attorney of record, if there be one, or, if there be no attorney of record, upon the adverse party. Reasonable time must be given therein for such adverse party to reach the place of examination. Service of such notice may be made in either of the following ways: (1) By delivering a copy of the notice to the adverse party or his attorney; (2) by leaving a copy at the usual place of business of the adverse party or with his attorney or with some one in his employment; (3) when such adverse party or his attorney has no usual place of business, by leaving a copy at his residence, with a member of his family over fourteen years of age and of discretion; (4) transmission by registered letter; (5) by express. Whenever it shall be satisfactorily shown to the Commissioner that neither of the above modes of obtaining or serving such notice is practicable, the notice may be published in the Official

Gazette. Such notice shall, with sworn proof of the fact, time, and mode of service thereof, be attached to the deposition or depositions, whether the opposing party shall have cross-examined or not.

Official certificate.

(3) Each witness before testifying shall be duly sworn according to law by the officer before whom his deposition shall be taken. The deposition shall be carefully read over by the witness, or by the officer to him, and shall then be subscribed by the witness in the presence of the officer. The officer shall annex to the deposition his certificate showing (1) the due administration of the oath by the officer to the witness before the commencement of his testimony; (2) the name of the person by whom the testimony was written out, and the fact that, if not written by the officer, it was written in his presence; (3) the presence or absence of the adverse party; (4) the place, day, and hour of commencing and taking the deposition; and (5) the fact that the officer was not connected by blood or marriage with either of the parties, nor interested, directly or indirectly, in the matter in controversy. The officer shall sign the certificate and affix thereto his seal of office, if he have such seal. He shall then, without delay, securely seal up all the evidence, notices, and paper exhibits, inscribe upon the envelope a certificate, giving the title of the case, the name of each witness, and the date of sealing, address the package, and forward the same to the Commissioner of Patents. If the weight or bulk of an exhibit shall exclude it from the envelope, it shall be authenticated by the officer and transmitted in a separate package, marked and addressed as above provided.

Depositions to be sealed up, addressed, and forwarded to Commissioner.

Exhibits.

*Ex parte* proofs in extension cases.

(4) In cases of extension, when no opposition shall be made, *ex parte* testimony will be received from the applicant; and such testimony as may have been taken by the applicant prior to notice of opposition will be received, unless taken within thirty days after filing the petition for the extension. But upon receiving notice of opposition the applicant shall immediately give notice to the opposing party or parties of the names and residences of the witnesses whose testimony shall have been thus taken.

Motion to extend time for taking testimony.

(5) If a party shall be unable to take any testimony within the time limited and desires an extension for such purpose he must file a motion, accompanied by a statement under oath setting forth specifically the reasons why such testimony has not been taken, and distinctly averring that such motion is made in good faith, and not for the purposes of delay. If either party shall be unable to procure the testimony of a witness or witnesses within the time limited, and desires an extension for such purpose, he must file a motion, accompanied by a statement under oath setting forth the cause of such inability, the name or names of such witness or witnesses, the facts expected to be proved by such witness or witnesses, the steps which have been taken to procure such testimony, and the dates on which efforts have been made to procure it. (See Rule 153.)

Caveat as evidence. Rev. Stat., sec. 892.

(6) When a party relies upon a caveat to establish the date of his invention, the caveat itself, or a certified copy thereof, must be filed in evidence, with due notice to the opposite party.

Official records and special matter offered in evidence.

(7) Upon notice given to the opposite party before the closing of the testimony, any official record, and any special matter contained in a printed publication, if competent evidence and pertinent to the issue, may be used as evidence at the hearing.

——The Commissioner has no authority to compel the filing of depositions in the Patent Office, Petithomme v. Bedbury, 1890, C. D. —; 52 O. G. 605, Chandler Act. Sec.

1887—151. Formalities.

155. The pages of each deposition must be numbered consecutively, and the name of the witness plainly and conspicuously written at the top of each page. The testimony must be written upon legal-cap or foolscap paper, with a wide margin on the left-hand side of the page, and with the writing on one side only of the sheet.

1887—152. Formalities.

156. The testimony will be taken in answer to interrogatories, with the questions and answers committed to writing in their regular order by the officer, or, in his presence, by some person not interested in the case, either as a party thereto or as attorney. But, with the written consent of the parties, the depositions may be written out by other persons

in the presence of the officer. No officer who is connected by blood or marriage with either of the parties, or interested, directly or indirectly, in the matter in controversy, either as counsel, attorney, agent, or otherwise, is competent to take depositions, unless with the written consent of all the parties.

Testimony taken in one interference case may be used in another.

157. By leave of the Commissioner, first obtained, testimony taken in an interference proceeding may be used in any other or subsequent interference proceeding, so far as relevant and material, subject, however, to the right of any contesting party to recall witnesses whose depositions have been taken, and to take other testimony in rebuttal of the depositions.

1887—153. Rev. Stat., sec. 4905. Testimony taken in foreign countries.

158. By leave of the Commissioner, first obtained, testimony may be taken in foreign countries, upon complying with the following requirements:

Motion.

(1) Such permission will be granted only upon motion duly made. (See Rule 153.) The motion must designate a place for the examination of the witnesses at which an officer duly qualified to take testimony under the laws of the United States in a foreign country shall reside, and it must be accompanied by a statement under oath that the motion is made in good faith, and not for purposes of delay or of vexing or harassing any party to the case; it must also set forth the names of the witnesses, the particular facts to which it is expected each will testify, and the grounds on which is based the belief that each will so testify.

Motion.

(2) It must appear that the testimony desired is material and competent, and that it cannot be taken in this country at all, or cannot be taken here without hardship and injury to the moving party greatly exceeding that to which the opposite party will be exposed by the taking of such testimony abroad.

Interrogatories. Cross-interrogatories.

(3) Upon the granting of such motion, a time will be set within which the moving party shall file in duplicate the interrogatories to be propounded to each witness, and serve a copy of the same upon each adverse party, who may, within a designated time, file, in duplicate, cross-interrogatories. Objections to any of the interrogatories or cross-interrogatories may be filed at any time before the depositions are taken, and such objections will be considered and determined upon the hearing of the case.

Objections.

Papers sent to proper officer.

(4) As soon as the interrogatories and cross interrogatories are decided to be in proper form, the Commissioner will cause them to be forwarded to the proper officer, with the request that, upon payment of, or satisfactory security for, his official fees, he notify the witnesses named to appear before him within a designated time and make answer thereto under oath; and that he reduce their answers to writing, and transmit the same, under his official seal and signature, to the Commissioner of Patents, with the certificate prescribed in Rule 154 (3).

Stipulations.

(5) By stipulation of the parties the requirements of paragraph 3 as to written interrogatories and cross interrogatories may be dispensed with, and the testimony may be taken before the proper officer upon oral interrogatories by the parties or their agents.

Weight of testimony taken in foreign countries.

(6) Unless false swearing in the giving of such testimony before the officer taking it shall be punishable as perjury under the laws of the foreign state where it shall be taken, it will not stand on the same footing in the Patent Office as testimony duly taken in the United States; but its weight in each case will be determined by the tribunal having jurisdiction of such case.

——Admissibility of testimony taken abroad prior to the making of this rule.
Actiengesellschaft Apollinaris Brunnen v. Saratoga Seltzer Water, 1879, C. D. 246; 16 O. G. 810.

——Motion for a commission refused.
Rumpf & Graessler v. Köhler v. Krügener, 1883, C. D. 29; 23 O. G. 1831.
Affirmed. *Ibid.*, 1883, C. D. 111; 23 O. G. 1832, Teller, Sec.

——Motion for a commission granted.
Leeman v. Smith, June 27, 1890, Fisher, Asst. Com., 2 G. 44.

1887—154.

Evidence on hearing.

159. Evidence touching the matter at issue will not be considered on the hearing which shall not have been taken and filed in compliance with these rules. But notice will

Formal objection to evidence.

not be taken of merely formal or technical objections which shall not appear to have wrought a substantial injury to the party raising them; and in case of such injury it must be made to appear that, as soon as the party became aware of the ground of objection, he gave notice thereof to the office,

and also to the opposite party, informing him at the same time that, unless it should be removed, he (the objector) should urge his objection at the hearing. This rule is not to be so construed as to modify established rules of evidence, which will be applied strictly in all practice before the office.

Rules of evidence.

——Motion to strike out testimony relating to date of invention abroad, allowed.
Tucker & Davis, 1872, C. D. 188;
Chambers & Mendham v. Duncan, 1876, C. D. 82; 9 O. G. 741.

——Motion to strike out testimony of wife, as not a competent witness for her husband.
Allowed.
Workman v. McNaught, 1879, C. D. 129; 16 O. G. 216.
Allowed, authorities reviewed.
Marsh v. Rein v. Ruppel, 1888, C. D. 58; 43 O. G. 1453.
Refused.
Koen v. Quint, 1883, C. D. 26; 23 O. G. 1329.

——Failure to object at proper time a waiver.
Michael v. Kenney, Sr., 1870, C. D. 140.
Chapman v. Morrison, 1875, C. D. 147; 8 O. G. 1031.

**Motion to strike out testimony allowed:**

——Where it tended to establish a date of invention prior to that set up in preliminary statement.
Allen & Moody v. Gilman, 1872, C. D. 204; 2 O. G. 293.

——Where it related to a patent not first introduced in evidence, nor a certified copy thereof.
Chapman v. Morrison, 1875, C. D. 147; 8 O. G. 1031.

——Where the testimony was not pertinent to the issue of priority.
Smith v. Perry *et al.*, 1876, C. D. 12; 9 O. G. 688.

**Refused:**

——Where the testimony was in rebuttal of application oath.
Hussey v. Van Wagenen, 1876, C. D. 199; 10 O. G. 942.

——Where, on witness' refusal to answer, the cross-examination had none the less been proceeded with.
Milligan v. Niedringhaus, 1887, C. D. 1, 38 O. G. 103.

——Where the failure to cross-examine witness was due to the party himself.
Wright v. Daggett, 1888, C. D. 116; 44 O. G. 943.

——Where witness had refused to answer improper cross interrogatories, and which had also been forbidden by the Court.
Osgood v. Badger v. Bennett, 1888, C. D. 125; 44 O. G. 1066.

——Proper practice as to form and time of notice of motion.
Milligan v. Niedringhaus, 1887, C. D. 1; 38 O. G. 103.

——Practice as to decision of Examiner of Interferences on such motion. Proper time for motion.
Wright v. Daggett, 1888, C. D. 116; 44 O. G. 943.

——The act of the Commissioner in deciding such motion is judicial, and the Secretary of the Interior has no appeal jurisdiction.
Houston v. Barker *et al.*, 1888, C. D. 173; 44 O. G. 697, Vilas, Sec.

1887—155. Rev. Stat., sec. 4906. Subpœnas.

160. The law requires the clerks of the various courts of the United States to issue subpœnas to secure the attendance of witnesses whose depositions are desired as evidence in contested cases in the Patent Office.

1887—156. Inspection. Printing.

161. After testimony is filed in the office it may be inspected by any party to the case, but it can not be withdrawn for the purpose of printing. It may be printed by some one specially designated by the office for that purpose, under proper restrictions.

1887—157. Copies of testimony.

162. Six or more printed copies of the testimony must be furnished—five for the use of the office and one for each of the opposing parties. The preliminary statement required by Rule 110 must be printed as a part of the record. These copies must be filed not less than one week before the day of hearing. They will have wide margins, with the names of the witnesses at the top of the pages over their testimony, and will contain indexes with the names of all witnesses and reference to the pages where their testimony may be found, and also to the pages where copies of papers and documents introduced as exhibits are shown.

Printing dispensed with.

When it shall appear, on motion duly made and by satisfactory proof, that a party, by reason of poverty, is unable to print his testimony, such printing will be dispensed with. In such case manuscript copies must be furnished—one for the office and one for each adverse party. Printing of the testimony can not be dispensed with upon the stipulation of the parties to the proceeding.

1887—158. Filing of briefs and arguments.

163. It is desirable that arguments and briefs in all contested cases shall be submitted in printed form and filed before the hearing. If either party fail to comply with this regulation, no extension of time will be granted for the purpose, except upon consent of the adverse parties.

# CAVEATS.

**N. B.—Only the following rules relate to interference proceedings.**

198. Any citizen of the United States who has made a new invention or discovery and desires further time to mature the same may, on payment of a fee of ten dollars, file in the Patent Office a caveat setting forth the object and the distinguishing characteristics of the invention, and praying protection of his right until he shall have matured his invention. Such caveat shall be filed in the confidential archives of the office and preserved in secrecy, and shall be operative for the term of one year from the filing thereof.

1887—190. Rev. Stat., sec. 4902. Qualification of caveator. Preserved in secrecy.

HISTORY OF RULE.

190 of XXII, XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 198 of April 18, 1888.

92. Aug., 1878. Any citizen of the United States, or alien who has resided for one year last past in the United States, and has made oath of his intention to become a citizen thereof,* can file a caveat in the secret archives of the Patent Office on the payment of a fee of ten dollars therefor.

92 of X, IX, VIII, VII, VI, V, IV, III, II, I, like 92 of Aug., 1878.

201. The caveat must comprise a specification, oath, and when the nature of the case admits of it, a drawing, and, like an application for a patent, must be limited to a single invention or improvement.

1887—192. Requisites.

HISTORY OF RULE.

192 of XXII, XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 201 of April 18, 1888.

92, Aug., 1878, and prior editions, see notes under Rule 205, April 18, 1888.

94. Aug., 1878. No caveat can be filed in the secret archives of the Office unless accompanied by an oath of the caveator that he is a citizen of the United States, or, if he is an alien, that he has resided for one year last past within the United States, and has made oath of his intention to become a citizen thereof; nor unless the applicant also states, under oath, that he believes himself the original and first inventor of the art, machine or improvement set forth in his caveat †

94 of X, IX, VIII, VII, VI, V, IV, III, II, I, like 94 of Aug., 1878.

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* This provision respecting aliens is repeated in Rule 200 of April 18, 1888, and see notes under Rule 205 of 1888.

† This provision is repealed in Rule 203 of April 18, 1888.

1887—192. Particularity of description. Rev. Stat., sec. 4902.

202. The same particularity of description is not required in a caveat as in an application for a patent; but the caveat must set forth the object of the invention and the distinguishing characteristics thereof, and it should be sufficiently precise to enable the office to judge whether there is a probable interference when a subsequent application is filed for a similar invention. If, upon examination, a caveat be found defective in this respect, amendment will be required. Without compliance with Rules 198, 201, 202, and 204, the caveator will not be entitled to the notice provided for in Rule 205.

Amendment.

HISTORY OF RULE.

193 of XXII, XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 202 of April 18, 1888, omitting the words "for a similar invention," at the end of the first sentence.

95. Aug., 1878. A caveat need not contain as particular a description of the invention as is requisite in a specification; but still it must set forth the design of the invention and the distinguishing characteristics thereof, and the description should be sufficiently precise to enable the Office to judge whether there is a probable interference when a subsequent application is filed.

95 of X, IX, VIII, like 95 of Aug., 1878.

95. Sept. 1, 1875. A caveat need not contain as particular a description of the invention as is requisite in a specification, but still the description should be sufficiently precise to enable the Office to judge whether there is a probable interference when a subsequent application is filed.

95 of VI, V, IV, III, II, I, like 95 of Sept. 1, 1875.

1887—195. Drawings.

204. The caveat should be accompanied when practicable by full and accurate drawings, separate from the specification, well executed on tracing muslin or paper that may be folded. (See Rule 51.)

HISTORY OF RULE.

195. March 9, 1887. When practicable, the caveat should be accompanied by full and accurate, etc., (like 204 of April, 1888.)

195 of XXI. XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 195 of March 9, 1887.

97. Aug., 1878. When practicable, the caveat must be accompanied by full and accurate drawings, separate from the specifications, well executed on tracing muslin or paper that may be folded, and of the same size as demanded in drawings for patents.

97 of X, IX, VIII, VII, VI, V, IV, III, like 97 of Aug., 1878.

97. Aug. 1, 1871. When practicable, the caveat must be accompanied by drawings or sketches.

97 of I, like 97 of Aug. 1, 1871.

205. If at any time within one year after the filing or renewal of a cavent another person shall file an application for an invention which would in any manner interfere with the invention set forth in such cavent, and if the invention be found patentable, then such application will be suspended and notice thereof will be sent to the person filing the cavent. 1887—196. Rev. Stat., sec. 4902.

If the caveator shall file a complete application within the time prescribed, he will be entitled to an interference with the previous application, for the purpose of proving priority of invention, and obtaining the patent if he be adjudged the prior inventor. The caveator, if he would avail himself of his cavent, must file his application within three months from the expiration of the time regularly required for the transmission to him of the notice deposited in the post-office at Washington. The day on which the time for filing expires will be mentioned in the notice or indorsed thereon. Notice of interfering application. Application by caveator.

## HISTORY OF RULE.

196. March 9, 1887. If at any time within one year after the filing or renewal of a cavent another person shall file an application with which such cavent should in any manner interfere, and if, within the year, the application shall be found patentable, then such application will be suspended, and notice thereof will be sent to the person filing the cavent, who, if he shall file a complete application within the prescribed time, will be entitled to an interference with the previous application, for the purpose of proving priority of invention, and obtaining the patent, if he be adjudged the prior inventor. The caveator, if he would avail himself of his cavent, must file his application within three months from the expiration of the time regularly required for the transmission to him of the notice deposited in the post-office at Washington; and the day when the time for filing expires will be mentioned in the notice or indorsed thereon.

196 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, XII, like 196 of March 9, 1887.

92 of Aug., 1878. Any citizen of the United States, or alien who has resided for one year last past in the United States and has made oath to become a citizen thereof, can file a cavent in the secret archives of the Patent Office on the payment of a fee of ten dollars therefor. And if at any time within one year thereafter, another person applies for a patent with which such cavent would in any manner interfere, such application will be suspended, etc., (as in 196 of March 9, 1887,) * * * must file his application within three months from the day on which the notice to him is deposited in the post-office at Washington, adding the regular time for the transmission of the same to him; and the day when the time for filing expires, will be mentioned in the notice or indorsed thereon.

92 of X, IX, VIII, VII, VI, V, IV, III, II, like 92 of Aug., 1878.

92. July 15, 1870. Any citizen, etc., (like 92 of Aug., 1878,) * * * another person applies for a patent for the same invention, the caveator will

be entitled to notice to file his application and to go into interference with the applicant for the purpose of proving priority and obtaining the patent if he succeed. He must file his application within three months, etc.

Caveat:

——Patent issued pending a caveat, caveator's right to notice.
Wheeler v. Rank, 1870, C. D. 119.
Wheeler, Jr., v. Peters, 1870, C. D. 141.
Hillebrand, 1870, C. D. 145.
Kenyon v. Wesson, 1871, C. D. 10.
Jones v. Pendleton & Boardman, 1871, C. D. 314.

——Caveator without notice of pending application, which is subsequently patented.
Hamilton v. Foster, 1869, C. D. 30.
Frevert v. Gahr, 1873, C. D. 92; 3 O. G. 660.
Ware v. Bullock, 1875, C. D. 11; 7 O. G. 39.

——Right of caveator to notice.
Tingley v. Carpenter, 1871, C. D. 237.
Ward, *ex parte*, 1889, C. D. 104; 46 O. G. 1513.

——Presumption of simultaneous filing of application and caveat. Notice to latter.
Essex, *ex parte*, 1876, C. D. 58; 9 O. G. 497.

——Signature of caveat by one of two or more joint inventors.
Gray, G. A., *ex parte*, 1877, C. D. 44; 12 O. G. 396.

——Expiration of caveat pending a rejected application which is subsequently allowed; right to notice.
Kenney, *in re.*, 1869, C. D. 97.

——Caveator not entitled to notice of reissue, with the original of which he was pending.
Hildebrand, *in re.*, 1870, C. D. 145.

1887—197. No notice of application pending or filed after expiration of one year.

206. The caveator will not be entitled to notice of any application pending at the time of filing his caveat, nor of any application filed after the expiration of one year from the date of the filing or renewal thereof.

## HISTORY OF RULE.

197 of March 9, 1887. The caveator will not be entitled to notice of any application pending at the time of filing his caveat, nor of any application filed after the expiration of one year from the date of the filing or renewal thereof. The caveat may be renewed by the payment of a second caveat fee of ten dollars, and it will continue in force for one year from the date of the payment of such second fee. Subsequent renewals may be made with like effect.

197 of XXI, XX, XIX, XVIII, XVII, XVI, XV, XIV, XIII, like 197 of March 9, 1887.

197. Dec. 1, 1879. The caveator will not be entitled, etc., (as in 197 of March 9, 1887,) * * * from the date of payment of such second fee, and so on from year to year for not more than two years.

93. Aug., 1878. The caveator will not be entitled to notice of any application pending at the time of filing his caveat; nor of any application filed after the expiration of one year from the date of filing the caveat; but he may renew his caveat at the end of one year by paying a second caveat fee of ten dollars, which will continue it in force for one year longer, and so on from year to year as long as he may desire.

93 of X, IX, VIII, VII, VI, V, IV, III, II, I, like 93 of Aug., 1878.

207. A caveat confers no rights and affords no protection except as to notice of an interfering application filed during its life, giving the caveator the opportunity of proving priority of invention if he so desires. It may be used as evidence in contents, as provided in Rule 154 (6). 1887—198. Effect of caveat.

## HISTORY OF RULE.

198 of XXII, XXI, XX, XIX, XVIII, XVII, XVI. XV, XIV, XIII, XII, like 207 of April 18, 1888.

Edition of August, 1878, and prior editions, contain no such provision.

——Caveat as evidence of a date of record.
Booth v. Lyman, 1880, C. D. 151; 18 O. G. 132.

# SUPPLEMENT

OF

# ADDITIONAL CASES

FROM

## 1869 TO JANUARY 1, 1891.

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### CLASSIFIED UNDER THE RULES OF APRIL 18, 1888.

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**Rule 93 of 1888.**

**An interference is properly declared:**

——Between a broad claim to "glycerine in composition roofing" and a composition consisting of a specific combination of elements of which glycerine was one.
Boon v, Hinman, 1870, C. D. 7.

——Where the inventions, specifications and claims were substantially identical.
Duthie v. Casilear, 1872, C. D. 50; 1 O. G. 255.

——Between a process and apparatus of one contestant and process and apparatus of the other.
Ransome, *et al.*, v, Norris, Jr., 1872, C. D. 209; 2 O. G. 295.

——Where, though a patentable difference existed, the claim of one party was limited to elements covered by all.
Hovey v. Hufeland, 1872, C. D. 229; 2 O. G. 493.

——Between a reissue application of a sole inventor and his prior joint rejected application, when.
Whelpton, 1873, C. D. 21; 3 O. G. 440.

——Where the action of the Primary Examiner in declaring it is unexcepted to in any regular way by either party.
Davis v. Scharffe, 1878, C. D. 63; 14 O. G. 354.

——Between a combination claim and an equivalent subordinate combination in another party's claim.
Tucker v. Kahler, 1879, C. D. 71; 15 O. G. 966.

——Between a generic claim to the subject matter of one contestant and a generic and specific claim of the other.
Slade v. Blair, 1880, C. D. 25; 17 O. G. 261.

——Between a generic and a specific claim, when the latter is an improvement upon or a special application of the broad invention.
Drawbaugh v. Blake, 1883, C. D. 17; 23 O. G. 1221.

——Where the issue was "The incandescent conductor for an electric lamp formed of carbonize paper" specifically shown by one, and by the other party in connection with carbons formed of other substances.
Sawyer & Man v. Edison, 1883, O. G. 80; 25 O. G 597.

No interference will be declared:

——Where the devices are improvements on an original but not on each other, and different from each other.
Barton v. Babcock, *et al.*, 1869, C. D. 67.

——By Primary Examiner, after appeal taken and decision rendered.
Duthie, *in re.*, 1871, C. D. 85.

——Where one contestant fails to claim the issue which he has expressly disclaimed in a prior patent.
Hermance v. Bussey, 1871, C. D. 216.

——Where the case is amended by filing an entirely new specification, embracing the claim in issue, and unaccompanied by the supplemental oath.
Hollingsworth & Burleigh, Jr., 1873, C. D. 86; 3 O. G. 583.

——Where there is unreasonable delay in amending an application having a specific claim in order to conflict with an allowed application having a generic claim.
Lombard, *et al.*, *ex parte*, 1888, C. D. 56; 43 O. G. 1347.

——Between B & A, where B has submitted to rejection on A's patent, but is successful in interference with later applicants.
McDonough v. Gray *et al.*, 1889, C. D. 9; 46 O. G. 1245.

——Between process and apparatus.
Atwood, *ex parte*, 1888, C. D. 74; 44 O. G. 341.

——Process and apparatus held different inventions, but the question none the less disregarded.
Ecaubert v. Hoffman, 1890, C D. —; 52 O. G. 2107.

——Between an applicant and a patentee, where the former is not entitled the letters patent as between himself and the public.
Meucci, *ex parte*, 1890, C. D. —; 51 O. G. 299,

——With a reissue application on claims rejected in the original application where the rejection has been acquiesced in, in order to obtain the original patent.
Hoeveler & McTighe v. Verner, v. Nicholson, Jr., July 14, 1890, Mitchell, MS., 2 G. 51.

**The issue in interference cases is not:**

——A question of sole or joint invention.
Crane & Rogers, 1871, C. D. 230, authorities.
Barnes v. Clinton, 1876, C. D. 145; 9 O. G. 1158.
Barsaloux, 1876, C. D. 109; 9 O. G. 883.
Waters *et al.*, v. Yost & Wallace, 1875, C. D. 59; 8 O. G. 517.

——As to the form of contestant's claim.
Knight v. Annan, 1871, C. D. 34.

——Where the question of novelty was not directly at issue it was not considered.
Spencer & Saylor v. Traffo d, 1871, C. D. 119.

——Patentability on an appeal to the Board of Examiner on the question of priority.
Morse v. Clark, 1872, C. D. 58; 1 O. G. 275.

**Relation of the conflicting inventions:**

——Species with genus.
Shepard v. Man, March 1, 1890, MS., 2 G. 18.
Edison v. Hysinger, April 17, 1890, MS., 2 G. 97.
Crane v. Meriam, 1890, C. D. —; 51 O. G. 1782.
Hotchkiss v. Smith & Post, June 25, 1890, MS., 2 G. 42.
Sprague v. Van Depoel v. Hunter v. Knight, July 24, 1890, MS., 2 G. 50.
Bretney & Curtis v. Kutsche, Dec. 1, 1890, MS., 2 G. 91.

¶ 1.

Rule 94 of 1888.

——What constitutes a "pending application" for the purpose of declaring an interference.
Leavitt, 1873, C. D. 27; 3 O. G. 212.
Schurz, Sec., 1879, C. D. 346; 16 O. G. 955.

——Between the application of joint inventors and the sole application of one of them. Authorities.
Shaw v. Keith, Shaw & Videto, 1876, C. D. 69; 9 O. G. 641.

¶ 2.

——A patent granted more than two years prior to a conflicting application not fatal to the latter.
Page v. Bowers, 1872, C. D. 110; 1 O. G. 521.

——Between the prior patent of two joint inventors and the subsequent sole application of one of them for the same invention.
De Lill v. Avery & De Lill, 1870, C. D. 128.
Chase and White v. Chase, 1873, C. D. 99; 4 O. G. 4.
Barsaloux, 1876, C. D. 109; 9 O. G. 883.
Walton v. Dennis, 1879, C. D. 265; 16 O. G. 959.
Warnant v. Warnant, 1880, C. D. 36; 17 O. G. 265.
Lovrien v. Banister, 1880, C. D. 152; 18 O. G. 299.

——Between a patent prematurely or inadvertently issued to one applicant and an application pending at the same time.
Duthie v. Casilear, 1872, C. D. 50; 1 O. G. 255.

Goodman v. Schribner, 1872, C. D. 254; 2 O. G. 673.
Perley and Orr v. Pallett, 1874, C. D. 26; 5 O. G. 457.
Gordon v. Withington, 1876, C. D. 110; 9 O. G. 1009.
Jones v. Greenleaf, 1879, C. D. 23; 15 O. G. 560.
Hunter v. Miller, 1890, C. D. —; 50 O. G. 1753.
De Ferranti v. Westinghouse, 1890, C. D. —; 52 O. G. 457.

——No declaration of an interference between A's patent and B's application, where B has submitted to rejection on A's patent, but is successful in interference with later applicants.
McDonough v. Gray, *et al.*, 1889, C. D. 9; 46 O. G. 1215.

——Between a patent and a pending application amended to interfere after the issue of the patent.
Edison v. Foote & Randall, 1871, C. D. 80.

——Between an original application and a prior reissued patent.
Marsh v. Dodge, 1872, C. D. 245; 2 O. G. 643.
Lacroix and Welch, 1873, C. D. 155; 4 O. G. 526.
Berry v. Stockwell, 1876, C. D. 47; 9 O. G. 401.
Smith v. Winchell, 1878, C. D. 75; 13 O. G. 1127.
Connor v. Williams, 1878, C. D. 137; 15 O. G. 387.
McKenna v. Redden, 1879, C. D. 173; 16 O. G. 458.
Etches v. Prescott, 1880, C. D. 40; 17 O. G. 267.

——Between an original application and a subsequently reissued patent.
Hazelip v. Richardson, 1876, C. D. 237; 10 O. G. 747.
McTammany v. Needham, 1880, C. D. 208; 18 O. G. 1050.

¶ 3.

——Between an original application and a reissue application of a patent granted during the pendency of the original application.
Welpton, 1873, C. D. 21; 3 O. G. 440.

——Between an original joint application, and a subsequent sole reissue application for the same invention of one of the joint applicants.
Welpton, 1873, C. D. 21; 3 O. G. 440.

——Between an original application and a reissue application of a prior patent.
Wright, 1870, C. D. 60.
Case v. Hastings, 1875, C. D. 37; 7 O. G. 557.
Stone v. Greaves, 1880, C. D. 23; 17 O. G. 260.
Same v. Same, 1880, C. D. 70; 17 O. G. 397.

——Suggested that a prior patentee, who was a foreigner, file a reissue with affidavit to determine priority between him and a pending application anticipated by his patent.
Nagel, *ex parte*, 1880, C. D. 17; 17 O. G. 198.

¶ 6.

——Between reissue applications of patents whose original applications were not pending at the same time.
McDougal v. Eames and Seely, 1872, C. D. 158; 2 O. G. 87.
Evans, Bussell, Vose, 1873, C. D. 36; 3 O. G. 180.

Roe, 1874, C. D. 30; 5 O. G. 397.
Paris v. Bussey, 1875, C. D. 145; 8 O. G. 859.
Sargent v. Burge, 1876, C. D. 175; 10 O. G. 285.
Same v. Same, 1877, C. D. 62; 11 O. G. 1050.
Daniels v. Chesterman, 1878, C. D. 26; 13 O. G. 4.
Davis v. Scharffe, 1878, C. D. 63; 14 O. G. 354.
Wild v. Smith, 1879, C. D. 23; 15 O. G. 560. Reissue of a reissue.
Brown v. La Dow, 1880, C. D. 199; 18 O. G. 1049.

¶ 7.

——Between a reissue application and an unexpired patent where the original applications were pending at the same time.
Pattee, 1872, C. D. 255; 2 O. G. 618.
Pattee v. Russell, 1873, C. D. 29; 3 O. G. 181.

¶ 8.

——Between the reissue application of a prior patent and a subsequent patent.
Neal & Adams v. Daniels, 1871, C. D. 156.
Eames & Seeley v. McDougall, 1871, C. D. 206.
Carr, 1874, C. D. 11; 5 O. G. 30.
Pearl v. Sawyer, 1874, C. D. 58; 5 O. G. 695.
Becker v. Throop, 1875, C. D. 87; 8 O. G. 1.
Stockwell v. Harris, 1877, C. D. 82; 12 O. G. 137.

——Between a prior reissued patent and a reissue application of a later patent.
Pugh v. Hauson, 1870, C. D. 153.
Pugh v. Hamilton, 1871, C. D. 116.
Crane v. Rogers, 1871, C. D. 230.
Morrill & Morrill v. Glidden, 1876, C. D. 243; 10 O. G. 863.
Same v. Same, 1877, C. D. 11; 11 O. G. 196.
Funck v. Doty, 1878, C. D. 18; 13 O. G. 322.
Same v. Same, 1878, C. D. 77; 14 O. G. 157.

——Between a prior unexpired patent and a reissue application of a later unexpired patent.
Doty v. Osborne & Ballard, 1869, C. D. 77.
Jenkins & Norton v. Putnam, 1870, C. D. 156.
Mayall v. Murphy & Schenck, 1874, C. D. 17; 5 O. G. 339.
Moore, 1875, C. D. 50.
Carroll v. Morse, 1876, C. D. 64; 9 O. G. 453.
Miller v. Miles, 1877, C. D. 15; 11 O. G. 197.
Redmond v. Parham, 1879, C. D. 166; 16 O. G. 359.
Greenough v. Drummond, 1879, C. D. 213; 16 O. G. 586.

——Between a reissue application and a patent.
Lynch & Raff v. Dryden, 1873, C. D. 73; 3 O. G. 407.
Chapman *et al.* v. Morrison, 1875, C. D. 147; 8 O. G. 1031.
Thomas v. Gutmann, 1879, C. D. 248; 16 O. G. 857.
Booth v. Lyman, 1880, C. D. 62; 17 O. G. 393.

Rule 95 of 1888.

——Reference from Primary Examiner for instructions as to definition and limitation of a functional claim.
Anders v. Gilliland, 1881, C. D. 1; 19 O. G. 177.

Rule 98 of 1888.

——Return to Primary Examiner of a preliminary declaration in which subject-matter was not briefly and concisely defined, approved.
Stephen v. Bailey, 1878, C. D. 7; 13 O. G. 45.

Rule 101 of 1888.

**The Examiner of Interferences:**

——He has no jurisdiction of matters, and can give no final judgment except upon questions of priority of invention, and such preliminary and interlocutory questions as may be necessary in determining the same.
Crane v. Rogers, 1871, C. D. 230.

——It is wholly within the discretion of the Commissioner whether all questions arising out of interference cases shall be determined in the first instance by the Examiner of Interferences or by some other primary Examiner.
Weitling, Sauerbier and Cross v. Cabel, 1872, C. D. 185; 2 O. G. 223.

——His jurisdiction in the first instance over question of public use or sale on affidavits filed by opposing parties.
Helfner-Altenock, *ex parte*, 1883, C. D. 33; 23 O. G. 2233.
Affirmed, *Ibid*, 1883, C. D. 114, 23; O. G. 2233, Teller, Sec.

——His authority to suspend a motion in order to allow of the proper execution of an affidavit and of its filing *nunc pro tunc*.
Green v. Hall, v. Siemens v. Field, 1886, C. D. 43; 37 O. G. 1475.

——Jurisdiction of Examiner of Interferences upon a motion for dissolution for no interference in fact sustained to the exclusion of the Primary Examiner.
Lynch v. Dryden, 1873, C. D. 73; 3 O. G. 407.

——A motion to dissolve based upon identity of subject-matter with another and prior interference between the same parties, and on which a decision was pending, is for the determination of the Examiner of Interferences.
Edison & Gilliland v. Phelps, 1887, C. D. 11; 38 O. G. 539.

——Expiration of limit of appeal, effect on jurisdiction. How restored.
Garrison v. Hubner, July 19, 1890, MS., 2 G. 51.
Holton & Malsch v. Merrow, Dec. 26, 1889, MS., 1 G. 91.

——Jurisdiction, where motion to reopen is filed on last day of limit of appeal.
Shinn v. McElroy, Feb. 21, 1890, MS.,—Mitchell.

——Removal of case from jurisdiction of Examiner of Interferences.
Hedges v. Daniels, 1880, C. D. 90; 17 O. G. 152.

Primary Examiner:

——He has no authority to dissolve an interference; he must act through the Examiner of Interferences.
Traut v. Disston, 1870, C. D. 99.

——After appeal taken and decision rendered by Board of Examiners-in-Chief, he has no longer jurisdiction to declare an interference.
Duthie, *in re.*, 1871, C. D. 85.

——When a case is remanded to him on motion to suspend or dissolve, or by direction of the Commissioner, the applications become *ex parte*, and the original jurisdiction with respect to the question submitted again attaches.
Faure v. Bradley & Crocker v. Cowles & Cowles, 1887, C. D. 33; 40 O. G. 243.

——His jurisdiction, when on motion to dissolve, an *ex parte* question is raised.
Hazelip v. Richardson, 1876, C. D. 237; 10 O. G. 747.
Keller & Olmesdahl v. Felder, 1876, C. D. 246; 10 O. G. 944.

——After dissolution granted his opinion as to the merits of one party's application cannot be interfered with by the other party.
Crane v. Rogers, 1871, C. D. 230.

——His jurisdiction on motion for dissolution in view of no interference in fact not exclusive.
Lynch v. Dryden, 1873, C. D. 73; 3 O. G. 407.

——Conclusiveness of his decision declaring an interference when unexcepted to.
Davis v. Scharffe, 1878, C. D. 63; 14 O. G. 354.

Rule 102 of 1888.

——Notice of requirement of a preliminary statement sent to contestant's attorney *held* a constructive notice to him.
Jones v. Greenleaf, *et al.*, 1879, C. D. 23; 15 O. G. 560.

Rule 103 of 1888.

——Waiver of want of official notice of declaration of interference.
Aldrich & Spaulding v. Bingham, 1871, C. D. 90.

——Notice to attorney is constructive notice.
Jones v. Greenleaf, *et al.*, 1879, C. D. 23; 15 O. G. 560.

Rule 106 of 1888.

——Purpose of the rule stated, and nature of the division allowed.
Wheeler, *ex parte*, 1883, C. D. 12; 23 O. G. 1031.

——Division under this rule the proper remedy as to matter not involved in interference.
Fiske, *ex parte*, Oct. 3, 1890, Mitchell, MS., 2 G. 75.

Rule 110 of 1888, ¶ 1.

**Preliminary statement:**

——Allegation of date of conception *held* too indefinite.
Gordon v. Withington, 1876, C. D. 110; 9 O. G. 1009.

¶ 4.

**"Parties will be strictly held in their proofs to the date set up."**

——The testimony must conform to the preliminary statement.
Vinton v. Pierce, 1873, C. D. 89; 3 O. G. 629.
Hunt v. King, 1880, C. D. 22; 17 O. G. 200.
Young v. Rogers, 1880, C. D. 178; 18 O. G. 733.

——Proof showing date of invention later than date set up in preliminary statement open to suspicion.
Walpuski v. Jacobsen, 1876, C. D. 144; 9 O. G. 964.

Rule 113 of 1888.

**Amendments to preliminary statements are not permitted:**

——After testimony taken, in the absence of diligence.
Allen & Moody v. Gilman, 1872, C. D. 204; 2 O. G. 293.
Smith & Thomas v. Cowles, 1885, C. D. 12; 30 O. G. 343.

——If there has been unusual and unnecessary delay prejudicial to the other side.
Buckingham v. Jones, 34, MS., 178, Hall, cited in.
Donnelan v. Berry, 1887, C. D. 140; 41 O. G. 1499.

**Amendments to preliminary statement permitted:**

——Where the motion to amend was made on notice prior to taking of testimony, and was based on mistaken advice of attorney.
Robinson v. Seymour, 1885, C. D. 98; 33 O. G. 113.

——The right to amend is a paramount right, and should not be denied except in case of unusual and unnecessary delay prejudicial to the other side.
Buckingham v. Jones, 34 MS., 178, Hall, cited in.
Donnelan v. Berry, 1887, C. D. 140; 41 O. G. 1499.

——Subsequent to a judgment on the record, under peculiar circumstances.
Zweibuch v. Stockheim, 1890, C. D. —; 53 O. G. 755.
——Where error was due to junior party's imperfect knowledge of English.
Schmiedl v. Walden, Dec. 23, 1890, Fisher, Asst. Com., MS., 2 G. 91.

Rule 114 of 1888.

**Judgment on the record:**

——The mere allegation of a caveat establishing prior date of record *held* not to entitle to a judgment on the record, in the absence of a connecting link between it and the application.
Booth v. Lyman, 1880, C. D. 151; 18 O. G. 132.

——Motion for judgment on the record allowed, where the divisional application was successfully connected with its prior original application, the date of which was not overcome.
Huntley v. Smith, 1880, C. D. 182; 18 O. G. 795.

——Where junior applicant relied wholly on proving that the senior party's application was not a complete reduction to practice, and had made no allegations of priority in his (the junior party) preliminary statement, a judgment on the record allowed.
Starr & Peyton v. Farmer, 1883, C. D. 34; 23 O. G. 2335.
Affirmed. *Ibid.*, 1883, C. D. 116; 23 O. G. 2327, Teller, Sec.

——The practice is to render judgment upon opening of preliminary statement without order to show cause, the contrary practice in Booth v. Lyman, 1880, C. D. 62; 17 O. G. 393, notwithstanding.
Kendall v. Frasch, 1890, C. D. —; 50 O. G. 1132.
Limit of appeal, effect on jurisdiction of examiner, see notes under Rule 101.

**Proceedings subsequent to expiration of limit of appeal:**

——How cured.
Parry & Parry v. Black, June 17, 1890, Fisher, Asst. Com., MS., 2 G. 43.
Garrison v. Hubner, July 19, 1890, Mitchell, MS., 2 G. 51.

Rule 115 of 1888.

——In the absence of testimony the date of application held the date of invention.
Lay v. Ballard, 1873, C. D. 94; 3 O. G. 687.

Rule 115 of 1888.

——In the absence of testimony the date of application held the date of invention.
Lay v. Ballard, 1873, C. D. 94; 3 O. G. 687.
Busha v. Phelps & Edmunds, 1876, C. D. 119; 9 O. G. 1010.
Dod v. Cobb, 1876, C. D. 232; 10 O. G. 826.
Locke v. Levalley, 1881, C. D. 26; 20 O. G. 671.

Rule 116 of 1888.

**Burden of proof:**

——As between a senior and junior applicant, the burden of proof is on the junior applicant.
Ecaubert v. Hofmann, 1890, C. D. —; 52 O. G. 2 07.

——As between a pending application and a patent inadvertently granted during its pendency, the burden of proof is on the junior applicant. Rule applied.
De Ferranti v. Westinghouse, 1890, C. D. —; 52 O. G. 457.

——As between the application of joint inventors and the subsequent sole application of one of them for the same invention, the burden of proof is on the latter.
Shaw v. Keith, Shaw & Videto, 1876, C. D. 69; 9 O. G. 641.

——As between the prior patent of two joint inventors and the subsequent sole application of one of them for the same invention, the burden of proof is on the latter.
Lovrien v. Banister, 1880, C. D. 152; 18 O. G. 299.

——A prior abandoned application cannot determine date of application to fix burden of proof and order of taking testimony.
Henderson v. Reese, 1883, C. D. 67; 25 O. G. 191.

——As between a prior patentee and an applicant, the forfeited application of the latter filed prior to the patent *held* to determine the burden of proof and order of taking testimony.
Thomson v. Waterhouse, 1885, C. D. —; 30 O. G. 177.

——A prior divisional application can determine the burden of proof and order of taking testimony.
Henderson v. Reese, 1883, C. D. 67; 25 O. G. 191.
Forbes v. Thomson, 1890, C. D. —; 53 O. G. 2042.

Rule 118 of 1888.

——A party employing inexperienced counsel not allowed to retake his testimony on that ground.
Ricker v. Merrill, July 24, 1890, Fisher Asst. Com. MS., 2 G. 51.

Rule 119 of 1888.

——Stipulation indefinitely extending of time for taking testimony condemned. Motion for order against junior party prior to expiration of time limited, and without the notice stipulated for, refused. Proper practice as to fixing time.
Baglin v. Doubleday, 1890, C. D —; 53 O. G. 1883.

Rule 121 of 1888.

**Extension of time for taking testimony refused:**

——Where it was based on the refusal of the office to furnish information as to adversary, prior to the filing of the preliminary statement.
Spalding & Aldrich v. Winchester, 1871, C. D. 94.

——On an affidavit with insufficient showing, but a time limited for renewal of motion with additional affidavits.
Appleby v. Morgan. 1879, C. D. 116; 15 O. G. 96.

—— For the taking of *ex parte* rebutting testimony as to public use, where the motion was made after a final favorable award and before the expiration of the limit of appeal.
Stearns v. Presscott, 1878, C. D. 24; 13 O. G. 121.

——Where with due notice as to time set, there was a delay of nearly two months after the expiration of the time, and the cause shown for the delay, *i e*, poverty and bad weather, were insufficient.
Hayes v. Sagendorph v. Hawes, Oct. 16, 1890, Fisher Asst. Com. MS., 2 G. 75.

——Where after the decision of the Examiners-in-Chief surprise was alleged as to the construction of the issue, and it appeared that such construction was based on the file wrapper and contents of both parties, and in the absence of reasonable diligence.
Adams v. Kinzer, Nov. 17, 1890, Mitchell. MS., 2 G. 83.

Rule 122 of 1888.

**Motion to dissolve based on want of patentability allowed:**

——Where one of the conflicting claims was not for a legitimate combination.
Pearl v. Sawyer, 1874, C. D. 58; 5 O. G. 695.

——Where interfering subject-matter was for a mere duplication.
Chambers & Mendham v. Tucker, 1877, C. D. 32; 11 O. G. 1009.

——Where the issue was not patentable.
Strong *et al* v. Cruikshank. 1877, C. D. 87; 12 O. G. 138.

——Where the combination was not patentable.
Funck v. Doty, 1878, C. D. 18; 13 O. G. 233.

——Where the combination was wanting in patentability.
Huttner v. Knox, 1878, C. D. 81; 14 O. G. 118.

——Where the combination was for an analogous use.
Waring v. Wilkerson, 1878, C. D. 120; 15 O. G. 246.

——Where the subject matter was wanting in invention.
Stone v. Greaves, 1880, C. D. 70; 17 O. G. 397.

——Where the process was a mere aggregation.
Rice v. Burt, 1880, C. D. 190; 17 O. G. 799.

**Refused:**

——Where the allegation was inconsistent with the mover's preliminary statement, and he was himself owner of the prior anticipating patent.
Disston & Morss v. Traut, 1872, C. D. 64; 1 O. G. 305.

——Where based on *ex parte* affidavits.
Hazelip v. Richardson, 1876, C. D. 237; 10 O. G. 747.

——Where the combination was legitimate and novel.
Scott v. Ford *et al* 1878, C. D. 106; 14 O. G. 413.
Hoe v. Scott, 1878, C. D. 108; 14 O. G. 447.
Waring v. Wilkerson, 1878, C. D. 120; 15 O. G. 246.
Glidden v. Copeland, 1879, C. D. 58; 15 O. G. 920.

——Because the issue was patentable.
Engleman v. Vester. 1879, C. D. 111; 16 O. G. 96.

**Mention to dissolve based on want of novelty allowed.**

Waring v. Wilkerson, 1878, C. D. 120; 15 O. G. 246.
Wild v. Smith, 1879, C. D. 17; 15 O. G. 513.
Slade v. Blair, 1880, C. D. 25; 17 O. G. 261.

——In an interference between design patents, where neither was novel.
Bennage v. Phillippi, 1876, C. D. 135; 9 O. G. 1159.

**Refused:**

——When moved for (on final hearing?) *held* that the question of priority alone was open, but successful party remanded to primary examiner to consider the novelty.
Yost v. Heston, 1871, C. D. 226.

——Where application oath of contestant referred to the earliest prior foreign anticipating patent as "a communication from abroad of the same invention" showing him to be its inventor.
Von Alteneck v. Thomson, 1880, C. D. 109; 17 O. G. 571.

**Motion to dissolve based on irregularity granted:**

——Where there were two divisional re-issue applications, and one of which a patent was granted, while the other was in interference.
Doty v. Osborne & Ballard, 1869, C. D. 77.

——Where a second interference was declared between A and B on the divisional re-issue of the patent awarded A in the first interference, and B's subsequent application without special authority.
Marsh v. Dodge, 1872, C. D. 245; 2 O. G. 643.

**Refused:**

——Where case was amended by filing of entirely new specification unaccompanied by supplemental oath, which was filed but a year later.
Hollingsworth & Burleigh Jr., 1873, C. D. 86; 3 O. G. 583.

**Motion to dissolve based no interference in fact:**

**Identity:**

——Granted where it appeared that the alleged interfering compositions were different.
Jackson v. Nichols, 1871, C. D. 278.

——Granted where the inventions were different.
Pearl v. Sawyer, 1874, C. D. 58; O. G. 695.

——Denied where the difference was one of mechanical equivalents only.
Keller & Olmsdahl v. Felder, 1876, C. D. 246; 10 O. G. 944.

——Granted where the combination claims were not identical.
Glidden v. Copeland, 1879, C. D. 58; 15 O. G. 920.

——Refused where the combination claims set forth different features and different combinations, but were all related to the accomplishment of the same result.
Hoe v. Scott, 1878, C. D. 108; 14 O. G. 447.

**Non-interference:**

——Refused, and interference assumed to exist, though claim when properly restricted did not conflict.
Sargent v. Burge, 1877, C. D. 62; 11 O. G. 1050.

——Refused where one combination was to the elements broadly and the other to the specific means.
Drawbaugh v. Blake, 1883, C. D. 17; 23 O. G. 1221.

——Refused where the combination claims were substantially the same in terms.
Little v. Sargent, 1877, C. D. 88; 12 O. G. 186.

——Refused where a conflict existed in fact.
Green v. Hall *et al*, 1889, C. D. 110; 46 O. G. 1515.

——Granted where the conflicting application might have, but did not claim the issue claimed in the patent.
Nicholson v. Bennett, 1879, C. D. 218; 16 O. G. 631.

**Ambiguity :**

——Dissolution granted where a certain term in both claims was a misnomer in one of them, not having the same function.
Hermance v. Bussey, 1871, C. D. 216.

——Granted where neither of the parties were entitled to make a broad claim, the elastic and ambiguous claims limited to the differing novel device of each.
Kafer & Gould v. Dennison, 1869, C. D. 14.

——Granted where the words of the issue had not the same meaning when applied to A's device as when applied to B's.
Greenough v. Drummond, 1879, C. D. 213; 16 O. G. 586.
Nicholson v. Bennett, 1879, C. D. 218; 16 O. G. 631.

——Granted where a claim was too broad and indefinite.
Scott v. Ford, *et al*, 1878, C. D. 106; 14 O. G. 413.

——Refused where the claims interfered in fact, though not couched in the same terms.
Drawbaugh v. Blake v. Edison, 1885, C. D. 7; 30 O. G. 259.

——Granted where the claims, though broad, did not relate to the subject matter and that the interference was purely one of words. Authorities.
Arencibias v. Durkee, Dec. 6, 1890. Mitchell, MS., 2 G. 91.

**Motion to dissolve based on statutory bar :**

——Allegation of more than two years prior public use and sale made in preliminary statement.
Shenck v. Rider, 1870, C. D. 135.

——Public use and sale more than two years prior to application on motion to dissolve, when *ex parte* question.
Keller & Olmesdahl v. Felder, 1876, C. D. 246; 10 O. G. 944.

——Denied where based on *ex parte* affidavits of public use, but judicial notice of such use taken by office.
Anson v. Woodbury, 1877, C. D. 49; 12 O. G. 1.

——Granted where there had been public use for more than two years prior to filing application.
Funck v. Doty, 1878, C. D. 77; 14 O. G. 157.

**Motion to dissolve :**

——Based on estoppel as between joint inventors and a subsequent sole application of one of them for the same invention.
De Lill v. Avery & Hill, 1870, C. D. 128.
Chase & White v. Chase, 1873, C. D. 99; 4 O. G. 4.
Berlew v. Berlew *et al*, 1879, C. D. 190; 16 O. G. 457.

Kohler v. Kohler & Chambers, 1888, C. D. 19; 43 O. G. 247.

——Refused where based upon a disclaimer, which was to the specific device, while the issue was the generic claim.
Walsh v. Shinn, 1879, C. D. 279; 16 O. G. 1006.

——Granted where based on reissue claims unauthorized in view of a prior disclaimer.
Funck v. Doty, 1878, C. D. 18; 13 O. G. 322.

——Dissolved where presumption was raised by oath of junior applicant that the invention had been made abroad.
Thomas v. Reese, 1879, C. D. 335; 16 O. G. 1234.

——Granted where based on an unauthorized reissue claim to the matter in interference.
Stockwell v. Haines, 1877, C. D. 82; 12 O. G. 137.

——Refused where incorrectly based on identity of subject-matter with that of prior interference between same parties. *Ibid.*

——An interference between a prior abandoned application and a subsequent patent, dissolved.
Davis v. Hartman, 1876, C. D. 43; 9 O. G. 351.

——Denied where incorrectly based upon the improper joinder of parties.
Green v. Hall v. Siemens *et al*, 1889, C. D. 110; 46 O. G. 1515.

**Irregularity :**

——Blank applications signed and sworn to, cured by subsequent filing of papers regularly executed, can not be availed of as an irregularity.
De la Mar v. Surens & Behrens, 1869, C. D. 94.

——A motion to dissolve based upon identity of subject-matter with another and prior interference between the same parties on which a decision was pending is not an irregularity transmissible to the primary examiner.
Edison & Gilliland v. Phelps, 1887, C. D. 11; 38 O. G. 539.

**Interrelation of joint inventors :**

——Joint inventors *held* not joint inventors; interference dissolved.
Crane v. Rogers, 1871, C. D. 230.
Waters *et al* v. Yost *et al*, 1875, C. D. 59; 8 O. G. 517.

——Dissolution refused :
Carter & Dwyer v. Perry & Dickey, 1875, C. D. 111; 8 O. G. 518.

**Dissolution in general:**

——Primary examiner has no authority to dissolve. his course is to act through the Examiner of Interference.
Traut v. Disston, 1870, C. D. 99.

——Rule 59 of 1872 does not confine the hearing of a motion for dissolution based on no interference in fact to the primary examiner; it is heard by him only if made before the evidence is taken.
Lynch v. Dryden, 1875, C. D. 73; 3 O. G. 407.

——The omission in a reissue of a disclaimer and its effect as an estoppe is properly raised by motion to dissolve.
Daniels v. Chesterman, 1878, C. D. 26; 13 O. G. 4.

——Motion to dissolve can only be made on notice to opposing parties.
Gray v. Bell, 1878, C. D. 133; 15 O. G. 385.

——*Semble* that the question of the operativeness of a device may properly be raised by motion to dissolve.
Voelker v. Gray *et al*, 1885, C. D. 16; 30 O. G. 1091.

——A motion to dissolve for irregularity, want of patentability and novelty held properly dismissed, where made after expiration of twenty days limit. Leave granted to renew it upon proper notice.
Green v. Hall v. Siemens v. Field, 1886, C. D. 43; 37 O. G. 1475.

——Motion to dissolve made after expiration of twenty days limit. Insufficient showing of reasons for delay.
Cornwall v. O'Neil, Aug. 11, 1890, Fisher Asst. Com. MS., 2 G. 58.

——Suspension of proceedings after testimony taken to consider questions of dissolution, an improper practice. Authorities:
Schmiedl v. Walden, Dec. 23, 1890, Fisher Asst. Com. MS., 2 G. 91

Rule 123 of 1888.

——A motion to reform, as well as a motion to dissolve can only be made on notice to opposing parties.
Gray v. Bell, 1878 C. D. 133; 15 O. G. 385.

——A case, when suspended and remanded to the primary examiner, continues until such suspension and even then is not actually terminated.
*Ibid.*

——A dilatory motion made after a decision and pending an appeal to refer to primary examiner to determine novelty and to reform, refused, with leave to call it up on final hearing before Commissioner.
Adams v. Kinzer, Sept. 16, 1890, Mitchell, MS. 2 G. 66.

——The practice of splitting up separate cases, and allowing separate parties to file separate motions and present them at different times condemned.
Green v. Hall v. Siemens v. Field, 1889, C. D. 156; 47 O. G. 813.

——Motion by defeated party to be heard as to the relation of the successful party to the state of the art, made after final decision, when the case had become *ex parte*, denied.
*Ibid.*

——Motion to amend a declaration and admit new party refused, the matter being *res adjudicata*.
Lee v. Walsh, 1879, C. D. 29; 15 O. G. 563.

Rule 124 of 1888.

**An appeal lies:**

——After dissolution by the Examiner of Interferences on the ground of *res adjudicata*, from him to the Commissioner in person.
Marsh v. Dodge, 1872, C. D. 245; 2 O. G. 643.

——From the adverse decision of the primary examiner on the question of novelty, to the Board of Examiners in chief, from them to the Commissioner and from him to the Supreme Court of the District of Columbia.
Neubecker & Schafhaus, 1873, C. D. 138; 4 O. G. 319.

——After case remanded to Primary Examiner and had become *ex parte*, an appeal allowed at the request of the opposing party from him to the (acting) Commissioner.
Massey v. Sawyer, 1875, C. D. 109; 8 O. G. 657.

**No appeal lies.**

——After the expiration of the limit of appeal.
Black v. Locke & Ulrich, 1869, C. D. 13

——After dissolution by the Examiner of interference on the ground of *res adjudicata* from him to the Board of Examiners in chief.
Marsh v. Dodge, 1872, C. D. 245; 2 O. G. 643.

——From the Commissioner in person on the question of priority.
Weitling *et al* v. Cabell, 1872, C. D. 185; 2 O. G. 223.

——From the Primary Examiner's decision that applicant has the right to make the claim.
Faure v. Bradley & Crocker v. Cowles & Cowles, 1887, C. D. 33; 40 O. G. 243.

**Delay in taking appeal.**

——Where limit of appeal has expired, it may be enlarged upon motion.
Covel v. Maxim & Radley, 1869, C. D. 78.

——Where there had been delay in a case, an appeal on the question of *res adjudicata* irregularly taken to the Board of Examiners considered as an appeal regularly taken to the Commissioner, and the interlocutary proceedings dispensed with.
Marsh v. Dodge, 1872, C. D. 245; 2 O. G. 643.

——Delay of more than two years in bringing appeal, motion continued to show cause for delay.
Cruickshank v. Strong, 1880, C. D. 102; 17 O. G. 511.

——The Board of Examiners in Chief and the Commissioner have jurisdiction only of the question of priority of invention.
Crane v. Rogers, 1871, C. D. 230.

——Above rule applied.
Morse v. Clark, 1872, C. D. 58; 1 O. G. 275.

Rule 125 of 1888.

**Concession of priority.**

——*Held* that the effect of the assent of one party to the patenting of their invention by the other could not be considered, as it involved no forfeiture.
Allen & Moody v. Gilman, 1872, C. D. 204; 2 O. G. 293.

——A concession of priority which was virtually a contract *held* not conclusive on an assignee entitled to transfer of the patent after issue coupled with a power of attorney.
Hammond v. Pratt, 1879, C. D. 337; 16 O. G. 1235.

——A particular reference in a patent of the junior applicant to the patent of the senior party included in the interference *held* not a concession of priority.
Del Grande v. Mannie, July 19, 1890, Mitchell, MS. 2 G. 51.

Rule 126 of 1888.

**Suspension of interference to consider statutory bar.**

——Custom of Commissioner to hear both parties on the *ex parte* question in order to determine whether or not it should be referred to the primary examiner, stated.
Carter & Dwyer v. Perry & Dickey, 1875, C. D. 111; 8 O. G. 518.

——Case suspended and remanded.
Redmond v. Parham, 1879, C. D. 166; 16 O. G. 359.

——Suspended and remanded to consider *ex parte* affidavits of prior knowledge and use.
Hedges v. Daniels, 1880, C. D. 64; 17 O. G. 394.

——Case remanded after final award.
Yost v. Heston, 1871, C. D. 226.
Stearns v. Prescott, 1878, C. D. 24; 13 O. G. 121.

——Attention of Commissioner directed to question of novelty, without motion of either party after favorable decision of primary examiner, to whom the case had been remanded.
Lovejoy v. Hill, 1880, C. D. 59; 17 O. G. 331.

——Case suspended and remanded to determine patentability, where last action had been a rejection.
Fiske *ex parte* Oct. 3, 1890, Mitchell, MS. 2 G. 75.

——It is contrary to office practice after part of testimony taken, to suspend proceedings to consider questions relating to dissolution. Authorities.
Schmiedt v. Walden, Dec. 23, 1890, Fisher Asst. Com. MS. 2 G. 91.

——Commissioner's final judgment on priority will not be suspended to await the determination of *ex parte* questions relating to the application of the successful party and not affecting the rights of the defeated party.
Smith v. Dimond, 1881, C. D. 34; 29 O. G. 742.

Rule 127 of 1888.

**A second interference allowed.**

——Where the defeated party filed a second application, and showed cause why he should have a rehearing.
Abraham v. Fletcher, 1869 C. D. 50;

——Between the same parties, where the subject matter is different.
Stockwell v. Haines, 1877, C. D. 82; 12 O. G. 137.

**Refused.**

——Where a second interference was declared on a new application of one of the parties in view of affidavits of newly discovered evidence *held* that the decision in the first interference must be followed, so far as it depended upon the same facts as were there proven.
White v. Purdy, 1870, C. D. 115.

——A second interference is not declared for the purpose of permitting a review of the former case under cover of the introduction of new testimony.
*Ibid.*

——A second interference declared without the Commissioner's authorization between the latter application of B and the patent awarded A in the prior interference between them. Dissolve as *res adjudicata*.
Marsh v. Dodge, 1872, C. D. 245; 2 O. G. 643.

**Motion to reopen refused**

——Where based on evidence of a prior pending caveat *held* it was not newly discovered evidence.
Kenyon v. Wesson, 1871, C. D. 10.

——Where the evidence tendered only to strengthen the decision already rendered.
Bingham v. Watkins, 1870, C. D. 186.

——Where the evidence was not newly discovered and due diligence was wanting.
Merrill & Merrill v. Glidden, 1876, C. D. 243; 10 O. G. 863.
Rogers v. Bear, 1879, C. D. 253; 16 O. G. 908.

——Where based on *ex parte* proofs.
Connor v. Williams, 1878, C. D. 133; 15 O. G. 335.

——Where made in order to take additional testimony because the tribunal had misconstrued the issue. The proper remedy is by appeal.
Slade v. Blair, 1879, C. D. 39; 15 O. G. 830.

——A motion construed to be for a rehearing of a motion of dissolution in view of want of patentability coupled with a motion to reopen, and refused because the combination was patentable.
Blinn v. Gale, 1879, C. D. 228; 16 O. G. 723.

**Allowed.**

——Where it appeared that the defeated party had a prior outstanding patent showing, but not claiming the issue.
Loring v. Hall, 1879, C. D. 8; 15 O. G. 471.

——Where made in order to take further testimony to fix conclusively date of invention, though not newly discovered, and reasonable diligence wanting.
Eccard v. Drawbaugh, 1883, C. D. 50; 24 O. G. 301.

——Where there were charges of fraudulent testimony.
Creteau v. Hall, Nov. 28, 1890, Mitchell, MS. 2 G. 83.

**Motion to vacate judgment.**

——Refused, where it was the decision of the Assistant Commissioner signed afterwards as Acting Commissioner by order of a new Commissioner. *Held* that it could not be reopened except in accordance with rules governing a new trial.
Simpson v. Wright, 1878, C. D. 126; 15 O. G. 293.

——Right to make this motion waived as to certain issues, by failure of party to appeal.
Hotchkiss v. Smith & Post, Aug. 13, 1890, Fisher Asst. Com. MS. 2 G. 59.

——It is the proper practice as to claims erroniously included in the issue, after final adverse decision on priority and rejection by the Primary Examiner thereon. Booth *ex parte* (1889, C. D. 242; 49 O. G. 1841,) approved.
Ehrlich *ex parte*, Nov. 15, 1890, Mitchell, MS. 2 G. 83.

**Motion for a rehearing denied.**

——Where it was defective for want of certainty in not setting forth the ultimate facts relied upon and also the legal points.
Huttner *et al* v. Knox *et al* 1878, C. D. 126; 15 O. G. 294.

——Because waived by appeal to the Secretary prior to the motion, and because *res adjudicata* by a former Commissioner.
Gill v. Scott, 1884, C. D. 68; 29 O. G. 949.

——Where based upon foreign knowledge, and also because it was *res adjudicata* and there was no error in the prior decision.
Green v. Hall v. Siemens, 1889, C. D. 156; 47 O. G. 813.

——Where it alleged as the error of law and fact that a model was a reduction to practice. But *held* that the motion was within the Commissioner's jurisdiction.
Green v. Hall *et al*, 1889, C. D. 161; 47 O. G. 1631.

——Where the failure to introduce the testimony of which the party had prior knowledge was due to error of judgment.
Lorraine v. Thurmond, 1890, C. D. —; 52 O. G. 1949.

——Where the exhibits did not show the invention embodied in the issue.
*Ibid.*

——On a motion to strike out certain testimony as secondary evidence, which motion had been refused. But leave given to urge the matter at final hearing before the Commissioner.
Wiselogel v. Morse, Nov. 10, 1890, Mitchell. MS., 2 G. 83.

**Granted:**

——Where based upon a caveat as evidence of invention.
Elges v. Miller, 1889, C. D. 108; 46 O. G. 1514.

——The jurisdiction of the Commissioner to reconsider the decisions of his predecessor and the history of rule 144, considered, in respect to grounds other than that of fraud.
Daniels v. Morgan, 1889, C. D. 150; 47 O. G. 811.

Rule 129 of 1888.

——A motion to make a new party and to amend the declaration denied, where it was *res adjudicata* and there were no new facts.
Lee v. Walsch, 1879, C. D. 29; 15 O. G. 563.

——Party omitted by oversight may be reinstated by the office of its own motion, or upon his petition without notice to the other parties.
Freeman v. Hunter v. Zippernowsky *et al*, May 24, 1890, Fisher Asst. Com. MS.

Rule 130 of 1888.

——A motion for leave to withdraw application and substitute a new one allowed on filing assent of assignees and other parties.
Rice v. Burt, 1879, C. D. 291; 16 O. G. 1050.

Rule 153 of 1888.

Notice :

——Where on motion to stay an interference, notice had not been given to the opposite party, *held* that the motion must be dismissed under this rule. The case, however suspended on other grounds.
Fiske *ex parte*, Oct. 3, 1890, Mitchell. MS., 2 G. 75.

Rule 159 of 1888.

——Motion to strike out certain secondary evidence the admissibility of which had been affirmed on appeal, refused but leave given to urge the matter at the final hearing before the Commissioner.
Wiselogel v. Morse, Nov. 10, 1890, Mitchell. MS., 2 G. 83.

# CHRONOLOGICAL LIST

OF

# DECISIONS IN TRADE-MARK INTERFERENCE CASES

## RELATING TO PRACTICE UNDER THE PATENT OFFICE RULES.

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Armistead v. Blackwell, 1872, C. D. 128; 1 O. G. 603.

Sternberger v. Thalheimer, 1873, C. D. 24; 3 O. G. 120.

Kidd & Co. v. Mills, 1874, C. D. 28; 5 O. G. 337.

Lautz Bros. & Co. v. Shultz & Co., 1876, C. D. 90; 9 O. G. 791.

Swift v. Peters, 1877, C. D. 57; 11 O. G. 1110.

Hoosier Drill Co. v. Ingels, 1878, C. D. 115; 14 O. G. 785.

Simpson v. Wright *et al.*, 1878, C. D. 119; 15 O. G. 248.

Simpson v. Wright, 1878, C. D. 126; 15 O. G. 293.

McElwee v. Blackwell, 1878, C. D. 152; 13 O. G. 963.

Josselyn v. Swezey, 1879, C. D. 15; 15 O. G. 207.

McElwee v. Blackwell, 1879, C. D. 37; 14 O. G. 658.

Wright v. Simpson, 1879, C. D. 75; 15 O. G. 968.

Hoosier Drill Co. v. Ingels, 1879, C. D. 86; 15 O. G. 1013.

Actiengesellschaft Apollinaris Brunnen v. Saratoga Seltzer Water, 1879, C. D. 246; 16 O. G. 180.

Duke v. Green, 1879, C. D. 297; 16 O. G. 1094.

Sorg v. Welsh, 1879, C. D. 258; 16 O. G. 910.

Braun & Co. v. Blackwell, 1881, C. D. 10; 19 O. G. 481.

Jacoby v. Lopez, 1883, C. D. 7; 23 O. G. 342.

Yale Cigar Mfg. Co. v. Yale, 1885, C. D. 27; 30 O. G. 1183.

Langdon & Bacheller v. Thomson, May 31, 1890, Mitchell, MS., 2 G. 38.

Proctor & Gamble v. Columbia Mfg. Co., Oct. 10, 1890, Mitchell, MS., 2 G. 77.

Richmond v. The Dr. S. A. Richmond Nervine Co., 1890, C. D. —; 52 O. G. 307.

# ALPHABETICAL LIST

OF

# DECISIONS IN TRADE-MARK INTERFERENCE CASES

## RELATING TO PRACTICE UNDER THE PATENT OFFICE RULES.

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| Duke v. Green, | 79–297 | 16–1094 |
| Hoosier Drill Co. v. Ingels, | 78–115 | 14–785 |
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| Langdon & Bacheller v. Thomson, May 31, 1890, Mitchell, MS., 2 G. 38. | | |
| Lautz Bros. & Co. v. Shulz & Co., | 76–90 | 9–791 |
| McElwee v. Blackwell, | 78–152 | 13–963 |
| McElwee v. Blackwell, | 79–37 | 15–658 |
| Proctor & Gamble v. Columbia Mfg. Co.. 10, 1890, Mitchell, MS., 2 G. 77. | | |
| Richmond v. The Dr. S. A. Richmond Nervine Co., | 90– | 52–307 |
| Simpson v. Wright *et al.*, | 78–119 | 15–248 |
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| Sorg v. Welsh, | 79–258 | 16–910 |
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| Yale Cigar Mfg. Co. v. Yale, | 85–27 | 30–1183 |

Rule 13, edition of Nov. 1, 1886, now in force.

13. In case of conflicting applications for registration, or in any dispute as to the right to use which may arise between an applicant and a prior registrant, the office will declare an interference, in order that the parties may have opportunity to prove priority of adoption or right; and the proceedings on such interference will follow, as nearly as practicable, the practice in interferences upon applications for patents; but each applicant and registrant will be held to the date of adoption alleged in the statement filed with his application. On the petition of any party dissatisfied with the decision of the examiner of interferences the case will be reviewed by the Commissioner without fee.

12 of edition of July 1, 1881, like 13 of Nov. 1, 1886.

This rule is based upon the final paragraph of Section 3 of the Act of March 3, 1881, as follows: "In an application for registration the Commissioner of Patents shall decide the presumptive lawfulness of claim to the alleged trade mark; and in any dispute between an applicant and a previous registrant, or between applicants, he shall follow, so far as the same may be applicable, the practice of courts of equity of the United States in analogous cases."

The Act previous to this, that of July 8, 1870, Sections 77 to 84 (R. S., §§ 4937–4947), as well as that of Aug. 14, 1876, punishing the counterfeiting of trade marks, was declared unconstitutional in United States v. Steffens (Trade Mark Cases), 100 U. S. (10 Otto), 82. For the Act of Aug. 14, 1876; see also United States v. Koch, 49 O. G. 891.

——Evidence of admissions as to previous use by an applicant.
Sternberger v. Thalheimer, 1873, C. D. 24; 3 O. G. 120.

——Interference in trade mark cases can properly be declared. Practice as in interference cases between applications for patents.
Lautz Bros. & Co. v. Shulz & Co., 1876, C. D. 90; 9 O. G. 791.

——The issue is, who was the first to put the trade mark into actual practice.
Swift v. Peters, 1877, C. D. 57; 11 O. G. 1110.

——Issues in trade mark interferences are ownership as well as priority under Rule 86, 1878, R. S., Section 4939.
Hoosier Drill Co. v. Ingels, 1878, C. D. 115; 14 O. G. 785.

——Title considered.
Simpson v. Wright, 1878, C. D. 119; 15 O. G. 248.
*Ibid*, 1879, C. D. 75; 15 O. G. 968.
Richmond v. The Dr. S. A. Richmond Nervine Co., 1890, C. D. —; 52 O. G. 307.
Proctor & Gamble v. Columbia Mfg. Co., Oct. 10, 1890, Mitchell, MS., 2 G. 77.

——R. S., § 4944, does not supersede the necessity of an interference proceeding.
Hoosier Drill Co. v. Ingels, 1878, C. D. 115; 14 O. G. 785.

——Formal award of priority, to whom and when awarded.
McElwee v. Blackwell, 1878, C. D. 152; 13 O. G. 963.
*Ibid*, 1879, C. D. 37; 15 O. G. 658.

——The jurisdiction of the Examiner of Interference in contested trade mark cases is in accordance with law.
McElwee v. Blackwell, 1878, C. D. 152; 13 O. G. 963.
Duke v. Green, 1879, C. D. 297; 16 O. G. 1094.

——Effect of a concession of priority of adoption, use and right.
Kidd & Co. v. Mills, 1874, C. D. 28; 5 O. G. 337.
Sorg v. Welsh, 1879, C. D. 258; 16 O. G. 910.

——All pending trade mark interference cases dissolved, the Secretary of the Interior having determined that they are not within the province of the Commissioner of Patents, in view of the decision in United States v. Steffens, 100 U. S., 82.
Braun & Co. v. Blackwell, 1881, C. D. 10; 19 O. G. 481.

——Trade Mark Act of 1881 elaborately discussed, and the practice thereunder.
Yale Cigar Mfg. Co. v. Yale, 1885, C. D. 27; 30 O. G. 1183.

——Registrations under the unconstitutional law of 1874 have lost their status of *prima facie* evidence.
Jacoby v. Lopez, 1883, C. D. 7; 23 O. G. 342.

——On a motion to dissolve an interference, registration and assignment under the invalid act of 1874 *held* no estoppel, and that Rule 13 must be applied.
Langdon & Batcheller v. Thomson, May 31, 1890, Mitchell, MS., 2 G. 38.

——Interference dissolved and registration refused, where neither party is entitled to registration.
Armistead v. Blackwell, 1872, C. D. 128; 3 O. G. 603.

——Motion to set aside decision of Acting Commissioner granting a rehearing, refused.
Simpson v. Wright, 1878, C. D. 126; 15 O. G. 293.

——Motion to reopen in view of newly discovered evrdence, denied.
Josselyn v. Swezey, 1879, C. D. 15; 15 O. G. 207.

——Unreasonable notice of taking of depositions. Discharge of attorney.
Hoosier Drill Co. v. Ingels, 1879, C. D. 86; 15 O. G. 1013.

——Admissibility under stipulation of testimony illegally taken abroad.
Actiengesellschaft Apollinaris Brunnen v. Saratoga Seltzer Water, 1879, C. D. 246; 16 O. G. 810.

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