

covery should be made at this late day, but I have no right upon this record to deny it.

After this discovery was made, it would probably occur to any one interested to apply it in the art of curing fish, and the mode of application is simply to remove the membrane. I see no reason why the person who improves the art of curing fish by removing a part of the animal not before known to be injurious, but in reality so, should not have a patent for it. It is gratifying to know that the patentee is the person who made the discovery; but, in the absence of a theft, the one who communicates the fact to the public, and shows its application, would be, I should suppose, an inventor—at least under the older decisions—and, *a fortiori*, the discoverer of the fact. If the fact itself were well known, there might be no invention. For instance, to cure hams by salting and smoking would not sustain a patent if the virtues of salt and smoke were well known, and had been applied in analogous arts. It would not be invention to salt a fish more or less thoroughly. But a patent might properly be granted for curing fish with a substance which had never before been used for any similar purpose, and which would effect the old result of curing the fish in a better or cheaper way, of which last fact the infringement would be sufficient evidence. I am unable to distinguish between adding and taking away, if the result is to improve the art.

Decree for the complainant.

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### GREEN v. GORDON and others.

(Circuit Court D. Massachusetts. January 30, 1880.)

TRUSTEES—ACTION AT LAW UPON AN AGREEMENT TO ACCOUNT.—Trustees cannot be charged in *assumpsit* or trover with the "earnings" of an estate for a specific period, under an agreement to account for the same

This was an action of contract, to which the defendants demurred.

The plaintiff was beneficial legatee of the income of the

residue of the large estate of her aunt, the late Sylvia Ann Howland, of New Bedford, after the payment of many legacies and the establishment of several smaller trusts. This residue was devised to trustees who were to pay the net income to the plaintiff during her life, and at her death to divide the principal among all the lineal descendants, then living, of Gideon Howland, the grandfather of the testatrix. The defendants are the trustees.

The settlement of the estate of the testatrix was delayed by litigation for several years; and in 1870 a compromise was agreed to by all the persons directly interested in the estate, and was confirmed by the supreme judicial court of Massachusetts, by which the amount to be paid the legatees, other than the plaintiff, was fixed, and the defendants, as trustees, were to take the assets after the payment of these legacies, and the debts and charges of administration, and divide said residual portion into two parts: first, the earnings of the estate since the death of Sylvia Ann Howland; and second, the remainder of said residue. The agreement then proceeded: "And said trustees shall, under the provisions of the trust, account for said first part to said Hetty H. Green and her legal representatives; and said second part shall constitute the principal of the trust fund, to be retained and kept by them as trustees, under the provisions of said will and codicil." By a supplemental agreement between the plaintiff and the defendants it was explained that "earnings," in the former agreement, should mean earnings less interest on the legacies.

These agreements, for a breach of which this action was brought, are printed in the report of *Manloll v. Green*, 108 Mass. 277. The plaintiff's action was for certain dividends of stock, amounting to a very considerable sum, received by the defendants from the administrators, which the plaintiff insisted should be given to her as "earnings," and which the defendants considered to belong to capital.

A bill in equity to settle this question had remained dormant for some years for want of parties. See *Gordon v. Green*, 113 Mass. 259.

The demurrer raised the question whether an action at law could be maintained upon the agreement and supplement.

*C. W. Clifford*, for plaintiff.

*T. M. Stetson*, for defendants.

LOWELL, J. This case reverses the usual relative positions of law and equity. It is brought at law because the remedy in equity has been found inconvenient.

I have no doubt that there is power somewhere to settle the plaintiff's income at some time before her death, which will at once relieve her from occasion for income, and ascertain who are the remainder-men; nor have I any belief that the supreme judicial court intended, by their intimation in *Green v. Gordon*, 113 Mass. 259, to require impossibilities.

I do not, however, understand that, by the settlement, the trustees promised to pay over the value of the earnings, so that they can be charged as *assumpsit* or trover with that value. They agreed to account as trustees; that is to say, in a court of equity, where questions of part performance, compensation to the trustees, costs, interest on what they should have paid, etc., can be determined and adjusted with a due regard to the equitable rights of all parties. Their agreement is that they will, "under the provisions of the trust, account;" and by reference to these provisions it will be found that they have a discretion as to times of payment. I do not, of course, mean to say that they could withhold it for years; but they may exercise a discretion on the subject. In short, I look upon the agreement as a sort of codicil, settling how the *corpus* of the trust should be ascertained; varying, perhaps, the rights of the parties, but not the remedy for a breach of trust, and not intended to impose a personal legal obligation to pay, instead of an equitable duty to account.

Demurrer sustained.

**HEERMAN v. BEEF SLOUGH MANUFACTURING, ETC., Co.**  
and others.

(*Circuit Court, W. D. Wisconsin. ———.*)

**NAVIGABLE STREAM—USE AS A PUBLIC HIGHWAY—OBSTRUCTIONS TO STEAMBOAT NAVIGATION.**—Where a river lies wholly within the territory of a single state, and certain piers and booms have been erected in that river by a private corporation, under the authority of the legislature of that state, such piers and booms will not be abated by a court of equity, at the instance of a private individual, as a nuisance, although they obstruct the steamboat navigation of the river, and such corporation has exceeded its powers in the erection of the same.

**SAME—INJUNCTION—ACTION AT LAW.**—In such a case, where the interests involved are very large, and the improvements complained of have been erected under color of legislative authority, and have been used in facilitating an important branch of commerce, and have been acquiesced in for a long time, a court of equity will not interfere by perpetual injunction until the right of the party complaining has been established at law, and it appears that no adequate compensation can be afforded in damages.

**SAME—CHIPPEWA RIVER—TRANSPORTATION OF LOGS.**—The use of the Chippewa river by the public as a highway for the transportation of logs and lumber is a right common to all, recognized and protected by the municipal law; and such right must continue so long as the public have any need of its exercise, unless changed or abrogated by the legislature of the state or by congress.

BUNN, J. This action is brought by the plaintiff, a resident of Minnesota, and the proprietor of certain steamboats engaged in the navigation of the Chippewa river in Wisconsin, against the defendants, two corporations existing under the laws of Wisconsin, to restrain and prohibit them from running loose logs in the Chippewa river, and to compel them to remove therefrom certain piers, booms and dams, placed therein by the defendants, to aid and facilitate the running, driving and storing of logs, on the ground that such piers, booms and dams, and the running and driving of logs in said river, constitute an obstruction to navigation, and are therefore a nuisance which ought to be abated and perpetually enjoined by the decree of this court.

The case was heard upon a general demurrer filed by the defendants to the plaintiff's bill of complaint.