

to apply for and obtain authority to borrow \$500,000 on receiver's certificates to complete the road, and further authority to purchase the claim of intervenors. After thus baffling and delaying them, it may not be inequitable to hold that the road, as a whole, should bear the burdens and losses of delay. But it is unnecessary now to determine absolutely the rights of the parties. It is enough to hold that the sale of the property as a whole should not stand, with this receiver's obligation on a part unsatisfied. The order will therefore be that the order of confirmation and the sale be set aside, and the receiver directed to take possession of the property, unless within 90 days the claim of the intervenors be paid. If it be paid, the order of confirmation will be final.

AMERICAN ZYLONITE Co. v. CELLULOID MANUF'G Co.

(Circuit Court, S. D. New York. December 14, 1887.)

1. PRACTICE IN CIVIL CASES—DISMISSAL OF CASE—EQUITY.

Prior to the term, the complainant, without application to the court, entered a rule in the common rule book discontinuing the cause on payment of costs. *Held*, that the complainant in an equity action cannot in this manner discontinue a suit. An order of the court is necessary.

2. SAME—PATENTS FOR INVENTIONS—INFRINGEMENT SUIT.

In an action for the infringement of a patent, the complainant asked to discontinue on payment of costs. Defendant objected, for the reason that the testimony relied upon to show prior invention was of such a character that defendant might not be able to procure it again. *Held* that, as a condition of the discontinuance, it should be stipulated that defendant's record may be used in any new suit brought against it by complainant.

In Equity.

Prior to the term, the complainant, without application to the court, entered a rule in the common rule book discontinuing the cause on payment of costs. The defendant, having printed its proofs, placed the cause upon the calendar, and, when it was reached on the regular call, insisted that it should be argued or dismissed upon the merits; that the complainant could not, without the consent of the defendant or the court, discontinue an action in equity; and that it was discretionary with the court to grant or refuse such permission. The court adopted the view that the cause was not discontinued, and set it down for a day certain, to be then disposed of. The complainant now moves for leave to discontinue, on payment of costs.

E. M. Felt and *H. M. Ruggles*, for complainant.

Frederic H. Betts, for defendant.

COXE, J. The *ex parte* entry in the rule-book was a nullity. A complainant in an equity action cannot in this manner discontinue the suit. An order of the court is necessary. *Conner v. Drake*, 1 Ohio St. 170. The right, however, of a complainant to dismiss a bill before hearing,

where the defendant has acquired no substantive rights, is well nigh absolute. It must be an extraordinary case where the court refuses to exercise its discretion. *Railroad Co. v. Rolling-Mill Co.*, 109 U. S. 702, 713, 3 Sup. Ct. Rep. 594; *Stevens v. Railroads*, 4 Fed. Rep. 97.

I have examined the defendant's record sufficiently to be convinced that there is nothing which particularly distinguishes this from other equity actions. It is asserted that the testimony relied upon to establish prior invention is of such a character that the defendant may be unable to procure it again, but the rights of the defendant will be protected in this regard if the complainant is compelled, as a condition of the discontinuance, to stipulate that the defendant's record may be used in any new suit which may be instituted against it by the complainant. *Brush v. Condit*, 22 Blatchf. 246, 20 Fed. Rep. 826.

Upon filing such a stipulation, and paying the costs, the action may be discontinued.

THORNBURN *v.* DOSCHER and another.

(Circuit Court, D. Oregon, November 21, 1887.)

1. EJECTMENT—PLEADING—OWNERSHIP.

In an action to recover the possession of real property, the defense of ownership by the defendant or another must be specially pleaded.

2. DOWER—WHO ENTITLED TO—RESIDENCE.

A woman who is not a resident of the state is not entitled to dower in any lands therein of which her husband did not die seized.

3. SAME—ESTIMATION OF VALUE.

In estimating the value of a widow's dower in land alienated by the husband in his life-time, she ought to have the benefit of the increase in value between the date of such alienation and the death of the husband, not arising from improvements made or placed thereon.

(Syllabus by the Court.)

Action to Recover Possession of Real Property.

John W. Whalley and James K. Kelly, for plaintiff.

Seneca Smith, for defendants.

DEADY, J. This action is brought by the plaintiff, a citizen of Arkansas, against the defendants, citizens of Oregon, to recover dower in a tract of land included in the William Blackstone donation, lying on the west bank of the Willamet river, just north of Portland, and valued at \$50,000.

It is alleged in the complaint that on December 24, 1865, and prior thereto, Thomas Thornburn was seized of an estate of inheritance in the premises, and that at and during such time the plaintiff was the lawful wife of said Thornburn, and so lived with him until his death, at Prescott, Arkansas, on October 20, 1886; that the plaintiff's right to dower in said premises has not been alienated, and that she is entitled to the undivided