enter judgments, or to issue executions or other final process.

". . . courts created by statute must look to the statute as the warrant for their authority; certainly they cannot go beyond the statute, and assert an authority with which they may not be invested by it, or which may be clearly denied to them." [11]

This court has never departed from the view that circuit courts of appeal are statutory courts having no original jurisdiction but only appellate jurisdiction.[12]

Neither this court [13] nor a circuit court [14] of appeals may hear new evidence in a cause appealable from a lower court. No suggestion seems ever before to have been made that they may constitute themselves trial courts, embark on the trial of what is essentially an independent cause and enter a judgment of first instance on the facts and the law. But this is what the opinion sanctions.

3. The temptation might be strong to break new ground in this case if Hazel were otherwise remediless. Such is

[11] *Cary* v. *Curtis*, 3 How. 236, 245. See *Sheldon* v. *Sill*, 8 How. 441, 449; *Kentucky* v. *Powers*, 201 U. S. 1, 24.

[12] *Whitney* v. *Dick*, 202 U. S. 132, 137; *United States* v. *Mayer*, *supra*, 65; *Realty Acceptance Corp.* v. *Montgomery*, *supra*, 549.

[13] *Russell* v. *Southard*, 12 How. 139, 158, 159; *United States* v. *Knight's Adm'r*, 1 Black 488; *Roemer* v. *Simon*, *supra*. In the *Russell* case Chief Justice Taney said: "It is very clear that affidavits of newly-discovered testimony cannot be received for such a purpose. This court must affirm or reverse upon the case as it appears in the record. We cannot look out of it, for testimony to influence the judgment of this court sitting, as an appellate tribunal. And, according to the practice of the court of chancery from its earliest history to the present time, no paper not before the court below can be read on the hearing of an appeal. Eden *v.* Earl Bute, 1 Bro. Par. Cas. 465; 3 Bro. Par. Cas. 546; Studwell *v.* Palmer, 5 Paige, 166.

"Indeed, if the established chancery practice had been otherwise, the act of Congress of March 3d, 1803, expressly prohibits the introduction of new evidence, in this court, on the hearing of an appeal from a circuit court, except in admiralty and prize causes."

[14] *Realty Acceptance Corp.* v. *Montgomery*, *supra*, 550, 551.



not the fact. The reports abound in decisions pointing the way to relief if, in equity, Hazel is entitled to any.

Since Lord Bacon's day a decree in equity may be reversed or revised for error of law,[15] for new matter subsequently occurring, or for after-discovered evidence. And this head of equity jurisdiction has been exercised by the federal courts from the foundation of the nation.[16] Such a bill is an original bill in the nature of a bill of review. Equity also, on original bills, exercises a like jurisdiction to prevent unconscionable retention or enforcement of a judgment at law procured by fraud, or mistake unmixed with negligence attributable to the losing party, or rendered because he was precluded from making a defense which he had. Such a bill may be filed in the federal court which rendered the judgment or in a federal court other than the court, federal or state, which rendered it.[17]

[15] A bill filed to correct error of law apparent on the record is called a strict bill of review and some rules as to time are peculiarly applicable to such bills. See *Whiting* v. *Bank of United States*, 13 Pet. 6, 13, 14, 15; *Shelton* v. *Van Kleeck*, 106 U. S. 532; *Central Trust Co.* v. *Grant Locomotive Works*, 135 U. S. 207. Street, Federal Equity Practice, § 2129 *et seq.* With this type of bill we are not here concerned.

[16] *Ocean Ins. Co.* v. *Fields*, 2 Story 59; *Whiting* v. *Bank of United States*, *supra*; *Southard* v. *Russell*, 16 How. 547; *Minnesota Co.* v. *St. Paul Co.*, 2 Wall. 609; *Purcell* v. *Miner*, 4 Wall. 519; *Rubber Co.* v. *Goodyear*, 9 Wall. 805; *Easley* v. *Kellom*, 14 Wall. 279; *Putnam* v. *Day*, 22 Wall. 60; *Buffington* v. *Harvey*, 95 U. S. 99; *Craig* v. *Smith*, 100 U. S. 226; *Shelton* v. *Van Kleeck*, *supra*; *Pacific Railroad* v. *Missouri Pacific Ry. Co.*, 111 U. S. 505; *Central Trust Co.* v. *Grant Locomotive Works*, *supra*; *Boone County* v. *Burlington & M. R. R. Co.*, 139 U. S. 684; *Hopkins* v. *Hebard*, 235 U. S. 287; *Scotten* v. *Littlefield*, 235 U. S. 407; *National Brake & Electric Co.* v. *Christensen*, 254 U. S. 425; *Simmons Co.* v. *Grier Bros. Co.*, 258 U. S. 82; *Jackson* v. *Irving Trust Co.*, 311 U. S. 494, 499.

[17] *Logan* v. *Patrick*, 5 Cr. 288; *Marine Ins. Co.* v. *Hodgson*, 7 Cr. 332; *Dunn* v. *Clarke*, 8 Pet. 1; *Truly* v. *Wanzer*, 5 How. 141; *Creath's Adm'r* v. *Sims*, 5 How. 192; *Humphreys* v. *Leggett*, 9 How. 297; *Walker* v. *Robbins*, 14 How. 584; *Hendrickson* v. *Hinckley*, 17 How.

Whether the suit concerns a decree in equity or a judgment at law, it is for relief granted by equity against an unjust and inequitable result, and is subject to all the customary doctrines governing the award of equitable relief.

New proof to justify a bill of review must be such as has come to light after judgment and such as could not have been obtained when the judgment was entered. The proffered evidence must not only have been unknown prior to judgment, but must be such as could not have been discovered by the exercise of reasonable diligence in time to permit its use in the trial. Unreasonable delay, or lack of diligence in timely searching for the evidence, is fatal to the right of a bill of review, and a party may not elect to forego inquiry and let the cause go to judgment in the hope of a favorable result and then change his position and attempt, by means of a bill of review, to get the benefit of evidence he neglected to produce. These principles are established by many of the cases cited in notes 16 and 17, and specific citation is unnecessary. The principles are well settled. And, in this class of cases as in others, although equity does not condone wrongdoing, it will not extend its aid to a wrongdoer; in

443; *Leggett* v. *Humphreys*, 21 How. 66; *Gue* v. *Tide Water Canal Co.*, 24 How. 257; *Freeman* v. *Howe*, 24 How. 450; *Kibbe* v. *Benson*, 17 Wall. 624; *Crim* v. *Handley*, 94 U. S. 652; *Brown* v. *County of Buena Vista*, 95 U. S. 157; *United States* v. *Throckmorton*, 98 U. S. 61; *Bronson* v. *Schulten*, 104 U. S. 410; *Embry* v. *Palmer*, 107 U. S. 3; *White* v. *Crow*, 110 U. S. 183; *Krippendorf* v. *Hyde*, 110 U. S. 276; *Johnson* v. *Waters*, 111 U. S. 640; *Richards* v. *Mackall*, 124 U. S. 183; *Arrowsmith* v. *Gleason*, 129 U. S. 86; *Knox County* v. *Harshman*, 133 U. S. 152; *Marshall* v. *Holmes*, 141 U. S. 589; *North Chicago Rolling Mill Co.* v. *St. Louis Ore & Steel Co.*, 152 U. S. 596; *Robb* v. *Vos*, 155 U. S. 13; *Howard* v. *De Cordova*, 177 U. S. 609; *United States* v. *Beebe*, 180 U. S. 343; *Pickford* v. *Talbott*, 225 U. S. 651; *Simon* v. *Southern Ry. Co.*, 236 U. S. 115; *Wells Fargo & Co.* v. *Taylor*, 254 U. S. 175.



other words, the complainant must come into court with clean hands.

4. Confessedly the opinion repudiates the unbroken rule of decision with respect to the finality of a judgment at the expiration of the term; that with respect to jurisdiction of an appellate court to try issues of fact upon evidence, and that with respect to the necessity for resorting to a bill of review to modify or set aside a judgment once it has become final. Perusal of the authorities cited will sufficiently expose the reasons for these doctrines. It is obvious that parties ought not to be permitted indefinitely to litigate issues once tried and adjudicated.[18] There must be an end to litigation. If courts of first instance, or appellate courts, were at liberty, on application of a party, at any time to institute a summary inquiry for the purpose of modifying or nullifying

[18] It has frequently been said that where the ground for a bill of review is fraud, review will not be granted unless the fraud was extrinsic. See *United States* v. *Throckmorton*, 98 U. S. 61. The distinction between extrinsic and intrinsic fraud is not technical but substantial. The statement that only extrinsic fraud may be the basis of a bill of review is merely a corollary of the rule that review will not be granted to permit relitigation of matters which were in issue in the cause and are, therefore, concluded by the judgment or decree. The classical example of intrinsic as contrasted with extrinsic fraud is the commission of perjury by a witness. While perjury is a fraud upon the court, the credibility of witnesses is in issue, for it is one of the matters on which the trier of fact must pass in order to reach a final judgment. An allegation that a witness perjured himself is insufficient because the materiality of the testimony, and opportunity to attack it, was open at the trial. Where the authenticity of a document relied on as part of a litigant's case is material to adjudication, as was the grant in the *Throckmorton* case, and there was opportunity to investigate this matter, fraud in the preparation of the document is not extrinsic but intrinsic and will not support review. Any fraud connected with the preparation of the Clarke article in this case was extrinsic, and, subject to other relevant rules, would support a bill of review.

a considered judgment, no reliance could be placed on that which has been adjudicated and citizens could not, with any confidence, act in the light of what has apparently been finally decided.

If relief on equitable grounds is to be obtained, it is right that it should be sought by a formal suit upon adequate pleadings and should be granted only after a trial of issues according to the usual course of the trial of questions of fact. A court of first instance is the appropriate tribunal, and the only tribunal, equipped for such a trial. Appellate courts have neither the power nor the means to that end.

On the strongest grounds of public policy bills of review are disfavored, since to facilitate them would tend to encourage fraudulent practices, resort to perjury, and the building of fictitious reasons for setting aside judgments.

5. I think the facts in the instant case speak loudly for the observance, and against the repudiation, of all the rules to which I have referred. The court's opinion implies that the disposition here made is justified by uncontradicted facts, but the record demonstrates beyond question that serious controverted issues ought to be resolved before Hazel may have relief.

In 1926 Hartford brought a suit for infringement of the Peiler Patent against Nivison-Weiskopf Company in the Southern District of Ohio. Counsel for the defendants in that case were Messrs. William R. and Edmund P. Wood of Cincinnati. About the same time, Hartford brought a similar suit for infringement against Kearns-Gorsuch Bottle Company, a subsidiary of Hazel. Counsel for Kearns were the same who have represented Hazel throughout this case.

In 1928 Hartford brought suit against Hazel in the Western District of Pennsylvania for a like infringement. The same counsel represented Hazel. The Ohio suits



came to trial first. In them a decision was rendered adverse to Hartford. Appeals were taken to the Circuit Court of Appeals of the Sixth Circuit, were consolidated, and counsel for the defendants appeared together in that court, which decided adversely to Hartford (58 F. 2d 701).

In the preparation for the defense of the Nivison suit, William R. Wood called upon Clarke and interviewed him in the presence of a witness. Clarke admitted that Hatch of Hartford had prepared the article published under Clarke's name. In the light of this fact the Messrs. Wood notified Hartford that they would require the presence of Hatch at the trial of the suit and Hatch was in attendance during that trial. Repeatedly during the trial, Hatch admitted to the Messrs. Wood that he was in fact the author of the article. It was well understood that the defendant wanted him present so that if any reference to or reliance upon the article developed they could call Hatch and prove the facts. There was no such reference or reliance.

As counsel for the various defendants opposed to Hartford were acting in close cooperation, Messrs. Wood attended the trial of the Hartford-Hazel suit in Pittsburgh, which must have occurred in 1929 or early 1930. (See 39 F. 2d 111.) One or other of the Messrs. Wood was present throughout that trial and Edmund P. Wood was in frequent consultation with the Hazel representatives and counsel. Hazel's counsel was the same at that trial as in the present case. The Messrs. Wood told Hazel's counsel and representatives that Clarke had admitted Hatch was the author of the article and that Hatch had also freely admitted the same thing. Hazel's counsel and representatives discussed at length, in the presence of Mr. Wood, the advisability of attacking the authenticity of the article. Counsel for Hazel, in these conferences, took the position that "an attack on the article might be a

boomerang in that it might emphasize the truth of the only statements in the article" which he regarded as of any possible pertinence. Mr. Wood's affidavit giving in detail the discussions and the conclusion of Hazel's counsel is uncontradicted, and demonstrates that Hazel's counsel knew the facts with regard to the Clarke article and knew the names of witnesses who could prove those facts. After due deliberation, it was decided not to offer proof on the subject.

The District Court found in favor of Hazel, holding that Hazel had not infringed. Hartford appealed to the Third Circuit Court of Appeals. In that court Hartford's counsel referred in argument to the Clarke article and the court, in its decision, referred to the article as persuasive of certain facts in connection with the development of glass machinery. The Circuit Court of Appeals for the Sixth Circuit rendered its decision in the Nivison and Kearns cases on May 12, 1932, and the Third Circuit Court of Appeals rendered its decision in the Hartford-Hazel case on May 6, 1932.

Counsel for Hazel was then, nearly ten years prior to the filing of the instant petition, confronted with the fact that, in its opinion, the Circuit Court of Appeals had accredited the article. Naturally counsel was faced with the question whether he should bring to the court's attention the facts respecting that article. As I have said, he asked and was granted five extensions of time for filing a petition for rehearing. Meantime negotiations were begun with Hartford for a general settlement and for Hazel's joining in the combination and patent pool of which Hartford was the head and front. At the same time, however, evidently as a precaution against the breakdown of the negotiations, Hazel's counsel obtained affidavits to be signed by the Messrs. Wood setting forth the facts which they had gleaned concerning the author-



ship of the Clarke article. These affidavits were intended for use in the Third Circuit Court of Appeals case for they were captioned in that case. Being made by reputable counsel who are accredited by both parties to this proceeding, they were sufficient basis for a petition for rehearing while the case was still in the bosom of the Circuit Court of Appeals. It is idle to suggest that counsel would not have been justified in applying to the court on the strength of them.

Had counsel filed a petition and attached to it the affidavits of the Messrs. Wood, without more, he would have done his duty to the court in timely calling its attention to the fraud which had been perpetrated. But more, the court would undoubtedly have reopened the case, granted rehearing, and remanded the case to the District Court with permission to Hazel to summon and examine witnesses. It is to ignore realities to suggest, as the opinion does, that counsel for Hazel was helpless at that time and in the then existing situation.

But counsel did not rest there. He commissioned an investigator who interviewed a labor leader named Maloney in Philadelphia. This man refused to talk but the investigator's report would make it clear to anyone of average sense that he knew about the origin of the article, and any lawyer of experience would not have hesitated to summon him as a witness and put him under examination. Moreover, the investigator interviewed Clarke and his report of the evasive manner and answers of Clarke convince me, and I believe would convince any lawyer of normal perception, that the Woods' affidavits were true and that Clarke would have so admitted if called to the witness stand. Most extraordinary is the omission of Hazel's counsel, although then in negotiation with Hartford for a settlement, to make any inquiry concerning Hatch or to interview Hatch, or to have him interviewed

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when counsel had been assured that Hatch had no inclination to prevaricate concerning his part in the preparation of the article.

The customary modes of eliciting truth in court may well establish that in the circumstances Hazel's counsel deliberately elected to forego any disclosure concerning the Clarke article and to procure instead the favorable settlement he obtained from Hartford.

In any event, we know that, on July 21, 1932, Hartford and Hazel entered into an agreement, which is now before this court in the record in Nos. 7–11 of the present term, on appeal from the District Court for Northern Ohio. Under the agreement Hazel paid Hartford $1,000,000. Hartford granted Hazel a license on all machines and methods embodying patented inventions for the manufacture of glass containers at Hartford's lowest royalty rates. Hartford agreed to pay Hazel one-third of its net royalty income to and including January 3, 1945, over and above $850,000 per annum. At the same time, Hazel entered into an agreement with the Owens-Illinois Glass Company, another party to the Hartford patent pool and the conspiracy to monopolize the glass manufacturing industry found by the District Court.

In the autumn of 1933 counsel for Shawkee Company, defendant in another suit by Hartford, obtained documents indicating Hatch's responsibility for the Clarke article, and wrote counsel for Hazel inquiring what he knew about the matter. Hazel's counsel, evidently reluctant to disturb the existing status, replied that, while he suspected Hartford might have been responsible for the article, he did not *at the time of trial*, know *of the papers* which counsel for Shawkee had unearthed, and added that his recollection was then "too indefinite to be positive and I would have to go through the voluminous mass of papers relating to the various Hartford-Empire



litigations, including correspondence, before I could be more definite."

The District Court for Northern Ohio has found that the 1932 agreement and coincident arrangements placed Hazel in a preferred position in the glass container industry and drove nearly everyone else in that field into taking licenses from Hartford, stifled competition, and gave Hazel, as a result of rebates paid to it, a great advantage over all competitors in the cost of its product. It is uncontested that, as a result of the agreement, Hazel has been repaid the $1,000,000 it paid Hartford and has received upwards of $800,000 additional.

In 1941 the United States instituted an equity suit in Northern Ohio against Hartford, Hazel, Owens-Illinois, and other corporations and individuals to restrain violation of the antitrust statutes. That court found that the defendants conspired to violate the antitrust laws and entered an injunction on October 8, 1942. (46 F. Supp. 541.) Hazel and other defendants appealed to this court. The same counsel represented Hazel in that suit, and in the appeal to this court, as represented the company in the District Court and in the Third Circuit Court of Appeals in this case. In its brief in this court Hazel strenuously contended that the license agreement executed in 1932, and still in force, was not violative of the antitrust laws and should be sustained.

Of course, in 1941 counsel for Hazel faced the possibility that the District Court in Ohio might find against Hazel, and that this court might affirm its decision. Considerations of prudence apparently dictated that Hazel should cast an anchor to windward. Accordingly, November 19, 1941, it presented its petition for leave to file a bill of review in the District Court for Western Pennsylvania and attached a copy of the proposed bill. In answer to questions at our bar as to the ultimate purpose of this proceed-

ing, counsel admitted that, if successful in it, Hazel proposed to obtain every resultant benefit it could.

In the light of the circumstances recited, it becomes highly important closely to scrutinize Hazel's allegations. It refers to the use by the Circuit Court of Appeals of the Clarke article in the opinion and then avers:

"That although prior to the decision of this Court your petitioner suspected and believed that the article had been written by one of plaintiff's employees, instead of by Clarke, and had been caused by plaintiff to be published in the National Glass Budget, petitioner did not know then or until this year *material and pertinent facts* which, if petitioner had then known and been able to present to this Court, should have resulted in a decision for petitioner. [Italics added.]

"That such facts were disclosed to petitioner for the first time in suit of *United States of America* v. *Hartford, et al.*, in the United States District Court for the Northern District of Ohio, and are specified in paragraphs 4, 5 and 6 of the annexed bill of review, which is made a part hereof.

"That your petitioner could not have ascertained by the use of proper and reasonable diligence the newly discovered facts prior to the said suit, and that the newly discovered evidence is true and material and should cause a decree in this cause different from that heretofore made."

In the proposed bill of review these allegations are repeated and it is added that the new facts ascertained consist of the testimony of Hatch in the antitrust suit and five letters written by various parties connected with the conspiracy and a memorandum prepared by Hatch which were in evidence in that suit. The bill then adds:

"The new matter specified in the preceding paragraphs 4, 5 and 6 is material, it only recently became known to plaintiff, which could not have previously obtained it with due diligence, and such new evidence if it had been previously known to this Court and to the Circuit Court



of Appeals would have caused a decision different from that reached."

Neither the petition nor the bill is under oath but there is attached an affidavit of counsel for Hazel in which he states that in or before 1929 Hazel "had suspected, and I believed," that the Clarke article had been written by Hatch and that Hartford had caused the article to be published, adding: "having been so told by the firm of Messrs. Wood and Wood, Cincinnati lawyers, who said they had so been told by Clarke and also by Hatch." The affidavit also attaches the reports of the investigator above referred to and refers to the exhibits and testimony in the antitrust suit in Northern Ohio.

In the light of the facts I have recited, it seems clear that if Hazel's conduct be weighed merely in the aspect of negligent failure to investigate, the decision of this court in *Toledo Scale Co.* v. *Computing Scale Co.*, 261 U. S. 399, may well justify a holding, on all available evidence, that, at least, Hazel was guilty of inexcusable negligence in not seeking the evidence to support an attack upon the decree. But it is highly possible that, upon a full trial, it will be found that Hazel held back what it knew and, if so, is not entitled now to attack the original decree. In *Scotten* v. *Littlefield*, 235 U. S. 407, in affirming the denial of a bill of review, this court said that if the claim now made was "not presented to the Court of Appeals when there on appeal it could not be held back and made the subject of a bill of review, as is now attempted to be done." Repeatedly this court has held that one will not be permitted to litigate by bill of review a question which it had the opportunity to litigate in the main suit, whether the litigant purposely abstained from bringing forward the defense or negligently omitted to prosecute inquiries which would have made it available.[19]

[19] *Hendrickson* v. *Hinckley*, *supra*, 446; *Rubber Co.* v. *Goodyear*, *supra*, 806; *Crim* v. *Handley*, *supra*, 660; *Bronson* v. *Schulten*, *supra*,

And certainly an issue of such importance affecting the validity of a judgment, should never be tried on affidavits.[20]

As I read the opinion of the court, it disregards the contents of many of the affidavits filed in the cause and holds that solely because of the fraud which was practiced on the Patent Office and in litigation on the patent, the owner of the patent is to be amerced and in effect fined for the benefit of the other party to the suit, although that other comes with unclean hands[21] and stands adjudged a party to a conspiracy to benefit over a period of twelve years under the aegis of the very patent it now attacks for fraud. To disregard these considerations, to preclude inquiry concerning these matters, is recklessly to punish one wrongdoer for the benefit of another, although punishment has no place in this proceeding.

Hazel well understood the course of decision in federal courts. It came into the Circuit Court of Appeals with a petition for leave to file a bill of review, a procedure required by long-settled principles. Inasmuch as the judgment it attacked had been entered as a result of the action of the Circuit Court of Appeals, Hazel properly applied to that court for leave to file its bill in the District Court.[22] The respondent did not object on procedural grounds to the Circuit Court of Appeals considering and acting on the petition. That court of its own motion denied the petition and permitted amendment to pray relief there.

417, 418; *Richards* v. *Mackall, supra,* 188, 189; *Boone County* v. *Burlington & M. R. R. Co., supra,* 693; *Pickford* v. *Talbott, supra,* 658.

[20] *Jackson* v. *Irving Trust Co., supra,* 499; *Sorenson* v. *Sutherland,* 109 F. 2d 714, 719.

[21] *Creath's Adm'r* v. *Sims, supra,* 204.

[22] *Southard* v. *Russell, supra,* 570, 571; *Purcell* v. *Miner, supra,* 519; *Rubber Co.* v. *Goodyear, supra; National Brake & Electric Co.* v. *Christensen, supra,* 431; *Simmons Co.* v. *Grier Bros. Co., supra,* 91.



On the question what amounts to a sufficient showing to move an appellate court to grant leave to file a bill of review in the trial court, the authorities are not uniform. Where the lack of merit is obvious, appellate courts have refused leave,[23] but where the facts are complicated it is often the better course to grant leave and to allow available defenses to be made in answer to the bill.[24] In the present instance, I think it would have been proper for the court to permit the filing of the bill in the District Court where the rights of the parties to summon, to examine, and to cross-examine witnesses, and to have a deliberate and orderly trial of the issues according to the established standards would be preserved.

I should reverse the order of the Circuit Court of Appeals with directions to permit the filing of the bill in the District Court.

MR. JUSTICE REED and MR. JUSTICE FRANKFURTER join in this opinion.

The CHIEF JUSTICE agrees with the result suggested in this dissent.

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## SHAWKEE MANUFACTURING CO. ET AL. *v.* HARTFORD-EMPIRE CO.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 423. Argued February 9, 10, 1944.—Decided May 15, 1944.

Decided upon the authority of *Hazel-Atlas Glass Co.* v. *Hartford-Empire Co., ante,* p. 238.
137 F. 2d 764, reversed.

[23] *Purcell* v. *Miner, supra; Rubber Co.* v. *Goodyear, supra.*

[24] *Ocean Insurance Co.* v. *Fields,* 2 Story 59; *In re Gamewell Fire-Alarm Tel. Co.,* 73 F. 908; *Raffold Process Corp.* v. *Castanea Paper Co.,* 105 F. 2d 126.