

offered to pay the freight by a bill at two months. The question is, whether he was personally liable for the freight, and if so, whether the form of the declaration is sufficient. We are of opinion that the defendant was not personally liable; and it is therefore not necessary to say anything as to the sufficiency of the declaration, which is not in the usual form of a common count for freight.

The case of *Cock v. Taylor* (13 East, 399) established the proposition, that the receipt of goods by the indorsee of a bill of lading, by which they were made deliverable to the consignee or his assigns, he or they paying freight, was evidence of a new contract between him and the shipowner to pay the freight according to the terms of the bill of lading; and that case has been followed by many others. But here the defendant is, on the face of the bill of lading, a mere agent to receive the goods, the London Gas Company being the consignees, and the property vesting in them, according to the rule laid down by Lord Holt, in the case of *Evans v. Marlett* (1 Ld. Raym. 271); and the promise to be inferred from the receipt of the goods under such a bill of lading is, *prima facie*, a promise by the defendant, as agent for the company, to pay the freight on their account, and not a promise to be personally responsible for it; and there was no sufficient evidence to the contrary.

Upon the subsequent offer to pay in a bill, no reliance [806] ought justly to be placed as any proof of personal liability. We are all therefore of opinion, that on the facts proved the defendant was not liable, and that a nonsuit ought to be entered. The rule must therefore be absolute.

Rule absolute.

NEILSON AND OTHERS v. HARFORD AND OTHERS. Exch. of Pleas. June 26, 1841.—

The construction of the specification of a patent belongs to the Court, and not to the jury.—If a specification contain an untrue statement in a material circumstance, of such a nature that, if literally acted upon by a competent workman, it would mislead him, and cause the experiment to fail, the specification is therefore bad, and the patent invalidated, although the jury, on the trial of an action for the infringement of the patent, find that a competent workman, acquainted with the subject, would not be misled by the error, but would correct it in practice.—In the specification of a patent, the title of which was “An invention for the improved application of air to produce heat in fires, forges, and furnaces, where bellows or other blowing apparatus are required,” the mode of operation was described as follows:—“A blast or current of air must be produced by bellows or other blowing apparatus, and is to be passed from the bellows, &c., into an air-vessel or receptacle, made sufficiently strong to endure the blast, and from that vessel or receptacle, by means of a tube, pipe, or aperture, into the fire, &c. The vessel or receptacle must be air-tight or nearly so, except the apertures for the admission and emission of air, and at the commencement and during the continuance of the blast, must be kept artificially heated to a considerable temperature.” After giving directions as to the materials and dimensions of the vessel, the specification proceeded to state, “The form or shape of the vessel or receptacle is immaterial to the effect, and may be adapted to the local circumstances or situation.” In other parts of the specification, the same language was used with reference to the ultimate beneficial effect upon the furnace, &c.:—Held, that such was the reasonable construction of the above clause also, and not that the form or shape of the vessel was immaterial to the effect of heating the air within it.—Held, also, that the title of the patent was not inconsistent with the specification, but that the invention of applying to fires, &c., air heated in the manner therein stated, might be described as an “improved application of air.”—Held, also, that in this specification the plaintiff did not claim a patent for a mere principle, but for a mode of applying a well-known principle, viz. the heating of air, by means of a mechanical apparatus to fires and furnaces.—If the notice of objections, delivered by a defendant with his pleas in an action for the infringement of a patent, pursuant to the stat. 5 & 6 Will. 4, c. 83, s. 5, be not sufficiently specific, the plaintiff’s course is to apply to a judge at chambers for an order for the delivery of a more specific notice; but if he omit to do so, he cannot object to the generality of the notice at the trial: the only question then

is, whether the notice is sufficiently large to include the objections relied on by the defendant.

[S. C. 1 Webst. P. R. 295. Referred to, *Plimpton v. Malcolmson*, 1876, 3 Ch. D. 582.]

This was an action on the case for the infringement of a patent, dated 11th September, 1828, granted to the plaintiff James Beaumont Neilson for a term of fourteen years, the title of which was "An invention for the improved application of air to produce heat in fires, forges, and furnaces, where bellows or other blowing apparatus are required."

[807] The defendants pleaded not guilty, and also several special pleas, of which the fourth only is material to this report. In that plea the defendants set out the specification of the invention enrolled by the plaintiff Neilson, as follows:

"I, James Beaumont Neilson, do hereby declare, that the nature of my said invention for the improved application of air to produce heat in fires, forges, and furnaces, where bellows or other blowing apparatus are required, and the manner in which the same is to be performed, is particularly described and ascertained as follows: that is to say:—A blast or current of air must be produced by bellows or other blowing apparatus, in the ordinary way, to which mode of producing the blast or current of air this patent is not intended to extend. The blast or current of air so produced is to be passed from the bellows or blowing apparatus into an air-vessel or receptacle, made sufficiently strong to endure the blast, and from that vessel or receptacle, by means of a tube, pipe, or aperture, into the fire, forge, or furnace. The vessel or receptacle must be air-tight, or nearly so, except the apertures for the admission and emission of the air; and at the commencement and during the continuance of the blast, it must be kept artificially heated to a considerable temperature. It is better that the temperature be kept to a red heat, or nearly so; but so high a temperature is not absolutely necessary to produce a beneficial effect. The air-vessel or receptacle may be conveniently made of iron, but as the effect does not depend upon the nature of the material, other metals or convenient materials may be used. The size of the air-vessel must depend upon the blast, and upon the heat necessary to be produced. For an ordinary smith's fire or forge, an air-vessel or receptacle capable of containing 1200 cubic inches will be of proper dimensions; and for a cupola of the usual size for cast-iron foundries, an air-vessel capable of containing 10,000 cubic inches will be of a proper size. For fires, forges, or furnaces [808] upon a greater scale, such as blast furnaces for smelting iron, and large cast-iron foundries' cupolas, air-vessels of proportionably increased dimensions and numbers are to be employed. The form or shape of the vessel or receptacle is immaterial to the effect, and may be adapted to the local circumstances or situation. The air-vessel may generally be conveniently heated by a fire distinct from the fire to be affected by the blast or current of air; and generally, it will be better that the air-vessel, and the fire by which it is heated, should be inclosed in brick-work or masonry, through which the pipes or tubes connected with the air-vessel should pass. The manner of applying the heat to the air-vessel is, however, immaterial to the effect, if it be kept at a proper temperature. In witness whereof," &c.

The plea then alleged, that the plaintiff, J. B. Neilson, did not, by the said instrument in writing under his hand and seal, at any time within six calendar months after the date of the said letters-patent, particularly describe and ascertain the nature of his said invention, and in what manner the same was to be performed, and by reason thereof the said letters-patent were and are wholly void.

The defendants delivered with their pleas, pursuant to the stat. 5 & 6 Will. 4, c. 83, s. 5, the following notice of objections to the validity of the patent:—

"The defendants in this action, besides denying that they have infringed the patent in the declaration mentioned, intend, at the trial of this cause, to rely on the following objections, that is to say:—that the alleged invention is not the subject of a patent, because it claims a principle: that the terms in which the subject of the patent is described, viz. 'an invention for the improved application of air to produce heat in fires, forges, and furnaces, where bellows and other blowing apparatus are required,' are ambiguous, and it is doubtful whether the patent is for the invention of the application of hot air, or only for an improved mode of applying hot air: that the said J. B. Neil-[809]-son is not the first and true inventor of the said supposed invention, and that the said supposed invention was publicly used and put in practice

before the granting of the said letters patent. [Here followed a statement of the facts on which the defendants relied as shewing that the invention was not new.] The defendants further contend that the said patent is void, because no sufficient specification of the said invention has been enrolled in conformity with the provisions of the said letters-patent in that behalf: that the description of the apparatus to be applied is so defective, that no workman of ordinary skill would be able to manufacture the said apparatus, merely by reading the said specification: that the said specification is calculated to deceive: that the mode of applying hot air by means of an air-vessel or receptacle, which is vaguely described in the said specification, is substantially the mode or apparatus for which Mr. Botfield had previously obtained his patent: that the said specification, so far as it can be understood as descriptive of an apparatus for forming and supplying hot air, describes an apparatus which does not answer the purpose: that the said specification is invalid on account of its general vagueness: that the said specification is defective, inasmuch as it does not describe the kind of furnace to which the said invention is applicable, and it is not applicable to all kinds of furnaces: that the apparatus described in the said specification to be employed for the purpose of heating air is so defective, that it is incapable of producing any beneficial effect in the blast furnace: that the apparatus used by the defendants is wholly different from that described in the specification, and upon a different principle; and it was invented at the Calder iron works, and other iron works near Glasgow in Scotland; and by John Jeffries and J. Patten, at the Grove iron-foundry, in the borough of Southwark, and not by the said J. B. Neilson: that, if the said apparatus described by the said J. B. Neilson in his specification could be made [810] to raise the atmospheric air to a sufficient degree of heat, it could not be used without a water twyre for introducing the hot air into the blast furnace: that the apparatus which the defendants do use, and any other apparatus which would be capable of raising the atmosphere to a sufficient degree of heat, could not be applied to the blast furnace without the use of a water twyre: that it is alleged in the said specification, 'that the size of the air-vessel must depend upon the blast, and on the heat necessary to be produced: that for an ordinary smith's fire or forge, an air-vessel or receptacle capable of containing 1200 cubic inches will be of proper dimensions, and for a cupola of the usual size for cast-iron founders, an air-vessel capable of containing 10,000 cubic inches will be of a proper size; for fires, forges, and furnaces upon a greater scale, such as blast furnaces for smelting iron, or large cast-iron founders' cupolas, air-vessels of proportionably increased dimensions and numbers will be required;' whereas, in order to produce the effect required, the heating apparatus ought to be made of such a construction, that the surface exposed to the action of the heat should be in proportion to the quantity of air required to be heated, and that instead of the vessel or receptacle being enlarged when a greater quantity of heat is required, the heating apparatus must be reduced in size, and the furnace increased in extent, so as to obtain the maximum of heating surface in proportion to the quantity of heated air required: that it is therein alleged, that 'the air-vessel or receptacle may be conveniently made of iron; but as the effect does not depend upon the nature of the material, other metal or materials may be used;' whereas in fact no other metal can be used which will effect the desired object so well, and at such small expense, as iron: also, that the sizes and proportions of the air-vessels mentioned in the specification render the alleged invention comparatively inoperative and useless. The defendants further object, that the said invention, as described [811] in the said specification, is of no public use or benefit; that the heated air cannot be introduced into the smelting furnaces by a simple pipe, as mentioned in the said specification."

The plaintiffs replied to the fourth plea, that the said plaintiff J. B. Neilson did, by the said instrument in writing under his hand and seal, within six calendar months after the date of the said letters patent, particularly describe and ascertain the nature of his said invention, and in what manner the same was to be performed:—on which issue was joined.

The cause was tried before Parke, B., at the Middlesex sittings in last Easter Term. It was contended for the plaintiffs, that the specification was sufficiently accurate and unambiguous, and that the words—"the form or shape of the vessel or receptacle is immaterial to the effect, and may be adapted to the local circumstances and situation" did not mean that the form or shape of the vessel was immaterial to the heating of the air, but that, provided the air were heated to a proper temperature,

the form or shape of the vessel in which it was heated was immaterial for the producing a beneficial effect on the fire, forge, or furnace. Secondly, it was contended that the construction of the specification was a matter for the jury, and not for the Court: and thirdly, that the defendants were not at liberty to object to the sufficiency of the specification in this respect, on the ground that they had not stated the objection with sufficient precision, in the notice of objections delivered pursuant to the statute. For the defendants it was insisted, that the notice was sufficiently precise, and that, at all events, it was too late to object at the trial that it was ambiguous, but that the plaintiffs, if it was not satisfactory, ought to have obtained a Judge's order for the delivery of a better notice of objections; and further, that, upon the proper construction of the specification, the statement as to the form or shape of the vessel [812] meant that the form or shape was immaterial to the effect of heating the air therein. The learned Judge was of opinion that the specification must be construed by the Court, and thought that its proper construction was as contended for by the defendants; and he submitted to the jury the following questions:—First, whether a person of common understanding and ordinary skill, and knowledge of the subject of the old blowing apparatus, could, from this specification, construct an apparatus capable of producing a beneficial effect; secondly, the like question as to a person acquainted with the heating apparatus; thirdly, whether the shape and form of the vessel was material to the effect of heating the air. The jury answered all these questions in the affirmative. The learned Judge, at the request of the defendants' counsel, then put to the jury these questions also:—First, whether a person of ordinary capacity and skill, and acquainted with the blowing apparatus, would be able to correct the error in the specification as to the form and shape of the vessel; secondly, the like question as to a person acquainted with the heating apparatus. The jury answered, that such a person would not be misled by the mis-statement in the specification.

The verdict was thereupon entered, under his Lordship's direction, for the defendants on the fourth issue, and for the plaintiffs on the other issues; and leave was given to the plaintiffs to move to enter a verdict for them on the fourth issue also.

Sir W. W. Follett having obtained a rule nisi accordingly, citing *Boulton v. Bull* (2 H. Bl. 463), and *Hill v. Thompson* (3 Meriv. 630).

The Attorney-General, Sir F. Pollock, R. V. Richards, Monteith, and Hugh Hill, shewed cause in Trinity Term (June 9). The first objection made on the part of [813] the plaintiffs is, that the defendants have not complied with the statute 5 & 6 Will. 4, c. 83, s. 5, by delivering a notice of objections sufficiently specific to enable them to insist on the objection taken to the specification. That section of the statute enacts, "that in any action brought against any person for infringing any letters-patent, the defendant, on pleading thereto, shall give to the plaintiff, and in any scire facias to repeal such letters-patent, the plaintiff shall file with his declaration, a notice of any objections on which he means to rely at the trial of such action; and no objection shall be allowed to be made in behalf of such defendant or plaintiff respectively at such trial, unless he prove the objections stated in such notice: provided always, that it shall and may be lawful for any Judge at chambers, on summonses received by such defendant or plaintiff, or such plaintiff or defendant respectively, to shew cause why he should not be allowed to offer other objections, whereof notice shall not have been given as aforesaid, to give leave to offer such objections, on such terms as to such Judge shall seem fit." This enactment was obviously framed with reference to the former state of pleading, before the new rules, when, not guilty being the only plea, great difficulty and hardship was thereby thrown on plaintiffs in actions of this nature. In *Bulnois v. M'Kenzie* (4 Bing. N. C. 127; 5 Scott, 419), the Court of Common Pleas held that, independently of the statute, the Court has a right to direct that the notice of objections shall be made more specific; and in *Fisher v. Dewick* (4 Bing. N. C. 706; 6 Scott, 587), they refused to set aside a Judge's order for the delivery of more specific particulars. If, therefore, the notice in the present case was in too general terms, the plaintiffs' proper course would have been to apply to a Judge for a more specific statement of the objections; but where they omit to do so, the only question at the trial is, whether the defendants have proved the objections [814] actually stated in this notice; and it is too late then to object that it is too general. [Alderson, B. The question at the trial is only whether the terms of the notice are sufficiently large to include the objection.]

Secondly, the specification does not sufficiently ascertain and describe the nature of the invention. In the first place, the title of the invention—"An invention for the improved application of air to produce heat in fires, &c., where bellows or other blowing apparatus are required"—is ambiguous, and might as well apply to a refrigerating as to a heating apparatus. The patent is granted for an improved application of air, and not for an improvement in the air applied; whereas the specification proceeds to describe an apparatus for the improvement in the air applied, and not an improvement in the mode of applying it. The title refers to air in its natural state, and excludes the notion of any process of heating or otherwise improving it before its application: the specification is for an application of air previously improved by heating. [Lord Abinger, C. B. It appears to us that the title is not inconsistent with the specification. When you look at the specification, it is for an improved application of air, by making it pass through a receptacle in which it is heated before its application to the fire. It is hypercriticism to say that that is not an improved application of air, but an application of improved air.] Then with respect to the directions as to the mode of carrying the invention into effect. The only direction given as to the heating vessel is, that it is to be made sufficiently strong to endure the blast, and air-tight or nearly so, and to be kept artificially heated to a considerable temperature. With respect to its form or shape, it is stated that that "is immaterial to the effect, and may be adapted to the local circumstances or situation." But surely it was essential to the validity of the patent, that the specification should state what should be the form or shape of the vessel. If the plaintiff did not [815] know this, he had not perfected his invention. He had no right to take out the patent for a general notion or principle existing in his own mind. The specification ought, therefore, to have stated both the proper dimensions and form of the air-vessel. Again, it is clear, upon the finding of the jury, that the form and shape of the vessel is, in one sense, material to the effect, and in this respect the specification is untrue. It is for the Court to put a construction upon the specification, as upon any other written instrument; and it is submitted that the true construction of this part of it is, that the form or shape of the air-vessel is immaterial to the effect to be produced therein—that is, to the production of the requisite degree of heat. But the jury have found that the form and shape of the vessel are material to that effect. [Lord Abinger, C. B. Does it not appear, that when the plaintiff uses the word "effect," he means to use it with an implied condition that the proper temperature is kept up? In the concluding clause of the specification, it clearly means the effect upon the furnace, if the air be kept at a proper temperature.] There the condition is expressed; here no condition is hinted at. It is manifest that the inventor thought the form or shape of the vessel was immaterial to the obtaining of the requisite degree of heat; which might have been supposed to be the case, until after the contrary was shewn by experiments. He had evidently not made any sufficient experiments as to the degree of heat necessary to be produced, and was ignorant of the superiority of one form of vessel over another in producing it. He speaks of the vessel in this specification in terms which describe a single open space, and which are quite inapplicable to a vessel consisting (for instance) of a combination of tubes.(a) It is plain he had never acquired the information necessary to enable him to present the invention in a perfect form; but the specification must be such as that a [816] competent workman can follow its directions, without first having recourse to experiments to ascertain the best mode of carrying it into effect: *Rees v. Wheeler* (2 B. & Ald. 345). [Parke, B. Is there any case in which a patentee has been allowed to correct an error in the specification by the testimony of persons of ordinary skill? Alderson, B., referred to *Blacum v. Elsee* (1 C. & P. 558).] That was the case of the mere use of a Gallicism, in employing the French word "vice" to mean a screw; and besides, by the drawing annexed to the specification, and which was to be taken as part of it, the ambiguity was fully explained. But it may further be observed, that in this specification the word "air" never is the nominative case at all. It says, that "the vessel must be air-tight or nearly so," &c.; "and at the commencement &c. of the blast, it (i.e. the vessel) must be kept artificially heated," &c. So, when it states that "it is better that the temperature be kept to a red heat," that clearly means the temperature of the vessel, not of the air within it. The grammatical construction of the clause

(a) The vessel employed by the defendants was of this form.

in question therefore is, (if any condition is to be imported into it), that the form or shape of the vessel is immaterial to the effect, provided the vessel be kept to the proper degree of heat. That is clearly negatived by the finding of the jury. Then, can such a mis-statement be corrected by their accompanying finding, that a competent workman would not be misled by it? Surely not. The rule of law on this subject is this:—When the patentee has described his invention in such terms that it is clear from the whole of the specification taken together what he meant to describe, a mere technical misuse of language will not vitiate it—as if air were said to be imponderable, or sulphur were called a metal. But when he deliberately states something as a part of the process or materials of the invention, which is in its nature material, but which [817] on bringing it into use turns out to be untrue or erroneous, that is per se fatal to the patent, and cannot be corrected by the experience of the workmen; for that is calling in another party to perfect the invention: if that be necessary, the patentee is no longer the inventor.

On the same day (June 9), and on a former day in the present sittings (June 18), Sir W. W. Follett, Kelly, and Butt, were heard in support of the rule. In the first place, it was not competent to the defendants to raise these objections to the specification, their notice of objections being of too vague and general a nature to be a sufficient compliance with the requisitions of the statute. The only clause of the notice under which it can be contended that the particular objections now taken can be included, is the general one, “that the specification is calculated to deceive:” but the notice ought to be sufficiently precise and positive in its terms, distinctly to apprise the plaintiff of the nature of the specific objections. It has been held that it is not enough that the notice be a mere echo of the plea, but that it must give more specific information than is given by a plea merely denying the novelty or usefulness of the invention: *Fisher v. Devick* (4 Bing. N. C. 706; 6 Scott, 587). The statute was passed after the alterations in pleading made by the rules of H. T. 4 Will. 4, and it must be assumed that the legislature were fully cognizant of the effect of those alterations, and did not think that a special plea would of itself furnish sufficient notice of the objections intended to be relied upon. If so indefinite a notice as this were held sufficient, the provisions of the statute would be rendered altogether nugatory. And the plaintiffs were at liberty to object to its insufficiency at the trial, and were not bound to aid the defendant by applying to have it made more specific. In all cases where [818] notice is required to be given by act of Parliament, the objection to the insufficiency of the notice is properly taken at the trial: as in the case of a notice to dispute bankruptcy, and of notice of action to magistrates: *Trimley v. Unwin* (6 B. & C. 537), *Moon v. Raphael* (7 C. & P. 115).

Secondly, the plaintiffs are entitled, upon the finding of the jury on the issue as to the sufficiency of the specification, to have the verdict upon that issue entered for them. It has been suggested that this is a patent merely for a principle; but that is not so; it is a patent for the mode of carrying a principle into effect. The mode of heating air and increasing combustion was known before; this patent is taken out for the novel application of air so heated to certain useful purposes—for passing the air in a heated state, instead of a cold state as formerly, into furnaces; and the mode of operation is by interposing a closed vessel, exposed to heat, between the blowing apparatus and the furnace. That is a sufficiently practical discovery to be the subject of a patent, according to all the authorities: *Minter v. Wells* (1 C. M. & R. 505), *Hornblower v. Boulton* (8 T. R. 98), Webster on Patents, p. 136. Then the only remaining question is, whether there is anything in the specification to render the patent taken out for this discovery void. Now, the jury have expressly found that no person acquainted with the subject could be misled by the supposed error in the specification as to the form and shape of the air-vessel: yet it is said that the Court, on a discussion upon the meaning of the specification, ought to take that question upon themselves, and direct a new trial. But it is submitted that the intelligibility of the specification was altogether a question for the jury. The question upon this issue is, whether the specification has sufficiently described and ascertained the invention for which the patent is taken out. Surely that is a question [819] for the determination of the jury. In many cases the construction of written instruments is for the Court, but not in such a case as this. In *Hill v. Thompson* (3 Meriv. 630), Lord Eldon says: “The utility of the discovery, the intelligibility of the description, &c., are all of them matter of fact proper for a jury.” The question in effect is, whether persons of com-

petent skill and knowledge can work under the specification as framed. In *Boulton v. Bull* (2 H. Bl. 497), Eyre, C. J., and Rooke, J., put their judgment in favour of the plaintiff expressly upon the ground that the jury had found that a workman of competent skill could execute the improvement by means of the specification; and on the same ground the opinion of the Judges in the House of Lords was given in favour of the patent. [Lord Abinger, C. B. It appears to me to be too late at the present day to contend that it is not for the Court to construe the specification, like any other written instrument. Parke, B. It was expressly held in *Turner v. Winter* (1 T. R. 602), that a patent is void if the specification is ambiguous, or gives directions which tend to mislead. Alderson, B. In *Harmar v. Playne* (11 East, 101), the Lord Chancellor sent the question, whether the specification gave sufficient information, to a Court of law for its decision; and one of the rules laid down in *Res. v. Arkwright* (Bull. N. P. 77) is, that "if the specification be in any part of it materially false or defective," the patent is void.]

At all events, if the construction be for the Court, the finding of the jury is most material to be taken into consideration by the Court. They have in effect negatived the only objection on which the defendants could rely at the trial, and found that the specification was not calculated to deceive. Now, all that the law requires is that a specification should contain sufficient information to enable a workman of competent skill to carry the patent into effect; *Boulton v. Bull*; if it be so, and if that be found by the jury, the specification is sufficient in law, notwithstanding any particular error or mis-statement. If the patentee sufficiently describes the mode of operation, but makes a mistake in a matter known to every body acquainted with the subject, and not of the essence of the invention, such a mistake does not invalidate the patent. [Parke, B. My doubt arose from this, that no case had gone so far as to allow a manifest error to be corrected by parol evidence of what an ordinary workman of competent skill would be able to do.] There is no case in which the patent has on the ground of such an error been held invalid, after the finding of the jury that it could not mislead. The only question is, whether on the whole the inventor has given sufficient information to the public by which the invention can, on the expiration of the term for which the patent is granted, be brought into public use without experiments or expense. It has been said that the description here is applicable only to a vessel consisting of one open space; but that is not so. A more correct word than receptacle could not have been used, to describe a vessel which is to receive and heat the air; and it is equally applicable to a vessel consisting of an open reservoir, of a single pipe, or of a series of tubes: whatever be the form, it must still communicate with the furnace by a pipe, tube, or aperture, and the description in the specification is equally appropriate. Any person who understands the heating of air would know how to enlarge the vessel in the proper way, upon the ordinary principle used for heating air. [Alderson, B. Then, where is the difference between claiming a principle which is to be carried into effect in any way you will, and claiming a mere principle? The patentee must claim some specific *modus operandi*.] So he does here,—namely, to heat the air in its passage from the blowing apparatus to the furnace, in a closed vessel placed there: and conceding the statement as [821] to the form and shape of such vessel to be inaccurate, the verdict of the jury has cured the defect.

But further, the true meaning of the passage is, not that the form or shape of the vessel is immaterial to the heating of the air, but that it is immaterial to the ultimate beneficial effect upon the furnace—to the object for which the patent is taken out. It is always to be remembered, that the patentee was not taking out a patent for a mode of heating air; he assumes that every workman of ordinary skill is acquainted with that process. He therefore does not intend to give any directions on that head. He does not mean to say that the size and shape of the vessel are immaterial to the effect to be produced upon the air therein; but that the party may use any ordinary form of vessel he pleases in which to heat the air, and provided it be kept at a proper temperature, and communicate with the furnace by a pipe, tube, or aperture, it will be the same as regards the effect on the furnace. Such is clearly the meaning of the word effect in the last clause of the specification, and there can be no reason for supposing that it was intended to be used in a different sense here: in this sense the statement is perfectly true. If the air be heated to a proper temperature, which the party knows how to do by the modes already in use, it is immaterial to the effect

on the furnace what is the form or shape of the vessel. Throughout the specification, the word effect (which occurs four times) is used in this same sense. The passage has the same meaning as if it had contained the words, "provided the vessel be constructed on the ordinary principles on which air is heated." The plaintiffs contend, therefore, either that there is no error in the specification at all; or, if there is, that the finding of the jury has remedied it.

Cur. adv. vult.

The judgment of the Court was now delivered by

[822] PARKE, B. In the case of *Neilson v. Harford*, at the request of my Lord Abinger, I proceed to deliver his Lordship's judgment, and that of the rest of the Court, on this question.

We have, after much consideration, and not without some doubt and hesitation, arrived at the conclusion that the present rule obtained by Sir William Follett, for entering the verdict for the plaintiff on the 4th issue, should be made absolute.

Several points were made at the time of the argument, to which we propose very shortly to advert. In the first place, it was contended that the objection to the specification, on which I proceeded at the trial, was not sufficiently raised by the notice given under the provisions of Lord Brougham's act; but we all think it was. We concur with the opinion of the Court of Common Pleas, in the cases cited by Sir William Follett, that the act must be construed to mean that a mere copy of the pleas will not be a sufficient compliance with its provisions. It was passed after the new rules had required the several defences to be pleaded, and must therefore be considered as having intended to give to the plaintiff some additional advantage beyond the information which the record would give him. The statute did not mean to say, nor do we think that the Common Pleas meant to decide, that it would not be sufficient in some cases to give notice in the terms of the plea itself. The objection may be so completely and so fully expanded on the record, that a mere transcript of the plea itself may be sufficient; in other cases the plea may be so general in its language, as to be insufficient as a notice, if transcribed from the plea merely. Each case must depend on its peculiar circumstances. But at Nisi Prius, we think the only question for the Judge is, whether the language of the notice fairly includes the objection taken. If the notice be too general, a previous application must be made to the Court or a Judge at Chambers for redress. Here the [823] language of the notice was very general, and we think included the objection relied on.

Then we come to the question itself, which depends on the proper construction to be put on the specification. It was contended that of this construction the jury were to judge. We are clearly of a different opinion. The construction of all written instruments belongs to the Court alone, whose duty it is to construe all such instruments, as soon as the true meaning of the words in which they are couched, and the surrounding circumstances, if any, have been ascertained as facts by the jury: and it is the duty of the jury to take the construction from the Court, either absolutely, if there be no words to be construed as words of art, or phrases used in commerce, and no surrounding circumstances to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them. Unless this were so, there would be no certainty in the law; for a misconstruction by the Court is the proper subject, by means of a bill of exceptions, of redress in a Court of Error; but a misconstruction by the jury cannot be set right at all effectually. Then, taking the construction of this specification on ourselves, as we are bound to do, it becomes necessary to examine what the nature of the invention is which the plaintiff has disclosed by this instrument. It is very difficult to distinguish it from the specification of a patent for a principle, and this at first created in the minds of some of the Court much difficulty; but, after full consideration, we think that the plaintiff does not merely claim a principle, but a machine embodying a principle, and a very valuable one. We think the case must be considered as if, the principle being well known, the plaintiff had first invented a mode of applying it by a mechanical apparatus to furnaces; and his invention then consists in this—the interposing a receptacle for heated air between the blowing apparatus and the furnace. In this receptacle he directs the air to be heated, by the application of heat externally to the receptacle, and thus he accomplishes the object of applying the blast, which before was of cold air, in a heated state to the furnace.

Now in this specification, after stating that air heated up to a red heat may be used, but that it is not necessary to go so far to produce a beneficial effect, he proceeds



to state that the size of the receptacle will depend on the blast necessary for the furnace, and gives directions as to that; and then he adds, the shape of the receptacle "is immaterial to the effect, and may be adapted to local circumstances." It is this part of the specification which has raised the difficulty. At the trial I construed this passage as meaning that the shape was immaterial to the degree of effect in heating the blast; and if this were so, the jury having, by their finding, negatived the truth and accuracy of this statement, the specification would be bad, as containing a false statement in a material circumstance, of a nature that, if literally acted upon by a competent workman, it would mislead him, and cause the experiment to fail. Nor do we think that the point contended for by Sir W. Follett, that if a man acquainted with the process of heating air were employed, the mis-statement could not mislead him, would at all relieve the plaintiff from the difficulty; for this would be to support the specification by a fresh invention and correction by a scientific person; and no authority can be found that, in such a case, a specification would be good. To be valid, we think it should be such as, if fairly followed out by a competent workman, without invention or addition, would produce the machine for which a patent is taken out, and that such machine, so constructed, must be one beneficial to the public.

If, therefore, we had thought, on consideration, that the construction which I put on this clause of the specification was the true one, we should have concluded that the patent was bad; and we should have thought that the verdict should remain as found by the jury on the 4th issue. But, [825] my Lord and my Brothers, after considerable hesitation, are of opinion that a construction may reasonably be put upon this clause which will support the patent; and though I myself still entertain great doubt whether such is the true construction, I am not prepared to say that it is not, and I am very glad that, in so meritorious an invention as this is admitted to be, in this view of the case, the plaintiff will not be deprived of his reward.

The word "effect" occurs four times in this specification; and it is a just rule of construction, to judge of the meaning of a particular phrase by taking the whole instrument together. In the first sentence, the patentee, speaking of the temperature being so high as that of a red heat, adds, "that so high a temperature is not absolutely necessary to produce a beneficial effect;" then he adds, that the receptacle may be made of iron, "but as the effect does not depend upon the nature of the material, other metals or convenient materials may be used." Here he cannot mean that all metals, or convenient materials, will equally be heated by the application of external fire, for some heat more easily, and others more slowly; but he means that the quantity of the heated air, whether heated in an air-vessel or any other (if heated at a proper temperature), will not materially alter the beneficial effect on the furnace to which it is applied. "Effect" here, then, is equivalent to a beneficial effect; and the sense of the passage is this,—“but as the effect, to be a beneficial effect, does not depend on the nature of the material,” and so forth. The same is, we think, obviously the meaning of the word "effect," in the concluding sentence of the specification—"the manner of applying the heat to the air-vessel is, however, immaterial to the effect, if it be kept at a proper temperature;" in other words, the effect will be a beneficial effect on the furnace, whatever be the manner in which you apply heat to the air-vessel, provided only that you so apply it as to raise its temperature sufficiently. Then if [826] so, it is not unreasonable, we think, to construe the word "effect," in the sentence on which this question turns, in a similar way, and to hold it to mean an assertion by the patentee, that though the size of the vessel must be regulated as directed, yet the shape of the air-vessel is immaterial to the effect; that is to say, any shape will produce a beneficial effect, and may be adapted to local circumstances. Now if this be so, still it casts upon him the necessity of proving, to the satisfaction of the jury, that any shape in which the air-vessel could reasonably be expected to be made by a competent workman, would produce a beneficial effect, and be a valuable discovery. On the present occasion we are bound, as to this point, by the finding of the jury, who have arrived at this conclusion of fact; and if they are right, we think the verdict was not correctly entered for the defendants on this 4th issue, but that it should have been entered for the plaintiffs. The rule, therefore, must be absolute.

There is another point which I need only notice shortly, which was made by the Attorney-General, as to the title of the patent. He contended that the title of the patent was itself defective, and did not agree with the invention, and he insisted also

that it was competent to raise that objection upon the issue raised upon the 4th plea, and probably it was. But we have already intimated, in the course of the argument, that we thought that objection was not well founded. The title of the patent is for the improved application of air. Though that is ambiguous, it is sufficiently explained by the specification, and is not at variance with it, as was the case in *Rex v. Wheeler*.

Rule absolute.

[827] SALMON AND ANOTHER, Assignees, v. MATTHEWS. Exch. of Pleas. June 26, 1841.—The owner of a house, having mortgaged it in fee, and continuing in possession let it as a ready furnished house to the defendant. He afterwards became bankrupt, and then, with the assent of his assignees, let the house ready furnished to the defendant, by the week, who, after three weeks' occupation, received notice from the mortgagee to pay rent to him:—Held, in an action brought by the assignees for use and occupation of the house and furniture, that they were entitled to recover for the use of the furniture: that the rent of the house and furniture might be apportioned, or if not, that upon the entry of the mortgagee claiming the house, and having no interest in the furniture, a new agreement might be inferred by the jury to take the house at a reasonable rent from the mortgagee, and to pay a reasonable amount as a compensation for the use of the furniture to the assignees.

[S. C. 11 L. J. Ex. 59.]

Assumpsit by the assignees of a bankrupt for the use and occupation of a house and the use of the furniture.—Plea, non assumpsit.

At the trial before Lord Abinger, C. B., at the last Spring Assizes for the county of Warwick, it appeared that the owner of the house, in respect of which this action was brought, having mortgaged it in fee, and continuing in possession, had let it as a ready furnished house to the defendant. He afterwards became bankrupt, and then, with the assent of his assignees, let the house ready furnished, by the week, to the defendant, who, after three weeks' occupation, received notice from the mortgagee to pay the rent to him, which he accordingly did. The assignees thereupon brought the present action for the use and occupation of the house and furniture. On the part of the plaintiffs it was contended, that they were entitled to the rent of both the house and furniture; on behalf of the defendant it was insisted, that the rent could not be apportioned, and that the mortgagee had a right to the whole of it, and therefore that the plaintiffs were not entitled to recover. The jury, under the learned Judge's direction, returned a verdict for the plaintiffs for the amount claimed by them in respect of the furniture, leave being reserved to them to move to increase the damages by the amount of the rent of the house, and to the defendant to enter a verdict for him, if the Court should be of opinion that the assignees were not entitled to recover either in respect of the house or the furniture. Rules were accordingly obtained by M. D. Hill for the plaintiffs, and Adams, Serjt., for the defendant, and both rules were argued in last Trinity Term.

[828] Hill and W. T. S. Daniell, for the plaintiffs. The question is, whether the tenant was justified in paying to the mortgagee the whole or any part of the rent of this house and furniture. It is submitted that he was not. The tenant cannot object to the title of the person under whom he was let into the possession of the premises. There is, however, an exception to that rule in the case of mortgagor and mortgagee, and in those cases the Courts have adopted the fiction of a supposed eviction by the mortgagee, and of the tenant being let in again under him; but, in order to have that effect, there must be not only notice to the tenant by the mortgagee, but a compliance with it by him, and payment of rent to the mortgagee. At all events, the assignees are entitled to retain their verdict, for they have a right to the rent arising out of the furniture, which became their property by the bankruptcy. When the tenant paid the whole rent to the mortgagee, the mortgagor might justly complain he had done wrong. If an ejectment were brought by the mortgagee, and he recovered, the tenant could only be compelled to pay the rent of the house, as the mortgagee could not have recovered the furniture, which belonged to the assignees of the mortgagor. It would be strange indeed, if the mortgagee, by ejecting the tenant, would become entitled to the furniture of the assignees. [Alderson, B. What right has the defendant to use the furniture without paying for it?] Undoubtedly he has none. In