

## Case No. 11,121.

PICKERING ET AL. V. MCCULLOUGH ET AL.

{3 Ban. & A. 279; 13 O. G. 818; Merw. Pat. Inv. 677; 6 Reporter; 101; 25 Pittsb. Leg. J. 157.}<sup>1</sup>

Circuit Court, W. D. Pennsylvania. May. 13, 1878.<sup>2</sup>

## PATENTS—ABANDONMENT—EFFECT OF SAME.

1. It is well settled that an abandonment of the use of a mechanical structure which has been perfected and the operative merit of which has been demonstrated by trial, will inure to the benefit of the public, and not to that of an original but subsequent inventor.

{Cited in *Brush v. Condit*, 20 Fed. 835.}

2. Reissued letters patent No. 6,166, granted to complainants, assignees of George Nimmo, December 8th, 1874, for an improvement in moulding crucibles, *held* void.

{This was a bill in equity by Arthur Pickering and others against Michael McCullough, Jr., and others, for the infringement of letters patent No. 49,140, granted to G. Nimmo August 1, 1865, reissued October 24, 1871, No. 4,608.}

{The plaintiffs were the owners of a patent issued to one Nimmo for a machine for the manufacture of plumbago crucibles, and they alleged that the defendants were infringing their patent. The defense showed that prior to the patent a machine essentially the same, and producing the same results, as that of the plaintiffs, had been made and used for about the space of a year at Kier's works, in Pittsburg. The use of the machine had been discontinued, and it was not produced at the trial.}<sup>3</sup>

J. E. Maynadier and R. Robb, for complainants.

Bakewell & Kerr, for defendants.

MCKENNAN, Circuit Judge. In deciding this case it is unnecessary to go beyond the proofs presented by the respondents touching the existence and use of a machine at Kier's works, in Pittsburg, for the

manufacture of plumbago crucibles. That such machine was constructed before the date of Nimmo's patent is clearly established by the proofs. That it was capable of successful operation is the result of a decided preponderance of the evidence. That it was so constructed as to perform the distinguishing function of Nimmo's machine—viz., the guidance of the rib toward the axis of revolution of the mould, so that it could be withdrawn therefrom without touching the sides of the mould—is manifest from the drawing prepared from the description of those who operated and saw the machine. In a word, in the mechanical forces employed, in mode of operation in so far as the essential feature of Nimmo's machine is concerned, and in the results produced, the machines are indistinguishable.

Why, then, is not the Kier machine an effectual anticipation of Nimmo's? The argument against this hypothesis is that it was an abandoned experiment. But the proof is, that it was a complete machine, that it operated for nearly a year, that crucibles were made upon it without any imperfection in form, and that the rib was removed from the mould by guiding it to the centre, and thence withdrawing it without touching the sides. True it is that it was not produced in evidence, and that it was not shown what had become of it. But these considerations tend rather to discredit the testimony touching the existence, construction and operation of the machine than to impress upon it the character of a mere experiment. If that testimony is believed, there can be no doubt that the machine was neither incomplete in construction nor ineffective in adaptation to the work for which it was intended.

And it is now too well settled to admit of controversy that an abandonment of the use of a mechanical structure which has been brought to such a degree of maturity, and whose operative merit has been demonstrated by trial, will inure to the benefit

of the public, and not to that of even an original but subsequent inventor. *Bedford v. Hunt* [Case No. 1,217]; *Reed v. Cutter* [Id. 11,645]; *Gayler v. Wilder*, 10 How. [51 U. S.] 498; *Coffin v. Ogden*, 18 Wall. [85 U. S.] 124. There is no sufficient reason to reject that testimony, and the result necessarily is, that the bill must be dismissed with costs.

{On appeal to the supreme court the decree of this court was affirmed. 104 U. S. 310.

{For another case involving this patent, see note to *Pickering v. Phillips*, Case No. 11,122.}

<sup>1</sup> {Reported by Hubert A. Banning, Esq., and Henry Arden, Esq., and here reprinted by permission. Merw. Pat. Inv. 677, contains only a partial report.}

<sup>2</sup> {Affirmed in 104 U. S. 310.}

<sup>3</sup> {From 6 Reporter, 101.}

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