

FRYER, Jr., v. MAURER.

(Circuit Court, S. D. New York. July 17, 1884.)

PATENT LAW—TILED ARCH, ETC., FOR INTERIORS—KREISCHER'S PATENT.

The invention is old; and it is useless to attempt to sustain the patent upon refined distinctions in structure, which the patentee evidently never contemplated, and which certainly are not within the claims as expressed in the patent.

In Equity.

Geo. W. Van Siclen, for complainant.

Gen. John A. Foster, for defendant.

WALLACE, J. A rehearing was granted in this cause because it appeared that an erroneous interpretation had probably been placed upon the description in the English provisional specification of George Davis at the original hearing. Upon the rehearing, however, the defendant was permitted to introduce a new exhibit, the Guichard French patent of 1869, which supplies all that was attributed originally to the Davis provisional specification. The Guichard patent is, in fact, a complete anticipation of everything that is essential and valuable in the complainant's invention as described and claimed in his letters patent, although it is introduced as showing that in the prior state of the art there was no invention in Kreischer's hollow-tiled arch.

The complainant insists that his patent is not for a flat arch of sectional hollow tiles supported by girders, the sections of which have plane joints, and recesses where they abut against the girders to catch over the flanges of the girders; but that it is for a flooring consisting of the flanged iron girders, the flat arch of sectional hollow tiles, with recesses which go under the flanges of the girders, wooden floor joists resting on the tiles, and with air spaces between the top of the tiles and the wooden floor. The patentee might have claimed such a flooring, but he did not either in his original or reissued patent, and obviously because he did not mean to be limited to such an invention. The claim of the original is for a hollow arched tile made in three sections, having recesses in the end sections to catch over the bottom flanges of the iron girders, and the middle section being a wedge-shaped key. The iron girders are necessarily included as a feature of the invention thus claimed, because, otherwise, there would be nothing to support the arch, and nothing for the recesses to catch upon or over, and by a reference to the description of the drawings the entire conception of the patentee may be readily understood.

In the reissue two claims are inserted in the place of the one claim of the original. The first claim is merely a more specific statement of the claim of the original, except that it does not limit the invention to an arch composed of three sections, and eliminates the recess in the end sections as a constituent. As it was apparent from the

description in the original that the arch could be made of a larger number of sections, and could be made without recesses in the end sections, it was proper to make these modifications in the first claim of the reissue; and the claim of the reissue was for the same invention described in the original. The second claim in the reissue is the first claim limited by making the recesses in the end sections of the tile, which are left out in that claim, a constituent. It is the same as the claim of the original patent, except that it does not confine the invention to an arch having three sections only; and, for the reasons stated in reference to the first claim, it is for the same invention described in the original. As the reissue was obtained within two years of the issue of the original, it is valid.

But it becomes necessary for the complainant now, in view of the evidence showing the prior state of the art, to abandon the real claims of the patent, which are for a peculiar arch of hollow tiles supported by girders to be used in the walls or in the ceilings of buildings, and to substitute a claim for a flooring with air spaces for ventilation, and an arch of a special construction which is peculiarly contrived to form the ceiling of the room below.

The patentee undoubtedly conceived that when his arch was used as a ceiling under the flooring of buildings an incidental advantage could be obtained by constructing it so as to leave air spaces for ventilation to the sleepers and flooring; and he pointed out the advantages of his arch over brick arches in that respect; but he did not intend to limit himself to a claim which would not be infringed if a flooring and sleepers were not used in connection with his arch. The language of the claims is not fairly susceptible of such a construction. They would be infringed if his arch were used, although the space above it were filled up with cement, and no sleepers or flooring were used.

The slight variation between the form of the recess in the end sections of the patentee's tiles and that found in the several earlier arches of sectional hollow tiles, is not of sufficient novelty to sustain the patent. The patentee describes the arch as provided, at its end sections, with a recess "to catch over" the bottom flanges of the iron girders, when his arch is used for ceilings, but he does not suggest any special advantage arising from the form of the recess. The recess was apparently designed to assist in supporting the arch as a locking device. If it has any advantages over those which were used for the same purpose by others previously, arising from its form, the form should have been described. The form is shown in the drawings, but obviously the language of the description does not confine the patentee to any particular form, but covers any form which will enable the end tile to "catch over" the flange. It may be that the earlier recesses do not catch over, but they lock the girder, for all practical purposes, as well as those of the patentee. In any event, the patentee's change in the form of the recess does not amount to

invention. The recess in the defendant's end tiles does not differ materially from the recesses in the Garcius and Roux Freres exhibits, yet the complainant insists that the defendant has the recess described in the patent.

In conclusion, there was no patentable novelty in Kreischer's hollow-tiled flat arch, the invention which is claimed in the complainant's patent, in view of the prior state of the art. Hollow tiles were old; flat arches were old; flat arches made of hollow tiles in sections were old; flat arches of sectional hollow tiles with plane joints were old; such arches supported at the ends by girders, and used to support the floors of fire-proof buildings, were old; such arches thus supported were old when the end sections of the tiling were provided with a recess to receive the flange of the girder. Everything which is of the substance of the invention was old except a slight change in the form of the recess in the end sections of the tiling. No advantages arising from this change of form are suggested in the patent, and it is doubtful whether there are any practically. If there are any, the form is described in terms so vague that any form which serves to lock the tile to the girder will satisfy the description; and the old recesses would do this. Kreischer, doubtless, thought that his arch was new, and he described and claimed his invention broadly upon this theory. It is now shown to have been old, and it is quite useless to attempt to sustain the patent upon refined distinctions in minor details in structure which the patentee evidently never contemplated, and which certainly are not within the claims as expressed in the patent.

THE NEGAUNEE.

(*District Court, N. D. Illinois. July 14, 1884.*)

1. ADMIRALTY—COLLISION—PLEADING—EVIDENCE—BURDEN OF PROOF.

The failure of a respondent to allege, as a defense, that the collision was an inevitable accident, does not aid the case of the libellant. The libellant's case depends upon his sustaining the main allegations in his libel, to the effect that the collision was caused by the fault of the respondent, and if he fails of his proof in that particular he cannot recover.

2. SAME—UNEXPECTED APPROACH OF VESSELS—NAVIGATION LAWS.

In cases where two vessels approach each other unexpectedly in very dangerous proximity, the guide for their action should be rule 24 of the navigation laws, (Rev. St. 4233,) which provides that "due regard should be had to all the dangers of navigation, and to any special circumstances which may exist in any particular case, rendering a departure from the general rules necessary in order to avoid immediate danger.

3. SAME—FOG-HORNS—PROOF—FAILURE TO HEAR.

The testimony being that the fog-horn was regularly and properly blown by the vessel complained against, the proof that it was not heard by the vessel complaining does not, under the circumstances, overthrow that testimony. The proof that the horns were properly blown on each vessel, and yet not heard