

GIBSON, Adm'r, and others v. SCRIBNER.

(Circuit Court, D. Maine. February 2, 1885.)

PATENTS FOR INVENTIONS—ANTICIPATION—SHINGLE-MACHINE—CLAIM 1 OF PATENT No. 216,344.

The first claim in patent No. 216,344, dated June 10, 1879, issued to Benjamin F. Penney, and his assignee of one-half interest, was anticipated by the machines invented by Porter and Webber and in public use before the issue of the patent to Penney; and such claim is void.

In Equity.

William Franklin Seavey, for complainants.

Laughton & Clergue, for respondent.

WEBB, J. This is a bill to restrain the infringement of patent No. 216,344, dated June 10, 1879, for which application was filed December 13, 1878, issued to Benjamin F. Penney, deceased, and his assignee of one-half interest. The alleged infringement is limited to the matter embraced in the first claim. It is admitted by the defendant that, since the date of this patent, he has made a shingle-machine embracing in its construction the features described in the patent and claimed in said first claim, which would have infringed said patent and claim if the same had been valid. He sets up as his defense: (1) That one Elbridge Webber, as early as 1856, invented and manufactured a machine embodying the invention in said first claim, and publicly used at Gardiner, Maine, the machine so constructed; (2) that, as early as and prior to 1875, machines, containing said alleged invention and discovery, were publicly manufactured and sold and kept on sale, at Gardiner, Maine, by this defendant and by Elbridge Webber; (3) that one Willis Porter, as early as 1875, constructed a machine known as the "Gardiner Improved" shingle-machine, and set the same in operation in public, which contained the features described in the first claim of these letters patent. The complainants deny the invention of Webber, and the construction of machines of the description alleged by Webber and this defendant, at the early time asserted. They admit that the "Gardiner Improved" does embody and contain the features claimed in the first claim of their letters patent, but do not admit that that machine was made or invented before the year 1875 or 1876, or that the improvements embraced therein were conceived before that date. To defeat the effect of any construction of the "Gardiner Improved" more than two years prior to their application, they seek to show that Penney conceived the improvements subsequently patented as early as 1870, and was prevented perfecting his invention by his poverty. It is not clear from the evidence that at the early date named he had formed any distinct conception of the invention, or anything more than an idea that some means might be devised to accomplish certain practical results. Neither is there proof that his poverty made

it impracticable to perfect sooner than he did any invention he had made. This was not a matter involving any considerable expenditure. Indeed, his model was made principally with his pocket-knife, and he was repeatedly offered assistance by persons of pecuniary ability, if he would show that the plan and device he was studying offered any features of value. All these proffers of help he rejected, because he had not yet perfected the invention, and therefore feared, as he alleged, that his invention, if explained, would be pirated; but when he had perfected his model, he availed himself of such assistance in procuring his patent.

On the other hand, the defendant produced evidence that Porter fully conceived the improvements involved in this controversy and contained in the "Gardiner Improved" in 1868, and postponed constructing a machine according to his conception, till prior patents on other features that he wished to use, should expire. This evidence is conclusive that Porter's invention was earlier than Penney's, and that he also constructed and set working publicly a machine embodying that invention more than two years before Penney's patent was applied for. The evidence further shows that in 1868 this defendant, a machinist, constructed under Webber's directions, and for him, a shingle-machine containing the matters described in the first claim of the patent No. 216,344, and that the same was, for a considerable time after, in public use.

This bill must be dismissed.

ROSENWASSER and others v. BERRY.

(Circuit Court, D. Maine. January 17, 1885.)

PATENTS FOR INVENTIONS—ROSENWASSER PERCOLATOR—PATENT NO. 256,504—INVENTION.

Patent No. 256,504, granted to Nathan Rosenwasser, April 18, 1882, for improvements in percolators for filtering purposes, or for making fluid extracts from drugs, is void for want of invention.

In Equity.

William Henry Clifford, for plaintiffs.

Wilbur F. Lunt, for defendant.

COLT, J. This suit is brought for an alleged infringement of letters patent No. 256,504, granted to Nathan Rosenwasser, April 18, 1882, for improvements in percolators for filtering purposes, or making fluid extracts from drugs. Percolators are old. The main elements described in the Rosenwasser patent, consisting of an elevated reservoir or vessel, a lower vessel containing a perforated plate or diaphragm on which the drug rests, and a tube or pipe connecting the two vessels, are old. In the old percolators the lower vessel is often

made in the shape of a funnel, and the drug is charged at the wide opening on top. A cap-piece may then be put on which connects with the tube or pipe attached to the reservoir. The discharge takes place through the restricted opening at the bottom. Rosenwasser inverts this funnel-shaped vessel, and then charges the drug through the wide opening at the bottom through which the discharge also takes place. In filling, the wide, open end is turned upwards and the drug put in. A diaphragm is then inserted on which the drug rests. The large end is then turned downwards and percolation begins. By this means, as set out in the specification, the upper part of the percolating vessel is closed, so that any increased or variable degree of pressure can be brought to bear on the menstruum, depending on the elevation of the reservoir.

The claim is as follows:

"The combination with a vessel, G, and adjustable tube, F, of a percolator, A, having a large filling and discharging orifice at its lower end, and a restricted opening, B, at its upper end, with which connects the lower end of the adjustable tube or pipe, F, substantially as set forth."

It will be observed that the claim omits to include a diaphragm as an element of the combination. A diaphragm is necessary to prevent the drug falling out from the opening at the lower end of the vessel. A diaphragm, however, is described in the specification and seen in the drawings. The plaintiffs contend that, consequently, it is made a part of the claim by legal construction. If we should adopt this view, it is still extremely doubtful if the machine is operative without the use of a second diaphragm, which is nowhere mentioned in the patent. When the large open end of the lower vessel is turned upwards for the purpose of filling, it would seem evident that a portion of the drug will fall out of the small opening at the other end unless there is another diaphragm to prevent it. It is possible that the drug may be so coarse, or the opening so small, that but little, if any, will escape. Practically, however, we think the evidence shows that two diaphragms are a necessity. It is a most significant fact that the percolators sold by the complainants have two diaphragms.

But in view of the prior state of the art, we fail to find any invention in the Rosenwasser patent. The most that Rosenwasser can claim is an improvement which consists in closing the upper part of the vessel containing the drug, by which means an increased or variable pressure can be brought to bear upon the menstruum, this result being accomplished by making the large, open end at the bottom of the vessel the charging and discharging mouth. That this is the scope of the improvement is apparent on reading the patent. No claim is made in the patent for an adjustable diaphragm. If Rosenwasser had been the first to close the upper part of the percolating vessel, he might lay claim to an invention, but we find a vessel airtight at the upper end described in Boullay's filter, or percolator, United States Dispensatory, by Wood & Bache, (13th Ed. 1870,) p.