

way, 11 Humph. 355; *Clouston v. Barbieri*, 4 Sneed, 338; *Newell v. Williams*, 5 Sneed, 212; *Talley v. Courtney*, 1 Heisk. 718; *Brinkley v. Boyd*, 9 Heisk. 152; *Iser v. Cohen*, 1 Baxt. 423; *Rivers v. Thomas*, 1 Lea, 649; *Taylor v. French*, 2 Lea, 257; *Harding v. Waters*, 6 Lea, 324. So would he be held in Texas, as I understand the cases there. *Cook v. Southwick*, 9 Tex. 615; *Carr v. Rowland*, 14 Tex. 275; *Chandler v. Westfall*, 30 Tex. 477.

But, according to the rulings of the supreme court of the United States, which follow the Massachusetts rule, somewhat regretted in *Essex Co. v. Edmands*, 12 Gray, 273, the defendant is to be held as a joint maker of the note, the case falling within the first category enumerated by Mr. Justice CLIFFORD, in the two cases cited from that court. *Rey v. Simpson*, 22 How. 341; S. C. Law Pub. Co. Ed. 260, and note; *Good v. Martin*, 95 U. S. 90.

Judgment for plaintiffs.

CLEMENS v. ESTES and others.

(Circuit Court, D. Massachusetts. February 10, 1885.)

AUTHORS—CONTRACT TO SELL BOOKS BY SUBSCRIPTION—SALE BY AGENTS TO PUBLISHER AT REDUCED RATE—INJUNCTION.

In the absence of notice of the terms of the contract between an author and the agents employed by him, for the sale of his books by subscription at a certain price, a publisher may buy or contract to buy such books from agents who have lawfully obtained them by purchase from the author or his publishers, and may advertise for sale and sell them at any price he may see fit. *Prince Albert v. Strange*, 1 Macn. & G. 25, distinguished.

In Equity. Motion for injunction *pendente lite*.

S. Lincoln and *G. L. Huntress*, for complainant.

S. J. Elder, for defendant.

COLT, J. This is a motion for a preliminary injunction. The material facts, as disclosed in the bill and affidavits, are as follows:

The defendants, Estes & Lauriat, are a firm of book-sellers and publishers located in Boston. In their last holiday catalogue appeared an advertisement in which a new work, entitled "Huckleberry Finn," written by the plaintiff under the name of Mark Twain, was offered for sale at a price reduced from \$2.75 to \$2.25. The book is sold on what is known as the subscription plan, and the regular subscription price is \$2.75. The canvass for the book has been in progress for some months. The advertisement to sell the work for less than the subscription price is working great injury to the regular sales by subscription. The book is not yet published, and will not be before February. On December 3, 1884, the title of the work was deposited with the librarian of congress to secure a copyright. Charles L. Webster & Co., of New York, are the general managers and authorized agents of the plaintiff in the publication and sale of the book. Numerous canvassing agents are appointed in different parts of the country. These agents purchase the books, but bind themselves by contract to sell only to subscribers, and not to the

trade, and for the full retail price. Prior to the time the catalogue was issued, several persons called at the place of business of Estes & Lauriat, and offered them the book at such prices that they could afford to sell it at \$2.25, and still make a fair profit. Dummies of the book were left for examination. Two of the persons who called had previously sold Estes & Lauriat other works of the author. Estes & Lauriat contracted with these persons to take 100 or more copies of the book, and then inserted in their holiday catalogue about to be published the advertisement referred to. Up to this time, about 30 orders for the book had been received by them. They had no knowledge of the terms of the contract between the plaintiff, or his publishers, and their canvassing agents. They say the prior works of the author, published by subscription, have been freely offered to them at large discounts. As soon as suit was brought, they cut out the page from the catalogue containing the advertisement; and they have not since and do not propose to distribute any more catalogues containing the advertisement.

Upon this state of facts, the plaintiff prays for an injunction restraining the further distribution of any catalogue containing the advertisement, and also enjoining the defendants from making any agreement, or carrying out any agreement already made with the plaintiff's agents, for obtaining any copies of the book by inducing them to break their lawful contract, or from selling any books except such as may be obtained by subscription or are second-hand. To entitle the plaintiff to any relief of the character asked for, he must first show that the defendants had notice of the terms of the contract between himself and his agents. In their affidavits the defendants deny any such knowledge, and we must be governed by the proof before us. Nor is there any evidence going to show that the defendants tried to induce the agents to sell the books, or to break any contract. In the absence of any notice of the contract, the defendants had a right to buy, or contract to buy, books from agents who lawfully obtained them by purchase from the plaintiff or his publishers, and had a right to advertise for sale and to sell such books at any price they saw fit. The plaintiff may have a right of action against his agents for the violation of their contract, and, from all that appears, they might be enjoined from doing what they had covenanted not to do, (High, Inj. § 713;) but it is not claimed that the defendants were in any way parties to that agreement, or interested in it. Sometimes the jurisdiction of a court of equity to restrain the breaches of negative contracts has been extended to a third party, who has notice of the covenant, or who, by forming a partnership with the wrongdoer, seeks to benefit himself by the injury committed. High, Inj. § 744.

In *Barfield v. Nicholson*, 2 Sim. & S. 1, it appeared that the defendant Nicholson, having assigned to Barfield his copyright in a certain book, agreed not to write or publish any work which might be detrimental to its sale. Afterwards, in violation of this agreement, he engaged with one Kelly, the other defendant, in the publication of a work which impeded the sale of the first book. On the ground that Kelly was a partner with Nicholson, and thus connected

with him in interest in the commission of a wrong, the vice-chancellor, Sir JOHN LEACH, granted an injunction against both. Afterwards, it was shown by Kelly that he was not a partner with Nicholson, and had no knowledge of the agreement, and the vice-chancellor dissolved the injunction against him on the ground that, having no notice of the agreement, he could not be affected by it. The plaintiff relies on the case of *Prince Albert v. Strange*, 1 Macn. & G. 25. But the decision in that case rests upon a different principle, namely, the right of an author or composer to his unpublished work, or manuscript, kept for private use or pleasure. It is a breach of confidence to publish such a work without the author's consent. And the court, to prevent the invasion of this right, prohibited the publication of a catalogue containing a description of the work. Upon the evidence submitted, I am clear the injunction must be refused.

Injunction denied.

MOSLER SAFE & LOCK Co. v. MOSLER and others.¹

(Circuit Court, S. D. Ohio, W. D. February 3, 1885.)

1. PATENTS—FIRE-PROOF SAFES—MOSLER'S ROUNDED CORNERS.

Claims 1 and 2 of patent No. 281,640, for an angle-bar for safes, consisting of a right-angled iron bar, one of the sides of which is cut away (the cuts being curved and meeting a right-angled cut) leaving a curve facing the uncut side, whereby said uncut side may be bent to form a rounded corner, are void, said device not being new.

2. SAME—CLAIM FOR PROCESS OF BENDING ANGLE-IRONS VOID.

Cutting an opening in one web of an angle-bar to permit the beading of the bar to an angle or curve was known and used before the date claimed by complainant's assignor, and determining the lines of the cuts and the shape of the opening by the use of a templet or pattern of flexible material is no exercise of the inventive faculty.

3. SAME—COMBINATION CLAIMS—AGGREGATION OF OLD PARTS.

The combinations claimed in patent No. 273,585 and in claim 3 of patent No. 281,640, are composed of parts which are old, excepting the precise lines of cuts and shape of the openings, (which are not material,) and, as they produce a result which is the mere aggregate of separate contributions, are not patentable.

In Equity.

Geo. J. Murray, for complainant.

James Moore, for respondents.

SAGE, J. The plaintiff sues for infringement of three patents for improvements in fire-proof safes, granted to Moses Mosler, plaintiff's assignor, as follows:

(1) No. 273,585; application filed February 5, 1883; letters dated March 6, 1883. The object of this invention, as stated in the specification, is to provide an improved means of constructing the outer casing, so that the safe may be filled from the bottom. The front

¹ Reported by Harper & Blakemore, Esqs., of the Cincinnati bar.

and back frames of the safe are formed from angle-bars, which have one side cut away where the bends of the corners are to be made, and the uncut side bent around to close the joint in the corner, and form a frame with its outer corners rounded. The meeting joint at the bottom of the frame is overlapped by a short angle-piece, which is screwed or riveted to the frame uniting the joint. A sheet-metal cover is bent around the top sides and around the lower rounded corners of the frames. Upon each edge of this cover at the bottom of the safe, and between the angle-frames, are secured metal bars, which project beyond the edges of the cover, to form rests for the bottom plate. The safe is made with the customary sheet-metal box forming the interior receptacle, and secured to the cast-metal door-frame in the usual manner. The tops of the caster-frames conform to the curve of the rounded corners, and after the bottom plate is pushed into its place, the inner bolts, which secure the caster-frames, pass through the bottom plate, which they secure, and the angle-frames. The patentee does not claim the bent angle-frames, nor the safe composed of these frames, and the sheet-metal cover bent around them, (the same being shown and claimed by him in an application then pending,) but limits his claim to the combination, in a fire-proof safe, of the frames, the sheet-metal cover bent around the top sides and lower corners, with projecting metal bars, and removable bottom plate, substantially as described.

(2) No. 281,640. This patent differs from No. 273,585 in that a particular description is given, in the specification, of the cuts in the side of the angle-bar, where the bends are to be made; but the patentee specifies that the shape of the cut may be varied, it only being essential that sufficient metal be cut away on one side of the angle-bar to permit the other or uncut side to be bent; the cut nearest the uncut side being in the form of a curve or curves, so that when said uncut side is bent to form the corner it will bear upon and be supported by the curved end or portion of the cut, and thus be rounded by a curve similar to the curve of the cut.

The claims are as follows:

First. An angle-bar for safe-frames, consisting, substantially as before set forth, of a right-angled bar, one of the sides of which is cut away, leaving a curve facing the uncut side, whereby said uncut side may be bent to bear upon said curve to form a rounded corner; *second.* an angle bar for safe-frames, consisting, substantially as before set forth, of a right-angled iron bar, one of the sides of which is cut away, with curved cuts meeting a right-angled cut, whereby the uncut side may be bent to form rounded corners; *third.* in a safe, the combination of the front and back frames, formed of single bent angle bars having one side cut away to leave curved ends, upon which the uncut side is bent to form rounded corners, and a metal sheet, E, bent around and secured to said frames to form the top sides of the safe, substantially as described.

(3) No. 283,136, dated August 14, 1883. Application filed December 11, 1882. The claim is as follows:

"The herein described process of bending angle-irons, which consists in cutting away a portion of one web by a cut which severs the two webs at their junction for a distance equal to the arc of the corner to be bent, and removes sufficient of metal in front of the single part of the uncut web to permit the same to bend to the desired angle, and to insure the edges of the opening, meeting to form a close joint as the bar is bent, substantially as shown and described."

In the specification, the sides of the angle-bar are designated by the letters A and B, A representing the uncut web, and B the cut web. The outer opening of the cut, C, is made by lines at angles of 45 degrees to the edge of the web, so that when the bar is bent the edges of this opening meet each other in a true miter. The inner opening, D, which extends outward within converging curved lines from the angle of the bar to where it meets the opening, C, extending inward from the edge of B, and within converging lines, (the letter X suggesting the shape of the entire opening, excepting that the outer opening extends nearly to the angle of the bar,) has a dove-tailed shape, bounded by curved lines described from points upon the miter line and the face of the uncut web, A. The curved ends of the web, B, abut against the uncut side when the bar is bent, making a close joint.

The patentee states in the specification that "the shape of the opening or cut-away portion of web, B, may be varied at will so long as the meeting line or lines be not extended beyond the space bounded by the rounded corner, and the edge lines extended to web, A." The angle-bars cut out as described, it is stated in the specification, may be bent to the proper form by the machine represented by Fig. 6 in the accompanying drawings. In this, E represents a metal block having upwardly projecting sides, screw-tapped to receive clamping screw, F. The opposite corners of the block are rounded to fit the inner curve of the desired corner. G is a loose block of iron, between which and the sides of block, E, the uncut web, A, is clamped by screw, F; the other web, B, resting on the block; the cut-away part over the rounded corner. By force applied to the projecting end of the bar, it is bent around until the severed edges meet in a close joint.

The angle-bar herein shown, is not claimed, as it is the subject of a pending application.

The safes described in these patents are filled through the bottom opening with fire-proof cement. The bottom is then secured in place and the casters attached. The patentee states in specification forming part of letters No. 281,640 that before his invention safes were filled from the back, and that his safes "can be completely finished before the filling is put in. The filling adds greatly to the weight; much labor in handling is therefore saved." For the purposes of this suit, these three patents may be considered as one, containing all the claims involved. As counsel for complainant suggests, the claims are for separate and distinct, but not for independent inventions, at least so far as the manufacture of safes is concerned. They might

have been all included in one application had the patentee chosen to so present them.

The first and second claims in letters patent No. 281,640 are for an angle-bar for safes, consisting of a right-angled iron bar, one of the sides of which is cut away (the cuts being curved and meeting a right-angled cut) leaving a curve facing the uncut side, whereby said uncut side may be bent to form a rounded corner. The patentee states in the specification that he is aware "that it has been proposed to make protecting corner pieces for safes from angle-iron, from one side of which a triangular piece was cut out to permit the opposite side to bend." He also states that "the shape of the cut to permit the angle-bar to be bent to form rounded corners may be varied without departing from the principles of my invention," etc.

In the drawings accompanying the specification forming part of letters patent No. 283,136, Fig. 5 represents a templet of card-board, or thin sheet metal, which the patentee states he uses to determine about the shape and size of the notch or cut which it is necessary to make to admit of the bar being bent to any desired angle, and to make a corner of any desired curve. The templet is of the shape and size of a section of the angle-bar. One web is severed by a cut at right angles to its edge. The two webs are then severed at their junction for some distance upon each side of the cut, then by bending the web so that the cut edges will pass each other, the templet may be bent to any curve or angle desired, and the lines of the cuts required to make the proper shape of opening in angle-bars to be bent to the same curve or angle, marked and fixed upon.

Such use of the templet as a pattern is nothing new. It is clearly shown by the testimony that cutting an opening in one web of an angle-bar to permit the bending of the bar to an angle or curve, was known and used before the date claimed by complainants' assignor for his invention. Different shapes of cuts and openings are shown in exhibits put in evidence by respondents. Unless the precise cuts and shape of opening shown in the drawing attached to the specification forming part of the letters patent are patentable, the claims are worthless. But the patentee shows how, by the use of a pattern of flexible material,—an old method and familiar as the use of the carpenters' miter-box,—he determines the lines of the cuts and the shape of the opening. In this there is no exercise of the inventive faculty. It is only what would occur to a mechanic of ordinary skill. Moreover, if the precise lines of cuts and shape of opening shown in the drawings were patentable, the patentee does not, as we have seen, so limit his claim, but seeks to cover variations, which he says may be made without departing from the principle of his invention. Claims 1 and 2 in letters patent No. 281,640, and the claim in letters patent No. 283,136 are therefore adjudged invalid.

As to the combination claims, being the only claim in letters patent No. 273,585, and claim 3 in letters patent No. 281,640, the parts

are old, excepting only—and this is not material—that the precise lines of cuts, and the shape of the opening of the angle-bar, are not found in safes of prior manufacture. The sheet-metal cover is old. It is shown in respondent's exhibit, St. Louis safe. The bars, C, and lower removable plate, D, claimed in 273,585, are old. (See respondent's Exhibit A, and the deposition of John Hurst.) The safes in the manufacture of which they were used, were square cornered, as was then the fashion, but that is not material. When the angle-frames were bent the corners were round, and then heated and hammered upon both sides of the corners to make them square. Respondent's testimony also establishes that fire-proof safes were filled from the bottom as early as 1879 by the Cincinnati Safe & Lock Company, and in that year, probably also in 1878, by Hall's Safe & Lock Company. The complainant was the first to employ the combination claimed in the manufacture of round-cornered safes, but the change from square-cornered safes was only a change in form. The combination is nothing more than an aggregation, and falls by the application of the rulings in *Hailes v. Van Wormer*, 20 Wall. 368; *Reckendorfer v. Faber*, 92 U. S. 347, and in *Pickering v. McCullough*, 104 U. S. 318.

The bill is dismissed at complainants' costs.

THE AVON.

(District Court, N. D. Illinois. January 5, 1885.)

1. COLLISION—VESSEL AT ANCHOR—LIGHTS—ADMIRALTY RULE 2.

The purpose of admiralty rule 2 was to have at least one bright white light set on a vessel at anchor so high as to be clearly visible from all directions, and which from its comparative height and the fact that it was stationary would indicate at once that it was upon a vessel at anchor; but having another light, even in the rigging or upon the hull or in the cabin windows, would not contradict such indication, or mislead an approaching vessel, and violate this rule.

2. SAME—EXHIBITION OF TORCH.

It is not necessary for a vessel at anchor to show a torch when its lights are properly set and burning, and an approaching vessel, by a vigilant and proper lookout, can see her without a torch.

3. SAME—LOOKOUT—COMPETENCY—USE OF NIGHT-GLASS.

A man who needs a night-glass to enable him to discover lights in time to avoid a collision is unfit for a lookout. His own natural vision should be sufficient to perform all the duties of a lookout.

4. SAME—STEAM-PROPELLER AND ANCHORED BARGE—NIGHT—LIGHTS—TORCH—LOOKOUT—FAULT—DAMAGES.

Upon examination of the evidence, *held*, that it is not shown, as claimed by the respondent, that the collision between the steam-propeller Avon in the night-time, on Lake Michigan, off the harbor of Milwaukee, with the barge Thomas A. Scott, while lying at anchor, was caused by the barge being anchored in an unsafe and improper place, or by a violation of admiralty rule 2 by her in displaying two lights, or by her failure to exhibit a torch when those

in charge of her saw the Avon approaching; but that the collision was caused by the negligence of the captain and lookout of the Avon, and that the Avon should bear the loss occasioned thereby.

In Admiralty.

Robert Rae, for libellant.

C. C. Clarke and Williams & Potter, for respondent.

BLONDETT, J. About 8 o'clock in the evening of October 29, 1880, a collision occurred on the navigable waters of Lake Michigan, off Milwaukee harbor, between the steam-propeller Avon and the four-masted schooner-barge Thomas A. Scott, while the barge was lying at anchor, whereby the barge was sunk and became a total loss. The Phenix Insurance Company and the Faneuil Hall Insurance Company had each issued season policies of insurance on the hull of the barge for the sum of \$2,000, which were in force at the time of the collision; and the Phenix Insurance Company, having reinsured the risk of the Faneuil Hall Company, paid the loss on both policies, amounting to \$4,000, and now brings this suit against the Avon to recover the amount so paid, alleging that the collision and the loss of the barge occurred solely by reason of the negligence and want of due care of those in charge of the Avon. The defenses set up are: (1) That the barge was anchored in an unsafe and improper place; (2) that the barge displayed two anchor lights, when, under the law, she should have shown but one; (3) that those in charge of the barge were guilty of contributory negligence in not showing a torch when they saw the Avon approaching the barge.

The proof shows, without dispute, that the barge in tow of the propeller Conemaugh was on a voyage from the port of Chicago to the port of Buffalo; that the Conemaugh, having occasion to enter the harbor of Milwaukee, dropped the barge a short distance outside the entrance to the harbor, and the barge came to anchor about half a mile nearly due east of the outer ends of the piers. The wind being southerly, she swung with her bow to the south, and her length over all being about 250 feet, she may be said to have lain directly opposite or athwart the entrance to the harbor, although a half-mile out in the bay beyond the entrance. There was ample depth of water to the north and south of the barge to enable vessels leaving or entering the harbor to pass the barge either to the north or south, and the usual course of steam-vessels bound to Chicago would carry them to the south, and those bound to the lower lakes would go to the north, of the place where the barge lay. The Avon, on a voyage from Buffalo to Chicago, entered the port of Milwaukee in the afternoon of the day of the collision, to discharge some freight, and left to pursue her voyage to Chicago about 8 o'clock in the evening. She was assisted to wind in the harbor by the tug Merrill, and then proceeded down the harbor with her own power. The night was not very dark, but there was some smoke on the waters of the bay about the mouth of the harbor, which came from the rolling-mills on the south side of the bay,

about a mile and a half south or south-east of the ends of the piers.

The barge had her anchor watch on duty, the mate being officer of the deck, and a proper anchor light hung on the jib-halyards from 12 to 20 feet above the deck, and where it was in plain sight of those approaching her. The proof also shows that there was another light seen upon the after-part of the barge; some of those who saw it concluding that it was a cabin light, and others thinking it was a lantern hung in the aft rigging. The officers and crew of the barge all concur in the statement that no light was intentionally set or displayed as a signal light in the after-part of the barge, and my own conclusion is that the light seen by the tug-men and crew of the life-saving station on the after-part of the vessel was a cabin light. But just a few moments before the Avon struck the barge, and when the collision was imminent, the mate of the barge took from the deck-house a bright lantern, ran along the deck with it, swinging it to attract attention; and this light may have been set down on the top of the cabin, or hung up in some of the after rigging, and thus have been the after light to which the mates of the Avon say the captain called their attention after the collision, and before the barge went down. The Avon had her side lights and her mast-head light duly placed, and all were brightly burning when she came down the harbor, and up to the time of the collision, and the proof is conclusive that her lights were plainly seen from the deck of the barge before she left the ends of the piers, until the collision. Why I say this fact is conclusively shown, is because it is unequivocally testified to by the crew of the barge, and several disinterested witnesses who were on board of tugs out in the bay, in the vicinity of the barge. The Avon had discharged some or all of her freight, so that she was down by the stern from the weight of her engines, and perhaps some freight aft, so that her bow was well out of water, and her lookout was stationed on her upper deck, forward of the wheel-house, and the captain, who was officer of the deck, stood near, and in front of the wheel-house.

As to the point made, that the barge was anchored in an unsafe place, I do not think the position is sustained by the proof. There was ample room for vessels leaving or entering the harbor to avoid her; and, in fact, the Avon, in laying her course for Chicago, after passing the end of the piers, would naturally have gone to the south of the space occupied by the barge. The half-mile intervening after the Avon was clear of the piers gave all the room that was needed to change her course, and go either to the south or north of the barge. For steam-vessels, whose course was not controlled by the wind, the course for the lower lakes and to ports north and north-east of Milwaukee was to the north, and for those bound to Chicago the course was to the south of where the barge lay; and only as to those bound directly across the lake—say to Grand Haven or perhaps Muskegon—could the barge be said to lie directly in their path. So, too, a