

tact when in operation, but, rather, that they should be run in conjunction with and in juxtaposition to each other.

Fourth. The specification describes adjustable bearings by means of which the rollers may be separated for a short distance, a totally useless function if they were always to touch each other.

Fifth. The specification also refers to the passage through the machine of articles having seams, buttons and protrusions; evidently requiring a wider space than collars and cuffs, which do not have buttons.

Sixth. Again, the operation of the machine is described, which is in direct conflict with the literal meaning of the word "contact," for it is manifest that the rollers cannot run in contact when they are separated by the article which is passing between them.

Seventh. The words "in contact" were not wisely chosen, but when the entire surroundings are considered it is evident that the patentees meant that the words should be construed as synonymous with "in connection." As no one has been or can be misled by this construction there is no reason why it should not be adopted.

Eighth. If the defendants' contention were adopted a machine which was originally arranged with the dampening rollers in contact and, therefore, an unquestioned infringement, would, by reason of the wear incident to the operation of dampening, cease to be an infringement, because the proof shows that the rollers change with use so that parts, at least, are not in contact. It will hardly do to adopt a construction which would absolve a licensee from paying royalties after a month or so of use; a construction which would make the operator of one and the same machine an infringer one day and a legitimate user the next.

Ninth. The equities are with the patentees. They have constructed a valuable and successful machine which performs the work required in a satisfactory manner. They were the first to make a success in this particular branch of industry. The defendants have copied all the essential features of the machine, and no reason is suggested which entitles them to a harsh and narrow construction.

It is thought, therefore, that the patent is valid, that the claims have been infringed by the defendants, and that the complainants are entitled to the usual decree.

KAESTNER v. NATIONAL BREWING CO. et al.

(Circuit Court, N. D. Illinois. February 18, 1893.)

1. PATENTS FOR INVENTIONS—NOVELTY—INVENTION—MASH RAKES.

Claim 1 of letters patent No. 207,283, issued August 20, 1878, to Charles Kaestner, for an improvement in mash rakes, which is for the construction of vertically and horizontally revolving rakes or agitators, and horizontally rotating scrapers, operating in the usual form of mash tub, is invalid for want of novelty and invention, the prior art showing that the patentee did not introduce any new operation or device; that the purpose of this claim, and the means therein employed, were old.

2. SAME.

The second claim was for the combination in a mash tub of scrapers which are secured upon a fixed arm that revolves around the axis of said tub, and have their faces inclined rearward, and towards the circle upon which is located the discharge opening, whereby the solid contents of said mash tub may be moved to, and caused to pass through, said opening. *Held*, that the claim is invalid for want of invention,—it being common in the art to use scrapers without agitators, and the changes in devices being only due to the skill of the mechanic,—even though the machine, as a whole, may be better.

3. SAME—INFRINGEMENT.

Even if the claims can be held valid by reason of special construction, then the defendants do not infringe, as they use an old, sweeping, single scraper, and do not use the scrapers, L, of either claim.

In Equity. Suit by Charles Kaestner against the National Brewing Company, Henry Olsen, Gustave Tilgner, and others for infringement of a patent. Bill dismissed.

Offield, Towle & Linthicum, for complainant.

Banning & Banning & Payson, for defendants.

GRESHAM, Circuit Judge. This suit is brought for the infringement of the first and second claims of the patent to Charles Kaestner for mash rakes, dated August 20, 1878. So far as the tub is concerned, it contains nothing new. The statement is, A and B represent the side wall and bottom "of a mash tub of the usual form," and further on the discharge hole is incidentally referred to. The drawing does not indicate that the tub has a double bottom or a false bottom, and the specification is silent as to this, for the words "usual form" refer to the entire tub; but, for the purposes of the improvements claimed, it seems not to be material whether the bottom is double or single, as both forms are shown to be old. The difficulty in the older machines, to be remedied by the improvements, is stated to be that the portion of grain "near the bottom of the tub being liable to be passed over by the revolving rakes usually employed," and that to obviate this difficulty the principal improvement consists in combining rotating scrapers with revolving agitators so as to raise the grain from the bottom of the tub. The first claim corresponds with this statement. It is:

"(1) In a mash tub, the combination of vertically and horizontally revolving rakes or agitators, K, and horizontally rotating scrapers, L, substantially as and for the purpose specified."

This claim is for the rakes, K, which are carried around the tub by the vertical shaft, and their supporting shaft is made to revolve by the gearing near the bottom of the tub. A set of scrapers is also carried around in the tub by the vertical shaft, but without being revolved by their carrying shaft or bar, or, in other words, the rakes have two motions, while the scrapers have only one, both sets operating in any suitable mash tub; the purpose being to lift the bottom grain so as to bring it within the action of the rakes, and for this purpose the hole in the bottom must be plugged or closed during the entire period of agitation. The agitators do not move the grain towards the discharge hole when it is open, any more than

they move it away from such opening. The absence of the hole is more essential, during agitation, than its presence. The prior art shows that the patentee did not introduce any new operation or device. The Schwalbe mash machine, from the Polytechnisches Centralblatt, (1859) shows a mash tub in which there are two rakes or agitators, one of which has the same double movement as that of the rakes, K, of the patent, and scrapers on the opposite side of the vertical shaft. Over these scrapers there is another agitator, which has a double horizontal rotation. The statement as to the scrapers is:

"Two wings, S, S, hanging near the bottom in the rotation of [shaft] L, stir up the mass that has deposited on the bottom."

The Volckner mash machine, from the same German publication of 1864, shows a similar machine, except that the doubly rotating agitator is shorter, and considerably above the scraper. The statement here is:

"The vertical agitator, H, carries two gratings, T and U, as well as two knives, V, hanging near the bottom. The latter stir up the mass that has settled on the bottom of the vat."

The Schwager meat cutter, of 1874, shows two sets of knives, having the same double rotation as the Kaestner rakes have, which is caused by a central shaft, and an arm having the same single rotation, which carries several stirring scrapers, or a single, full-width, cleaning scraper. Brand & Hoffman, in 1866, show a mash tub in which two agitators, having a double horizontal rotation, are used with scrapers at the bottom. They say, "The service performed by this scraper is to scrape up the mash, and prevent it from settling to the bottom of the tub," and their first claim is, "The adjustable scraper on bottom of tub." Other patents might be referred to, but these are sufficient to show that the purpose of the Kaestner first claim was old, that the means employed were old, and the use of more than one agitator would seem to depend on the amount of agitation desired.

The second claim is as follows:

"(2) In combination with a mash tub, scrapers, L, which are secured upon a fixed arm that revolves around the axis of said tub, and have their faces inclined rearward, and towards the circle upon which is located the discharge opening, b, whereby the solid contents of said mash tub may be moved to, and caused to pass through, said opening, substantially as and for the purpose shown."

Securing scrapers on a fixed arm is shown in the Schwager patent of 1874. A single curved scraper delivering mixed paint to a discharge hole in the bottom is shown by Poole in 1867. A series of scrapers on fixed arms, delivering salt or "other substances" to a discharge side hole, which scrapers can be adjusted in regard to their edge lines, is shown by Winegar in 1868; and scrapers which are attached to fixed arms that revolve around the axis of the tub, and have faces with an upward and rearward incline, which are so arranged as to bring the mixed material to a discharge hole in the bottom, are shown in the Martien patent of 1872. These scrapers

are also "dodged." The prior art illustrated by the exhibits shows that it is also common in the art to use agitators without scrapers, and scrapers without agitators; and, as the combination of the second claim is complete without the rakes or agitators which are included in the first claim, I do not see how the rakes or agitators can be carried into this claim, and thus make it substantially like the first. I do not think, in view of the first claim, that this was the intention of the patentee. The changes in devices, in so far as they differ from older ones, appear to be only due to the skill of the mechanic, even though the machine, as a whole, may be better. Better or worse, in kind, belongs to skill, and not to invention. The combinations of both claims are found in the older art in several forms.

If the claims could be held valid by reason of special constructions, then the defendants would not infringe, as they use an old, sweeping, single scraper, and do not use scrapers, L, of either claim. The bill is dismissed for want of equity.

BIXBY et al. v. DEEMAR.

(Circuit Court of Appeals, Fifth Circuit. March 13, 1893.)

No. 107.

1. SHIPPING—CARRIAGE OF GOODS—LIABILITY FOR LOSS—MASTER'S NEGLIGENCE TO SAVE CARGO.

It is the duty of the master of a wrecked vessel, whether insured or not, to use reasonable diligence to save and reship the cargo; and where it appears that a part of the cargo was so stored that it might have easily been saved, and that several opportunities to reship what was saved were neglected, the carrier is responsible to the shipper for his loss, although the shipment was at the owner's risk, and "dangers of the river" were excepted.

2. SAME.

Where the master of a wrecked vessel abandons her to the underwriters without the exercise of due diligence to save the cargo, the fact that the underwriters take possession, and sell a part of the cargo which is not insured, does not exempt the carrier from liability to the shipper for his loss.

3. ADMIRALTY—APPEAL.

A decree in admiralty, awarding damages to a shipper, should be affirmed on appeal when it does not clearly appear on what grounds the district court based its award, and the proof does not clearly fail to show that the loss was caused by the master's neglect to use proper means for saving the cargo.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

In Admiralty. Libel in personam by H. H. Deemar against Horace E. Bixby and the St. Louis & New Orleans Anchor Line for loss of cargo on respondents' steamer. Decree for libelant. Respondents appeal. Affirmed.

R. H. Browne, (Browne & Choate, on the brief,) for appellants.

J. W. Gurley, Jr., (Gurley & Mellen, on the brief,) for appellee.