

anticipatory product was said to have been put on the market before January 1, 1888; and from that time until January, 1890, the respondent was continuously engaged with the complainant in making stove knobs, the respondent having immediate charge of the business. At the latter date the respondent withdrew, and commenced a like business on his own account in May, 1890. The patent in dispute was taken out on the application of Mr. Turner, the original patentee, filed March 20, 1890, and issued to the complainant, as Turner's assignee, July 22, 1890. The case shows that respondent, although he had active charge of the business, as already said, did not follow up the alleged anticipatory product, and that he never manufactured, or caused to be manufactured, any knobs of that type, until a year after he commenced business for himself. These facts form a practical verdict by the respondent in favor of the complainant, on the question of the alleged anticipatory use, of great weight, and afford a strong presumption against him. This presumption is all the more weighty, because the respondent does not undertake to connect his infringing manufactures in 1890 or 1891 with the alleged anticipatory product, or show that the former in any way reverted to the latter.

With our rapid progress in mechanical improvements, what an ingenious man fails to accomplish to-day, with the appliances now at hand, another ingenious man may accomplish to-morrow, with the better appliances which he then finds; and, if the latter acts from his own resources, he is not to be deprived of the fruits of his ingenuity by reason of the prior failure of to-day, although, without taking into account the change in appliances, it may be difficult to understand why and wherein one failed, and the other succeeded. There is no equity or public policy which requires that one should be deprived of his just reward who revives a lost art, whether buried for ages, or for only a few years, although with the latter there is, of course, more necessity for making sure that the revival was not suggested by the knowledge of what had apparently disappeared. Nothing, however, to this effect has been brought to our attention in this record.

On the whole, this part of the case seems to the court to be fully within the spirit of the closing paragraphs of the Barbed Wire Patent, 143 U. S. 292, 12 Sup. Ct. Rep. 443, 450.

Decree for an injunction and an account, with reference to the first and second claims only; complainant to file draft decree on or before rule day in September, and respondent to file corrections of the decree on or before the 16th day of September.

---

DETWILER v. BOSLER.

(Circuit Court, E. D. Pennsylvania. July 6, 1893.)

No. 16.

PATENTS FOR INVENTIONS—INFRINGEMENT—GRINDING MILLS.

Letters patent No. 188,783, issued March 7, 1877, to John S. Detwiler, for an improvement in grinding mills, claims the "combination of a pair of stones set to grind coarse, with a second pair of stones, of larger

diameter, set to grind fine, and run at a lower speed than the upper and smaller pair;" the partially ground grain falling from the upper to the lower pair. *Held*, that the claim was not infringed by the use of rollers revolving in a vertical plane, instead of stones revolving in a horizontal plane. 55 Fed. Rep. 660, overruled on rehearing.

**In Equity.** On rehearing. Suit by John S. Detwiler against Joseph Bosler for infringement of letters patent No. 188,783, issued March 27, 1877, to complainant, for an improvement in grinding mills. On May 9, 1893, a decree was ordered for complainant, but a rehearing was subsequently granted. Bill dismissed.

Charles B. Collier, for complainant.

Horace Pettit, for respondent.

DALLAS, Circuit Judge. Upon May 9, 1893, I filed an opinion in this case, in which the conclusion was reached that the plaintiff was entitled to a decree. Before any decree was entered, however, and with sufficient promptitude, a motion for a rehearing was made on behalf of the defendant. After argument and consideration of that motion, I was of opinion that perhaps I had fallen into error upon a single but essential question, which, being one of fact, it was especially incumbent upon me to reconsider. Accordingly, the motion for rehearing was granted, and the case has since been reargued, but only upon one point, viz. as to whether "the court had misunderstood or misconstrued the testimony regarding the construction of defendant's mill." In my former opinion I said: "The defendant's expert (Hollingsworth) has testified that, irrespective of scalpers and assuming that rollers are the equivalents of millstones, the two processes are in his opinion exactly the same." I now perceive that as to this, I did misunderstand the evidence. The witness Hollingsworth had testified, it is true, precisely as I stated; but it should be observed (as I failed to do) that the portion of his testimony to which I especially referred related exclusively to "the two processes," and not to the two organized mechanisms of the complainant and of the defendant respectively; and the patent in suit is not for a process, but for a combination of mechanism by which a designated process is carried on. My attention has now been directed to the fact that Mr. Hollingsworth, himself, very pointedly made this distinction, and testified, in effect, that the "machine" of the defendant was different from that of the complainant. My misapprehension of the evidence in this particular led me to attribute undue force to the argument of complainant's counsel in aid of the construction which he contended should be given to the testimony of Mr. Collins and of Mr. Berger with reference to the diameter and speed of defendant's rolls. That the second pair of stones shall be of larger diameter, and run at a lower speed, than the upper and smaller pair of stones, are essential features of the claim. These elements I now find, after a careful review of the evidence, have not been shown to be present in the defendant's construction; and the very ingenious argument of complainant's counsel, not having (as I had supposed it had) the support of the defendant's own expert, seems to me, upon re-examination,

to be too conjectural and inferential for acceptance. The burden of proving infringement was upon the complainant. To discharge himself of this burden, he might, and should, have established with reasonable clearness, if it existed, the substantial identity of the organized mechanism of the defendant with that of the patent. This he has not done with respect to the two elements which I have particularly mentioned, and therefore the direction of May 9, 1893, for the preparation of a decree in favor of the complainant is revoked; and it is now ordered that the bill of complaint be dismissed with costs.

---

THE E. A. PACKER.

SCULLY v. NEW JERSEY LIGHTERAGE CO.

(Circuit Court of Appeals, Second Circuit. October 17, 1893.)

No. 87.

1. ADMIRALTY APPEALS—SUPREME COURT—CIRCUIT COURT OF APPEALS.

An expression of opinion on the merits by the supreme court in reversing and remanding an admiralty cause, which was again tried in the circuit court after the passage of the judiciary act of March 3, 1891, is not binding on the circuit court of appeals when, according to its practice, the case is brought before it on all the evidence, which shows an additional material fact not in the record before the supreme court, and the absence of which that court expressly recognized.

2. COLLISION—DAMAGE TO TOW.

A vessel guilty of fault contributing to a collision with a tow, which is free of fault, is liable therefor, although the tug in charge of the tow was also in fault, and is not a party to the suit.

3. SAME—INSPECTION RULES—NEW YORK HARBOR.

A tug rounding the Battery in New York harbor from the North river into the East river with a tow is subject to rule 2 of the supervising inspectors, providing that, when vessels approach each other obliquely, the one having the other on her starboard hand and being herself on the other's port hand shall put her helm to port, and pass under the other's stern; and she is not excused from obedience thereto by the fact that, as the other vessel is approaching obliquely across the East river, the maneuver will throw her out into the ebb tide, and cause her great inconvenience and delay. 49 Fed. Rep. 92, affirmed.

4. SAME—CUSTOM.

The mere fact that vessels in rounding the Battery often agree with each other to depart from the inspectors' rule, so as to allow the vessel going against the tide to keep next the piers, is not sufficient to excuse a vessel for disregarding the rule without any agreement.

Appeal from the Circuit Court of the United States for the Southern District of New York.

In Admiralty. Libel for collision filed by the New Jersey Lighterage Company against the steam tug E. A. Packer, John Scully, claimant. There was a decree for libellant in the court below, (49 Fed. Rep. 92,) and the claimant appeals. Affirmed.

E. D. McCarthy, for appellant.

R. D. Benedict, for appellee.

Before LACOMBE and SHIPMAN, Circuit Judges.