

The engraving on the disk looks as old as is claimed, and the wear upon the ornamentation about it looks equally old or older. They strongly support the claim of age, so far as their identity with the instrument is established. They seem older than the other parts. The covering of the handle is testified by experts to be much newer than it is said by Cushing to be, while others testify that this cannot be told. To the eye it does seem comparatively new. The disk appears to be soldered to the tube forming the handle with soft solder, and the joint between the tube and collar at the other end and all other joints to be brazed. These things tend to discredit the continuous identity of this holder. Such an instrument, so publicly used as this is said to have been, would be likely to draw attention, and that no more are produced who ever saw it is singular. Upon much consideration of the whole, doubts which seem quite reasonable also arise as to whether this holder existed before the orator's invention. That such doubts are to be resolved in favor of the patent is too well settled to be, and is not here, controverted. With these things out of the way as anticipations, this case is the same as that decided by Judge Coxe, and not the same as that decided by Judge Shipman.

The decision by Judge Shipman on the proceedings for contempt, being in a suit between these same parties, is relied upon as conclusive against this alleged infringement; otherwise, no suggestion is understood to be urged that the decision by Judge Coxe should not be followed. Neither the Stendicke device, as an anticipation, nor the decree made by Judge Shipman, limiting the scope of the patent upon it as an estoppel, is brought by the defendants into this case. The proceedings for contempt were in their nature criminal, and not a part of the suit; and the decision upon them would be upon the question of guilt or innocence, and not a part of the decree. The question of infringement, although involved, obviously was not intended to be, and would not be, thereby concluded. *Cromwell v. County of Sac*, 94 U. S. 351.

Let a decree be entered for the orator.

DOUGHERTY v. DOYLE et al.

(Circuit Court, N. D. New York. January 22, 1894.)

PATENTS—LIMITATION OF CLAIM—MINCE-PIE COMPOUNDS.

The Allen patent, No. 268,972, for a dry mince-pie compound, composed essentially of cooked meat, dried fruit, sugar, and spices, "compounded dry," if not void for want of invention, is restricted to a compound in the preparation of which no free liquid is used, and does not cover a compound in which 140 pounds of boiled cider has been added to each 1,000 or 1,200 pounds of the dry ingredients.

In Equity. Suit by Thomas E. Dougherty against Michael Doyle and Albert S. Bigelow for infringement of a patent. Bill dismissed.

Hey, Wilkinson & Parsons, (Hey, Ephraim Banning and Jas. I. Kay, of counsel,) for complainant.

osiah Sullivan, for defendants.

WALLACE, Circuit Judge. Infringement is alleged in this suit of letters patent No. 268,972, granted to Henry Julian Allen, dated December 12, 1882, for preserved compound for mince pies. The defenses are want of patentable novelty and noninfringement. In the general statement in the specification the object and nature of the invention is set forth by the patentee as follows:

"Mince-pie compounds have heretofore been prepared in the wet state, with free water present in the shape of wine, cider, or other liquid, and put up in cans, jars, and barrels, which condition of the compound involves a liability to ferment, decay, or mold, and in which state the compound is not easily handled in definite quantities. My invention, while employing no substantially new ingredients, is founded upon the combination of old ingredients, which are combined, both chemically and mechanically, under peculiar conditions that enable me to produce a practically dry compound that may be put up as a dry solid in separate packages, which remain stable, and keep sweet and pure, under all ordinary influences."

The specification describes the ingredients of the compound to be cooked meats, sugar, desiccated apples or other fruit, and spices. In preparing it, the beef or other cooked meat, and the dried apples or other dried fruits, are chopped or ground to a suitable fineness; sugar, spices, and salt are added; and the ingredients are thoroughly rubbed or mixed together dry, until a stable compound is formed. The compound is then ready to be put up in suitable packages for use, sale, and transportation. The specification points out that when the ingredients are compounded dry the sugar absorbs the moisture from the cooked meats, and forms a syrup, which is at once taken up by the dried fruits and spices, and effectually permeates and coats the various ingredients. After giving the proportional quantities of the ingredients, and stating that these proportions may be varied as the taste of the operator or buyer may dictate, the specification says:

"A small quantity of wine, brandy, or other liquor may be added to the compound while in course of preparation, or afterwards, if desired. This, however, is quickly absorbed by the dry products, and creates no sensible moisture in the composition."

The specification concludes by the following disclaimer:

"I am aware of the fact that the ingredients named by me are not new in mince-pie compounds when compounded in a wet state, and I am also aware that desiccated compounds of meats and cereals have been prepared to form pemmican, dried soups, etc., and I do not claim such."

The claim is as follows:

"As an improved article of manufacture, a dry mince-pie compound, composed essentially of cooked meat, dried apples or other fruit, sugar, and spices, compounded dry, whereby the meat is desiccated and preserved without being carbonized, and a dry, stable composition formed, substantially as herein shown and described."

The patentee was not the first to make a commercial mince-pie compound. Such an article had been made and sold in large quantities by grocers and other dealers. Nor was he the first to make a compound of new ingredients. As he states in the disclaimer, the ingredients were old when compounded in a wet state. In the old compounds fresh apples were used, and also cider, wine, or other

liquids; consequently free water was present in the compound. The new thing described in the specification as made by him is a dry or solid compound, instead of the moist and more or less liquid compound previously made by the housewife and the grocer. The free moisture is carefully excluded from the new compound by using no liquids or fresh fruits, and mixing the ingredients together in a substantially dry state. In this respect, and in this only, does the patented compound differ from the old ones.

It is open to doubt whether there is any patentable novelty in the compound of the patent. It is undoubtedly true that Allen was the first to conceive the practicability of making a compound which could be put up in convenient packages for sale, would keep for an indefinite length of time, and could be readily prepared for family use by the admixture of water. The great convenience of such a preparation commended itself quickly to the public, and led to the introduction of a condensed mince meat which has achieved an extraordinary commercial success. But the patent cannot be sustained unless there was invention in devising the compound; it cannot rest upon the mere thought, however felicitous, that the compound, when made, would be acceptable and popular. Mince-pie compounds are of such varying liquidity that it seems very questionable whether any inventive faculty can be involved in making them more or less liquid, and it would seem that any changes in the proportions or quantities of the ingredients necessary to make the compound more or less liquid or solid would be within the ordinary skill of the grocer or cook. It is shown to have been customary in making the grocer's compounds to graduate the quantity of liquid according to the dryness of the fruit, less being used with the cider apple and more with drier apples. It would seem an obvious thing to reduce the quantity of the liquid ingredients, or to use drier fruits instead of juicier ones, if it were desired to make a less liquid compound, and to increase the liquid or use the juicier fruits if a more liquid compound were desired. Allen did but little more than this in using no free liquid, and using only dried fruit with the meat and spices. Nevertheless, his dry compound may be regarded as something more than the old preparations with a different degree of liquidity. It is a new commercial article. In view of its utility and value, and the presumption arising from the grant of the patent, any doubt as to patentable novelty ought to be resolved in favor of the patentee.

But the narrowness of the invention, as well as the description in the patent, require the claim to be narrowly construed. It cannot be construed to cover any compound which is substantially dry without invalidating it as a patent for a mere improvement in degree. When is the compound sufficiently free from moisture to be "compounded dry" within the meaning of the claim? It is described as "a practically dry compound, that may be put up as a dry solid." It is made by a process of preparation which, when complete, forms "a stable compound." It is one which is so dry that when liquid seasoning is used no "sensible moisture" is created. The patentee evidently supposed that all the moisture in the com-

pond would be that derived from the juices of the cooked meat, which, as he states in the specification, passes into the sugar, and converts it into a syrup of meat, which is absorbed by the dried fruits. The most satisfactory criterion afforded by the description to determine when the compound is sufficiently free from moisture to answer the terms of the claim is found in the fact that no free liquid is used in preparing it, and the only moisture present is what is produced by the juices of the cooked meats and dried fruits.

It seems very clear that the condensed mince meat made by the defendants is not compounded dry, within the meaning of the claim. It is made by adding to the ingredients described in the patent 140 pounds of boiled cider to each 1,000 or 1,200 pounds of the compound. This is an addition in volume of about 12 or 14 gallons of liquid, and is more than the other ingredients will absorb. When packed, it is a sensibly moist product, which will wet paper, and destroy paper boxes, and for this reason it is wrapped in a waxed paper, to prevent the moisture from injuring the outer package.

The bill is dismissed, with costs.

THE ETHEL.

HODGKINS v. WELSH et al.

(District Court, E. D. Pennsylvania. January 19, 1894.)

No. 74 of 1893.

SHIPPING—SHORTAGE OF CARGO—EVIDENCE.

In determining whether there is a shortage of cargo consisting of bags of sugar, both the consignee's output count and the intake count as shown by the bill of lading are controlled, when the deficiency alleged is only three bags, by proof that the hatches were sealed after the sugar was in, and opened only by the port wardens on the vessel's arrival, and that there was no opportunity for loss or abstraction.

In Admiralty. Libel by Frank M. Hodgkins, master of the bark Ethel, against S. & J. Welsh, to recover a balance of freight, which respondents assume to withhold because of shortage of cargo. Libel sustained.

Curtis Tilton, for libelant.

Richard C. McMurtoil, for respondents.

BUTLER, District Judge. The only question involved is one of fact. The respondents seek to have the value of three bags of sugar, (a part of the cargo,) \$41.40, deducted from the freight, on the ground that the delivery was short to this extent. The bill of lading acknowledges the receipt of 6,443 bags, and the respondent's output tally shows only 6,440 bags. If there was nothing more the claim would be allowed. While the ship is liable only for the cargo received the bill of lading has the force of a written receipt, and binds her until disproved. To discredit it and the respondent's output tally the libelant invites our attention to a dispute which existed respecting the intake count, and to a discrep-