The commissioner finds that if Ecaubert conceived of the invention prior to December, 1887, he certainly did not reduce it to practice; that at the time Hofmann made his operative machine the whole matter was in a nebulous and experimental state, so far as Ecaubert was concerned. I see no reason to disagree with these conclusions. Though a commissioner's decision is entitled to respect and consideration in every controversy, particularly is this so when, as in the present cause, it comes from a lawyer of conceded ability, fairness and diligence. After giving considerable time to the consideration of the questions involved, I cannot resist the conclusion that the controversy was properly disposed of in the patent office, and that nothing has been presented since which will justify the court in setting aside the judgment then pronounced. The same argument which convinced the supreme court in the Telephone Cases (8 Sup. Ct. 778) seems equally persuasive here. Can it be that Ecaubert, familiar with patents as he undoubtedly was, if he had made an invention of conceded importance in 1879, or in 1885, would have remained inactive and taken no steps to secure the fruits of his genius for eight or even for two years? His excuses for this supineness are wholly inadequate, especially in view of the fact that during this period he took out several patents for comparatively trivial improvements in the same art. But, if it be conceded that the idea of the invention was clearly defined in his own mind, he certainly failed to embody it in a perfected machine. Hofmann was the first to do this. He made a simple but successful machine, and used it almost immediately in ornamenting centers for practical business purposes. With this issue of priority determined in favor of Hofmann there is nothing patentable left in the Ecaubert patent.

It follows that the complainants are entitled to the relief demanded in the bill.

ECAUBERT v. APPLETON et al.

(Circuit Court, S. D. New York. April 19, 1894.)

This was a suit by Frederic Ecaubert against Daniel Fuller Appleton and others for infringement of the patent to complainant, No. 434,539, brought after the commencement of a suit against him by defendants herein to cancel said patent (62 Fed. 742). The two causes were heard together. Complainant moved to strike out certain testimony taken by defendants.

COXE, District Judge. The foregoing considerations dispose of this cause also, which is an ordinary action of infringement. The bill is dismissed.

Note: As these causes have been decided upon the broad ground that Ecaubert conceived of the invention before December, 1887, he had not succeeded in reducing it to practice until after Hofmann had made an operative machine, it seems unnecessary to pass, seriatim, upon the questions raised by the motions to strike out. In view of the fact that the actions were, practically, tried together, all the testimony complained of seems to have a bearing upon some of the issues presented. I am of the opinion that the testimony should not be stricken out, and this ruling may be put in any form which counsel for Ecaubert may suggest to enable him to present the questions on appeal.

THE THOMAS MELVILLE.

COUL v. LOUISIANA CONST. & IMP. CO.

(Circuit Court of Appeals, Fifth Circuit. May 22, 1894.)

No. 219.

1. WHARVES—DUES—VESSELS "ARRIVING FROM SEA."
Under the ordinance of the city of New Orleans of 1875, as amended in 1881, for collection of wharf dues, requiring ocean steamships "arriving from sea" and landing at any wharf in the city to pay a certain rate per ton for the first two months or less, and extra charges if remaining longer, such a vessel, so arriving and landing, and then departing for a coastwise port for part of her cargo, is liable for additional wharf dues on returning to New Orleans to finish loading and again departing, all within two months; the intention being apparent from other provisions of the ordinance that dues should be charged on each entry or trip of a vessel.

2. SAME—TONNAGE.
Such wharfage is to be computed on gross tonnage, as contemplated at the time of the ordinance and its amendments, not on the net tonnage basis subsequently adopted by act of congress (Act Aug. 5, 1882).

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

This was a libel by the Louisiana Construction & Improvement Company against the steamship Thomas Melville (J. Coul, claimant), for wharfage. The district court rendered a decree for libelant. Claimant appealed.

Henry P. Dart, for appellant.

J. R. Beckwith, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and LOCKE, District Judge.

PARDEE, Circuit Judge. The Louisiana Construction & Improvement Company, a corporation created under and by virtue of the laws of the state of Louisiana, is the contractor and lessee of the public wharves and landing places of the city of New Orleans, and, as such lessee, in consideration of maintaining the wharves and landings and making other outlays in relation thereto, is entitled, under its contract with the city of New Orleans, to collect wharf dues from vessels using the wharves at the rates established by the ordinance of the city of New Orleans adopted January 19, 1875, as amended May 12, 1875, and again amended May 27, 1881.

Among other rates, the said ordinance as amended provides as follows:

"Section 1. Upon all ships and other decked vessels and steamships arriving from sea and landing or mooring at any wharf in the city, the charges shall be as follows: On 1,000 tons and under, 20 cents per ton; excess over 1,000 tons, 15 cents per ton; steamships in Gulf of Mexico trade, 15 cents per ton.

"Sec. 2. The same payments on ships or sail vessels shall be exacted as on steamships; and an extra charge of one-third these rates shall be paid by all sail vessels or steamships which may remain in port over two months, the same to be recovered before departure, and, if they remain over four months,