

fact right to use. A decree cannot be given the complainant unless the court is prepared to take the broad ground that the complainant alone has the right to sell soap powder in packages covered with yellow paper. Once enunciated the rule must be applied to all similar cases. The shield of the law must be extended to every dealer who adopts paper of a particular color in which to wrap his goods until at last the court may be called upon to protect one who claims "for his goods the primitive brown paper and tow string as a peculiar property." *Harrington v. Libby*, 14 Blatchf. 128, Fed. Cas. No. 6,107. The position contended for is in advance of any yet reached by the courts. This court has on three occasions refused to interfere where the question related only to the color of the wrapper in which the goods are displayed. *Novelty Co. v. Blakesley*, 40 Fed. 588; *Novelty Co. v. Rouss*, Id. 585; *Mumm v. Kirk*, Id. 589. The complainant's contention is not, it is thought, in the interest of fair and free competition in trade or capable of a consistent and uniform application. When it comes to a question of such details it is wiser to leave the parties to contend for patronage before the bar of public opinion in the usual manner and with the usual weapons. This may be done with an abiding confidence that he who sells honest goods by honest methods will, in the end, prevail. Commerce is impeded rather than aided by the officious intermeddling of the courts in every petty quarrel between rival traders. It will be an intolerable annoyance if trade is to be still further hampered by a rule which enables a merchant to bring his rival into court because the latter wraps his merchandise in the same colored paper as the former. The bill is dismissed.

CARRINGTON v. SILVER & CO.

(Circuit Court of Appeals, Second Circuit. December 17, 1895.)

PATENTS—INFRINGEMENT—GAS STOVES.

The Carrington patents, Nos. 419,827 and 420,225, for improvements in gas stoves, construed, and *held* not infringed. 64 Fed. 854, affirmed.

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

This was a suit by Anna A. Carrington against Silver & Co. for alleged infringement of letters patent No. 419,827, issued January 21, 1890, and No. 420,225, issued January 28, 1890, both to James H. Carrington, for improvements in gas stoves. The circuit court held that neither patent was infringed by defendant, and dismissed the bill. See 64 Fed. 854, where a full statement of the facts will be found. Complainant appeals.

H. Albertus West, for appellant.

J. E. M. Bowen, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. We agree with the court below that the appellee's gas stoves do not infringe either of the patents of the

appellant. As to the patent No. 420,225, it is unnecessary to add anything to the opinion of the judge of the circuit court, inasmuch as we fully concur in it.

The claims of patent No. 419,827 are restricted to a stove having "small perforations" throughout its body, or a body "closely perforated" throughout its length, and the stoves of the appellee do not have such perforations. The stove of this patent consists of a hollow body, perforated throughout its length; a top, which is, by preference, closed or imperforate; a burner of any approved type, located near the base of the stove; and a perforated bottom plate. The specification states that by the invention of the patent "there is practically no draft into the stove, except at the bottom, through the perforated bottom plate."

In view of the prior state of the art, the claims must be narrowly construed. As is stated in the opinion of the court below, gas stoves having perforated drums and bottom plates, and burners located near the base, were old. This sufficiently appears by the prior patents of Shaler and of Dinsmore. In the stove of the Shaler patent the perforations extend throughout the body. This stove has a perforated top plate. The stove of the Dinsmore patent has a closed top plate. If there is any patentable novelty in the stove of the present patent, it must be found in the peculiarity of the perforations. What this consists in can only be definitely ascertained from the statement in the specification that there is practically no draft into the stove except at the bottom. A stove in which the perforations will not effect this result does not contain the "small perforations" or the "closely perforated" body of the claims. The stoves of the appellee do not contain them, and consequently they do not infringe the claims.

For these reasons, we do not deem it necessary to consider whether the use of the interior glass cylinder in the appellee's stove is or is not important in determining the question of infringement.

The judgment of the circuit court is affirmed, with costs.

REED et al. v. POMEROY et al.

(Circuit Court, D. Massachusetts. December 23, 1895.)

No. 379.

1. PATENTABLE INVENTION—WHIPSTALK MACHIN.

There is no patentable invention in so changing the location of the knife in a machine for splitting whipstalks that instead of splitting off a small strip, thicker at one end than at the other, by a diagonal movement of the stalk against the knife, the machine will, by a like motion, divide the stalk into two equal strips, each thicker at one end than at the other.

2. SAME.

The Reed patent, No. 454,497, for improvements in a "stalk-splitting machine for whips," is void for want of patentable invention.

This was a suit in equity by Thomas W. Reed and others against John P. Pomeroy and others for alleged infringement of a patent.

William H. Chapman, for complainants.
Fish, Richardson & Storrow, for defendants.

ALDRICH, District Judge. The supposed invention involved in this suit relates to improvements in a machine patented to M. E. Moore, April 17, 1877, No. 189,569, for fitting sidings for whips; and the improvements, which are covered by letters patent granted to T. W. Reed under date of June 23, 1891, and numbered 454,497, and which are the subject of the present controversy, consist in an attachment to the Moore machine, which Reed, in his specification, denominates a "stalk-splitting machine for whips." Reed, the patentee, more particularly describes—or, in other words, limits—his supposed invention by the language used in lines 10, 11, and 12, page 2, of his specification, wherein he says:

"The table, with its appendages, the serrated guide rollers, and the knife, are all that I add to the Moore machine."

Having described the invention, he makes his claim for letters patent:

"In a stalk-splitting machine for whips, the combination of the rollers 1 and 2, having their faces transversely serrated; rollers 7, 8, and 9, with circumferential serrations in grooves to prevent the turning of stalks conveyed therein; the cam guide, with bar and cam to operate the same; the pressure guide acting against said cam guide; and the knife, E, held rigidly to the frame,—substantially as set forth."

Counsel for the complainants, in argument, makes no claim for merit in the rolls with circumferential serrations, but contends that the patentee specified such rolls under the erroneous impression that flat-faced rolls would not hold the stalk from turning as it passed through the machine, and, it having been demonstrated that such belief on the part of the patentee was a mistaken one, that the circumferentially serrated rolls were discarded; and the complainants therefore make no claim for these rolls, as an essential in their device, but, on the other hand, ask to be protected in an invention of a combination which was new, irrespective of this form of roll. The object of the supposed invention was to provide a machine which would successfully split stalks of rattan, by beginning at one end of the stalk at one side of the axial center, and terminating at the other end upon the opposite side of the axial center, thus producing two correspondingly tapered pieces of rattan; so that the larger or butt ends of such pieces, with others, when placed upon a center, and all tapering towards the other end, would give the desired form of the whip. Neither the original Moore machine nor the alleged infringing machine employ the circumferentially serrated rollers, and this feature of the Reed patent may therefore be treated as of no materiality upon the question under consideration. The complainants contend that they may discard this feature, and thereby limit their claim, and hold their invention of a useful combination, irrespective of this form of roll; and in order to determine the question of invention in respect to what remains, for the purposes of this case, the complainants are treated as not bound by the broad claim which embraces this form of roll in its combination. As has been observed,

the object was to split pieces of rattan in such a manner as should leave two correspondingly tapered halves, and this is accomplished by the complainants' machine,—and by the defendants' alleged infringing machine as well,—by holding the stalk firmly, so that it shall not twist or turn, and forcing it diagonally upon a fixed splitting knife, and through the machine, when you have two pieces of rattan, thick at one end, and tapering gradually to the other end. It is obvious that the old Moore machine, constructed in accordance with the Moore patent, contained all the mechanism necessary for holding and passing the stalk diagonally upon a knife; but its knife, although a fixed knife, was so located or attached, as to take off a shaving or strip only, which was passed from the side of the machine at the point where the strip or shaving was severed, while the main stalk passed through the rollers, and from the end of the machine. It, however, possessed the means of presenting the stalk diagonally, and would take off a strip or shaving thicker at one end than the other. Indeed, it was admitted in argument that the machine constructed under the Moore patent possessed the means for holding and presenting the stalk upon a knife in such a manner as to accomplish the desired result, provided its knife was properly located and attached. The Reed patent in suit presents a vertically disposed knife, rigidly fixed to the frame at such a place and in such a manner that as the stalk is forced longitudinally, under slight diagonal direction, upon the knife, the piece is divided in halves thick at one end and thin at the other. The Moore machine, constructed under the Moore patent, possesses all the means of holding the stick, and passing it longitudinally and diagonally upon a knife, but its knife is so attached to the frame of the machine that it takes off a shaving or strip thick at one end and thin at the other. So it would seem that one machine will divide a stick longitudinally by taking off a strip, whereby two pieces are left thick at one end and thin at the other, but not of corresponding size, while the other will divide a stick longitudinally by splitting it so as to leave both pieces thicker at one end than at the opposite end, and of corresponding size. All that remains, therefore, of the complainants' invention, by way of improvement of the Moore machine, consists of the knife vertically disposed over the guide rolls so as to split the stick diagonally, instead of shaving or stripping it diagonally, as was done by the Moore machine, with the knife at the side of the guide rolls; and the question presented is whether this amounts to invention. The uses of the knife, as applied to wood, are old. In the old civilization, with the knife in hand, the cutting function was so ingeniously applied as to produce wonderful and marvelous shapes and results; and in modern times its function as a fixed, adjustable, and movable instrument has been manifest in machinery designed for cutting, splitting, and shaping wood. In view of the varied and well-understood uses of the knife in olden and modern times, the idea involved in attaching it to the frame of the machine over the guide rolls, instead of attaching it to the frame at the side of the guide rolls, cannot be treated as patentable invention. The bill should be dismissed, with costs, and it is so ordered.

COLUMBIA WIRE CO. v. FREEMAN WIRE CO. et al.
(Circuit Court, E. D. Missouri, E. D. December 23, 1895.)

No. 3,901.

1. PATENTS—PRELIMINARY INJUNCTION.

A preliminary injunction should be granted, in the absence of affirmative defenses, where infringement is clear, the monopoly secured by the patent has been generally acquiesced in by all manufacturers and dealers, and where it appears that complainant's established business would be seriously interfered with by denying the injunction, while defendants have not yet begun to manufacture with the infringing machines, and would not be seriously affected in their pursuit by the injunction.

2. MUTUALITY OF CONTRACTS.

It seems that an agreement, by the owner of a patent for certain machines, to furnish to another "such a number of machines as they desire for their own use at present or hereafter," is void for want of mutuality.

3. CONSTRUCTION OF CONTRACTS.

Where the owner of a patent for certain barbed-wire machines contracted to furnish to a company, which at the time was engaged in equipping a shop for the manufacture of barb wire, "such a number of machines as they desire for their own use at present or hereafter," *held*, that the natural construction of the contract would limit the obligation to the furnishing of the number of machines required for equipping that shop.

4. TRANSFER AND ABANDONMENT OF CONTRACTS.

A corporation manufacturing barbed wire obtained from the owner of a patent covering barbed-wire machines an agreement to furnish it such a number of the machines "as they desire for their own use at present or hereafter." Thereafter the corporation sold and transferred all its assets and property to a new company, controlled and managed by practically the same owners. The contract was not included in the inventory, but its possession passed to the new company, and was represented as belonging to it, by its officers, in transactions with third parties. The original corporation discontinued business, having no place of business, no assets, money, or property, and continued in this state for over six years, when it was revived, and claimed a right, under the contract, to procure as many machines as it desired, and, in default thereof, to make them for itself. *Held*, that the contract had either passed to the successors of the old company or had been effectually abandoned.

5. MONOPOLIES—PATENTS—STATE ANTI-TRUST LAWS.

A corporation organized for the purpose of acquiring patents and granting licenses thereunder, and which has acquired many, if not all, of the valuable patents covering machines relating to a certain art, is not subject to the anti-trust laws of Illinois; for to subject patents to the operation of state laws of this description would be inconsistent with the rights acquired under the patent laws. *Harrow Co. v. Quick*, 67 Fed. 131, disapproved. *Edison Electric Light Co. v. Sawyer-Man Electric Co.*, 3 C. C. A. 605, 53 Fed. 592; *Strait v. Harrow Co.*, 51 Fed. 819; and *Soda-Fountain Co. v. Green*, 69 Fed. 333,—followed.

6. JURISDICTION OF FEDERAL COURTS—STATE LAWS RESPECTING FOREIGN CORPORATIONS.

Failure of a foreign corporation to file a copy of its charter with the officers of a state, as required by the state laws, does not affect its right to sue in the federal courts in the state, whatever effect the omission may have; by the state decisions, upon the right to sue in the state courts.

This was a suit in equity by the Columbia Wire Company against the Freeman Wire Company and others for alleged infringement of a patent relating to barbed-wire machines.