

by varying nonessential details. For instance, in the patent the grain is received from the spout into a long trough; in the defendants' structure it is received into a series of hoppers arranged side by side,—in fact, the complainants' trough partitioned off. In the former the tower is held in place by cables tightened by drums; in the latter by hooks tightened by screws. In the one case the tower is moved by an anchored rope passing around a drum; in the other by a sprocket and chain supplemented by hand power. But all these things are not of the essence of the invention. Dunbar showed one method of accomplishing the desired result. The defendants show a slightly different method of accomplishing the identical result, and, because they have left the shadow, they assert that they may take the substance with impunity. The law is otherwise.

To paraphrase the language of the supreme court in *Machine Co. v. Lancaster*, 129 U. S. 263, 284, 9 Sup. Ct. 299:

"It makes no difference that in the infringing structure, the staying mechanism is more simple, and the propelling mechanism and the mechanism for receiving the grain are different in mechanical construction, so long as they perform each the same function as the corresponding mechanism in the Dunbar structure, in substantially the same way, and are combined to produce the same result."

It follows that the complainants are entitled to the usual decree for an injunction and an accounting, with costs.

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THOMPSON et al. v. JENNINGS et al.<sup>1</sup>

(Circuit Court of Appeals, Second Circuit. May 28, 1895.)

No. 116.

1. PATENTS—SAWS—NOVELTY.

Claim 1 of patent No. 328,019, issued to Thompson and others, as assignees of Fowler, for a saw to cut metal, with a tough, pliable, steel blade, highly tempered as to its teeth only, to prevent breaking of the blade by sudden twisting, is valid, having utility and novelty. 66 Fed. 57, affirmed.

2. SAME—CONSTRUCTION OF CLAIM.

Though, in the specifications of patent No. 328,019, for a saw to cut metal, it is stated that it is possible to fix the temper line at any point in the width of the blade, but that it is preferable to fix it at the base line of the teeth, and though claim 1 is for a saw highly tempered as to the teeth, claim 2, for a saw with a soft back and high-tempered teeth, will not be construed to cover saws in which the temper runs into the blade any distance, but only saws where the temper is practically, though not mathematically, coincident with the base line of the teeth. 66 Fed. 57, affirmed.

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

This was a suit in equity by Henry G. Thompson and others against Charles E. Jennings and others for alleged infringement of letters patent No. 328,019, issued October 13, 1885, to them, as assignees of the inventor, Thaddeus Fowler. The circuit court held that the

<sup>1</sup> Rehearing denied June 24, 1895.

patent was valid, but that defendants had not infringed. See 66 Fed. 57, where the opinion of that court, by LACOMBE, Circuit Judge, is reported in full. The complainants have appealed.

John K. Beach, for appellants.

Marion H. Phelps, for appellees.

Before WALLACE and SHIPMAN, Circuit Judges.

PER CURIAM. Unless the patent in suit can be limited so as to cover only a band saw or a hack saw, there appears to be no escape from the conclusions expressed in the opinion of Judge LACOMBE in the court below. It cannot be thus limited, in view of its unequivocal language. We deem it unnecessary to add anything to the opinion of Judge LACOMBE. The decree is affirmed, with costs.

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AMERICAN SODA-FOUNTAIN CO. v. ZWIETUSCH.

(Circuit Court, E. D. Wisconsin. August 8, 1896.)

1. PATENTS—REISSUES—ENLARGEMENT OF CLAIMS—INADVERTENCE.

Where both the recitals and claims of a patent for an improvement in soda-water fountains clearly and unmistakably referred to the style of apparatus having vertical sirup cans, and the claims mentioned only vertical cans, *held* that a subsequent reissue which included both vertical and horizontal cans was void for improper enlargement of the claims, where the same were thereby made to cover a new device invented and placed upon the market in the meantime by another, and that the testimony of the solicitor that in using the word "vertical," in the original, he had in mind merely the form of apparatus in which the cans were inserted from above, as distinguished from that in which they were inserted from in front, by sliding in like a drawer, was not a sufficient showing of inadvertence, accident, or mistake.

2. SAME—APPLICATION FOR REISSUE—LACHES.

Lapse of time is only one of the elements to be considered on an application for reissue, and the fact that such an application is made less than 10 months from the issuance of the original will not warrant the insertion of claims deliberately omitted, without inadvertence, from the original, and where adverse rights have intervened. *Coon v. Wilson*, 5 Sup. Ct. 537, 113 U. S. 268, applied.

3. SAME—SODA-WATER APPARATUS.

Reissue No. 11,313, to Park, as assignee of Herron (original No. 452-754), for an improvement in soda-water apparatus, is void for unwar-  
ranted enlargement of the claims.

This was a suit in equity by the American Soda-Fountain Company against Otto Zwietusch for alleged infringement of a patent for an improvement in soda-water apparatus.

The complainant is the owner of reissued letters patent No. 11,313, issued to Harvey S. Park, assignee of James B. Herron, March 14, 1893, for an improvement in soda-water apparatus; and the bill charges the defendant with infringement of the first, second, third, and sixth claims, viz.: "(1) In a soda-water fountain, an elevated can chamber, adapted to receive a sirup can from below, and mechanism for holding the can in position above the bottom, substantially as and for the purposes specified. (2) In a soda-water fountain, the combination of an elevated can chamber, receiving a sirup can from below; a front for such chamber; an opening below the front, and extending beneath the can chamber; a sirup can adapted to enter the open-