

those thus formed, the one which they selected as determinative under this test, they originally declared to be "alpha-naphtylendiamine." Subsequently, and before patent issued, they changed that declaration to "alpha-naphthylamine." There is no evidence that one skilled in the art would know, when he saw "alpha-naphthylamine" named as the identifying product, that it was a misnomer for "alpha-naphtylendiamine." We know no reason why they should not be held to the selection they thus declared to the public as one of the characteristic tests of their product. If this were a blunder of an ignorant solicitor, they had ample opportunity to correct it by reissue; but, having allowed it to stand in their patent, they must be held to their declaration that reducing agents will produce this result. It has been suggested that since the evidence shows that alpha-naphthylamine would not be formed out of the product of the patent by reducing agents, and that persons skilled in the art would know that fact, the entire test may be rejected as nonsensical surplusage. But there must be some limit to a court's functions in rewriting patents. Assuming that all the imperfections in this patent were due to an ignorant solicitor, remote from his clients,—and it may be noted that there is no evidence of this,—it does not follow that all should be disregarded. We held, as to the error and omission of paragraph 4, that the omission was really supplied elsewhere in the patent; that the error was harmless, since the skilled workman would himself substitute "nitrite" for "nitrate"; and that, although the error must stand in the patent where the patentee's careless solicitor had placed it, we would not infer from its presence that it was due to a fraudulent design to mislead, formed and carried out by the patentees. But here there has been an identifying test put into the patent by the solicitor; the patentee accepts such patent, and applies for no reissue, alleging no mistake; and the court is asked to strike out the test altogether, as ridiculous surplusage. In the absence of any authority for such action, we are unwilling to establish the precedent. By what their solicitors do, patentees should abide. If they are dissatisfied with the letters patent their solicitors obtain, they may, in proper cases, apply for a reissue; but, when they accept their original patents without objection, they must be assumed to have assented to such changes as were made by their solicitors in specification or claim while their application was on its way through the patent office.

When the defendant's coloring matter is treated with reducing agents, it is destroyed, but no alpha-naphthylamine is formed. We have, then, a case where the inventor has prescribed six tests in his patent, and an alleged infringing body responds to five of them, but fails to respond to the sixth. Manifestly, it is not absolutely identical with the product of the patent, as the inventor has defined that product by distinguishing characteristics. It may be that the variance results from some immaterial change in the process, from the use of starting material, which is within the fair range of equivalents; but, having failed to prove identity by the prescribed tests, the burden is on the holder of the patent to show

that the variances in process are immaterial, or the starting materials equivalents of those of the patents. There being no such proof here, the complainant must stand or fall by the results of the tests of the patent; and, since the defendant's color does not respond to these, it cannot be held to be an infringement. The conclusion thus reached renders it unnecessary to discuss the other points raised in the case. The decree of the circuit court is reversed, with costs, and cause remanded, with instructions to dismiss the bill.

On Rehearing.

PER CURIAM. In the patent, as it was finally amended in the patent office, and in the form in which that office notified the patentees that it was prepared to issue it upon payment of the fees, the sixth test was phrased as follows: "Reducing agents destroy the color, forming alpha-naphthylamine besides other products." In the printed copies as they were subsequently issued, the same test is phrased as follows: "Reducing agents destroy the color-forming alpha-naphthylamine besides other products." The record does not disclose which of these forms appeared in the original letters patent, "issued in the name of the United States of America under the seal of the patent office, and signed by the secretary of the interior, and countersigned by the commissioner of patents," as provided in section 4884 of the United States Revised Statutes. We assumed, perhaps erroneously, that the original letters patent conformed to the text of the amendments as allowed; but, if such original letters patent were phrased in the alternative, the situation is not materially changed. In the brief filed with this petition, it is asserted that the statement, "Reducing agents destroy the color-forming alpha-naphthylamine besides other products," is not untrue as to either complainant's or defendant's color. We do not find this assertion to be supported by the proof. The complainant's expert did, under cross-examination, make the following statements:

"My view is that by reducing agents alpha-naphthylamine, which was used to form the color of the patent in suit, and therefore in the patent is named the color-forming alpha-naphthylamine, is destroyed."

"Your interpretation that reducing agents are applied to the color is the right one. The meaning of this sentence is very clear. Reducing agents are applied to the color. The reaction which takes place destroys the alpha-naphthylamine besides other products."

"Alpha-naphthylamine is the most characteristic constituent of the so-called 'naphthol-black color compound.' Therefore that sentence, perhaps only to emphasize that alpha-naphthylamine is so important in the process, states that alpha-naphthylamine is destroyed by the reduction process."

None of these accurately states the fact. It is not true that any "alpha-naphthylamine is destroyed by reducing agents," nor that "the reaction which takes place [when reducing agents are applied to the product] destroys the alpha-naphthylamine," nor that "alpha-naphthylamine, * * * the most characteristic constituent of the * * * compound, * * * is destroyed by the reduction process," for the very good reason, as pointed out in the original opinion, that the alpha-naphthylamine had ceased to exist before the product was obtained, having perished in the process of chemical