

The bill will therefore be dismissed.

I think the same ruling will be applied to the case of *Truman v. Holmes*.

Mr. Boone: Did you honor take into consideration the fact that the testimony shows that they also did make other carts where it did pass under the axle? There is testimony to that effect.

The Court: It is new to me if there is.

Mr. Nougues: There is no testimony to that effect.

Mr. Boone: There is one branch of the case where there is testimony to show they had made carts so.

The Court: I did not so understand it. Look it up, and let me see it. I will reserve my opinion until I see what effect that has.

NOTE. On February 25, 1897, the decrees ordered in the foregoing opinion to be entered were set aside by order as follows:

"McKENNA, Circuit Judge. The decrees in these cases are set aside, because, in addition to the points decided, there are other points in the brief, which, by inadvertence, did not receive the deliberate consideration and judgment of the court."

The orders of submission in both cases were then vacated, and the cases restored to the calendar. On March 26, 1897, both cases were reargued before MORROW, District Judge, and the bill in each case was ordered dismissed.

DIAMOND MATCH CO. v. OHIO MATCH CO. et al.

(Circuit Court, N. D. Ohio, E. D. April 16, 1897.)

No. 5,591.

1. PATENTS—ACTIONS ON SEVERAL PATENTS—MISJOINDER.

A suit can be maintained on several patents only when the inventions covered thereby are embodied in the alleged infringing machine, process, manufacture, or composition of matter; and where the averment is that defendant's machines embody "either the whole, or one or more, of the said inventions" contained in the patent sued on, the bill is demurrable.

2. SAME—MISJOINDER OF DEFENDANTS.

A joinder of defendants alleged to be infringers is bad, unless they are alleged to be joint infringers.

3. SAME—PLEADING.

A bill which fails to show that the invention of the patent sued on was not patented or described in some printed publication in this or some foreign country prior to the patentee's alleged invention thereof is demurrable.

Edwin Walker and Charles Colahan, for complainant.

Kline, Carr, Tolles & Goff and E. A. Angell, for respondents.

SAGE, District Judge. This case is before the court upon three demurrers to the bill. The grounds of demurrer are:

First, that the bill sets up three several letters patent of the United States, relating to several alleged inventions, which are entirely distinct and separate from each other; that the said letters patent contain, in the aggregate, 58 claims, relating to alleged inventions, which are disassociated and disconnected one from the other; that the averment as to infringement in the bill is, in sub-

stance, that the respondents have made, and are using and selling, numbers of the said match machines, embodying in each of them "either the whole, or one or more, of the said inventions and improvements contained in said letters patent Nos. 416,888, 528,457, and 389,435."

The second ground of demurrer is misjoinder; it nowhere being alleged in the bill that the respondents K. A. Young and Charles W. Steele have any connection whatever, as officers or otherwise, with the defendant corporation, or are connected in any way with the other respondents named therein.

These grounds of demurrer are both well taken. A suit may be brought upon several patents, but it can be maintained only when the inventions covered by those patents are embodied in the infringing process, machine, manufacture, or composition of matter. *Seymour v. Osborne*, 11 Wall. 516; *Bates v. Coe*, 98 U. S. 48; and a number of cases decided by the circuit courts, and reported in the *Federal Reporter*, to which reference may be found in note 1 to section 417, *Walk. Pat.* (3d Ed.).¹

The averment in the bill is in the alternative, which is bad. It does not appear upon the face of the bill that the three patents sued upon are embodied in the respondents' alleged infringing machine.

As to the second ground of demurrer, there is an averment that the respondents named infringe, but no averment that they are joint infringers with the other defendants. That objection, therefore, is well taken, and the demurrer is sustained upon both grounds.

The second demurrer is, in substance, the same as the first ground of the first demurrer, and therefore need not be further referred to.

The third demurrer is upon the ground that it nowhere appears in the bill that the letters patent sued upon were not patented or described in some printed publication in this or some foreign country prior to the alleged invention thereof. That objection is well founded, and is supported by *Overman Wheel Co. v. Elliott Hickory Cycle Co.*, 49 Fed. 859; also, by *Hanlon v. Primrose*, 56 Fed. 600; *Goebel v. Supply Co.*, 55 Fed. 825; and *Hutton v. Seat Co.*, 60 Fed. 747. See, also, section 4886 of the Revised Statutes of the United States.

The demurrers will be sustained.

¹ *Telegraph Co. v. Chillicothe*, 7 Fed. 351; *Nellis v. Manufacturing Co.*, 18 Fed. 451; *Lilliendahl v. Detwiller*, 18 Fed. 177; *Consolidated Electric Light Co. v. Brush-Swan Electric Light Co.*, 20 Fed. 502; *Griffith v. Segar*, 29 Fed. 707.

BOWERS DREDGING CO. et al. v. NEW YORK DREDGING CO. et al.

(Circuit Court, D. Washington, W. D. March 24, 1897.)

1. PATENT INFRINGEMENT SUITS—PRELIMINARY INJUNCTION—JUDGMENT OF APPELLATE COURT.

On application for preliminary injunction against infringement, a judgment of the appellate court in another action, declaring the patent valid, will be deemed conclusive on the court as to that question.

2. SAME—INVALIDITY OF PATENT—NEW EVIDENCE.

New evidence of the invalidity of a patent which has been declared valid by the appellate court in a prior case, to prevent the granting of a preliminary injunction against its infringement, must be such that, had it been introduced in the prior case, it would probably have produced a different decision.

John H. Miller and Campbell & Powell, for complainants.

R. Percy Wright and E. C. Hughes, for defendants.

HANFORD, District Judge. In the order denying the complainants' application for a provisional injunction, there was reserved to the complainants a right to renew the application upon a further showing, which they have taken advantage of. In support of the new application, it has been shown that since the former hearing (77 Fed. 980) the decision of the United States circuit court for the Northern district of California in the case of *Bowers v. Von Schmidt*, 63 Fed. 572, has been affirmed by the circuit court of appeals (80 Fed. 121), and that a petition for a rehearing has been denied, so that the validity of the several claims of the Bowers patents involved in the present suit have been established by an adjudication and final decree of the court of last resort. The defendants herein still dispute the validity of the claims referred to, on grounds which they allege were not considered in the *Von Schmidt* Case, and the showing in their behalf includes new and additional evidence which they contend is sufficient to prove that the Bowers patents are absolutely void, for the reason that the commissioner of patents had no power to grant the same, and for the further reason that the machinery and apparatus which Bowers claims to have invented was described in patents granted in England, long prior to the date of the alleged inventions of Bowers and of *Von Schmidt*; and they contend that the evidence of anticipation was not introduced in the case referred to, for the reason that in the controversy between Bowers and *Von Schmidt* they each claimed the rights of an original discoverer and first inventor of the machinery for dredging, covered by the Bowers patents, so that both parties were interested in excluding from consideration of the court evidence tending to prove anticipation. I find from the evidence and documents on file that the litigation between Bowers and *Von Schmidt* was carried on in earnest, and, as all the proceedings in the patent office, from the first application made by Bowers until the final issue of the letters patent sued on in this case, were before the court, I must consider that the decision comprehends all questions as to compliance on the part of Bowers with requirements of the patent laws, and the power of the commissioner to issue the