

From this evidence,—and I have endeavored to state it all, and that, too, most strongly in favor of the complainant,—it is claimed that the court ought to find, as a fact, that the defendant corporation either actually constructed and sold cars embodying complainant's invention, after complainant's patents were issued in July, 1890, or, at least, that it threatened so to do.

Complainant's counsel argue that the court should find evidence of infringement, after the issue of his patents, from the evidence of witness Brill, when he says, as already set out, that "the model shown him is practically an exact copy of a truck that the St. Louis Car Company have been furnishing to different parties," and when he says he "first saw cars manufactured by defendant corporation after his device in December, 1889," claiming that the words "have been furnishing" may relate to a time subsequent to the dates of the patent, and that the words "he first saw" cars, etc., indicate that he had seen them afterwards. This kind of evidence is too vague and uncertain to establish the fact claimed for it, and the argument is not convincing. In the light of all the evidence, these expressions of the witness clearly relate to what he had before that time sworn to, namely, the manufacture of cars by defendant corporation, in the summer and fall of 1889, for the Lindell Railway Company, and, possibly, the St. Joseph & Denver Railway Company. It may be also remarked that the inference counsel draws in argument from the language of defendants' counsel, when offering Kling as a witness, is rather forced, and exhibits more distress than confident reliance on its intrinsic value.

Complainant's counsel argue that the proof of construction by defendant of cars for the Lindell Railway Company and other companies, before the date of any of its patents, creates a presumption that the defendant would continue to so construct them after the patents were issued to complainant. I do not think such presumption obtains. Defendant had a perfect right, so far as the law is concerned, to manufacture any kind of cars, even those embodying the principle of plaintiff's patents, up to the time complainant's monopoly came into existence by the grants of patents to him. The presumption is that defendants conformed to the law rather than violated it,—that they respected complainant's rights rather than infringed them.

Again, it is claimed, by way of argument, that defendants, in order to manufacture the cars for the Lindell Railway Company and other parties in the fall of 1889, must, of necessity, have expended much money in making patterns and otherwise outfitting themselves for the work, and that the court ought to presume that defendants would not have entered upon so expensive an enterprise without intending to continue it after the grant of patents to complainant. Even if the court should take judicial knowledge of the assumed facts involved in the foregoing argument, and should indulge the presumption that defendants intended to continue the business after the grant of the monopoly to complainant,—which, in my opinion, cannot be done,—it would, for the reasons already suggested, natu-

rally draw the inference that defendants intended to continue the business lawfully; that is, under license from the patentee, rather than in contravention and violation of his rights.

Again, it is argued that the correspondence already referred to between the complainant and defendants evinces a purpose on the part of the defendants to continue infringement after the grant of letters to complainant. In the first place, the complainant's letter to defendants' customer in Denver, referred to in the correspondence, was manifestly somewhat annoying. It asserted the existence of exclusive rights on his part six months before he acquired them, and properly enough evoked the rebuke from defendant corporation found in its letter to complainant of January 3, 1890. It is claimed that this last-mentioned letter is equivalent to saying: "We intend to continue to build such trucks. If you wish to sue any one, sue us." I think this is a forced construction placed upon it. The phraseology from which this construction is drawn is as follows:

"If you are really under the impression that your patent is being infringed upon [by persons to whom we have sold trucks], the proper caper will be to write us in regard to same, and not try to work a scare game upon our patrons."

This language, in my opinion, taken in connection with the admitted fact that complainant then had no exclusive right to make the trucks, cannot be tortured into a threat on the part of defendant corporation either to continue to make the same at all after complainant should secure a patent, or to continue to do the same without license from the patentee.

Again, complainant's letter of January 6, 1890, warning defendant of his exclusive right to the alleged patented independent rigid trucks for electric motor cars, and stating that it was but a short time before complainant would assert his alleged right, was a false statement of facts; and the fact that it evoked no response from the defendants is no evidence that they were violating any rights of complainant, or that they intended to do so.

The only other letter specially called to my attention on this issue is complainant's letter to defendant corporation, of date July 19, 1890, four days after the date of complainant's latest patent. It is argued that, because defendant corporation did not answer this letter, it thereby admitted that it intended thereafter to infringe complainant's rights. This letter, already copied, charged the defendant, in effect, with having theretofore infringed complainant's rights in the matter of making cars for the Lindell Railway Company and for parties in Denver, and calls attention to the fact that the patents sued on in this case had then been issued to complainant, and notifies defendant as follows: "To quit the use of these devices at once, otherwise we shall be compelled to resort to law." The reference contained in this letter to the Lindell Railway Company and the parties in Denver, in the light of the evidence, manifestly refers to the transactions, already alluded to, in the summer and fall of the year 1889. In fact, the evidence discloses no other transactions with these parties. In other words, there is no proof of a continuation of building cars embodying complainant's device through the

six months following these specific transactions, and prior to the grant to complainant of the patents sued on. The manifest purpose of the letter is to inform defendants of complainant's perfected monopoly, and to threaten a resort to the law in case of future infringement. In the absence of evidence to the contrary, the presumption must be that defendants intended to respect complainant's rights. The bare fact that defendants did not answer this letter, and in terms admit complainant's rights, and consent to recognize them, is, in my opinion, under the circumstances of this case, no evidence at all of an intention to violate them.

Again, it is argued that, because it was easy for defendants to have disproved an intention to infringe, the fact that they did not do so is presumptive evidence that they entertained such intention. This argument shifts complainant's burden upon the defendants. The law as well as settled practice forbids this. A clear and well-defined issue as to infringement was made in defendants' answer, and six months before the trial of the case defendants' counsel notified complainant's counsel that he intended to move for a dismissal of the bill for failure to prove infringement or intent to infringe. This issue was a material issue, and upon its determination complainant's right to injunctive relief depends. For want of proof of infringement, or intention to infringe, the bill must be dismissed. The order will be made without prejudice to complainant's right to institute a new suit.

COBURN TROLLEY-TRACK MANUF'G CO. v. McCABE MANUF'G CO.

(Circuit Court, S. D. New York. April 8, 1897.)

PATENTS—ANTICIPATION—DOOR HANGERS.

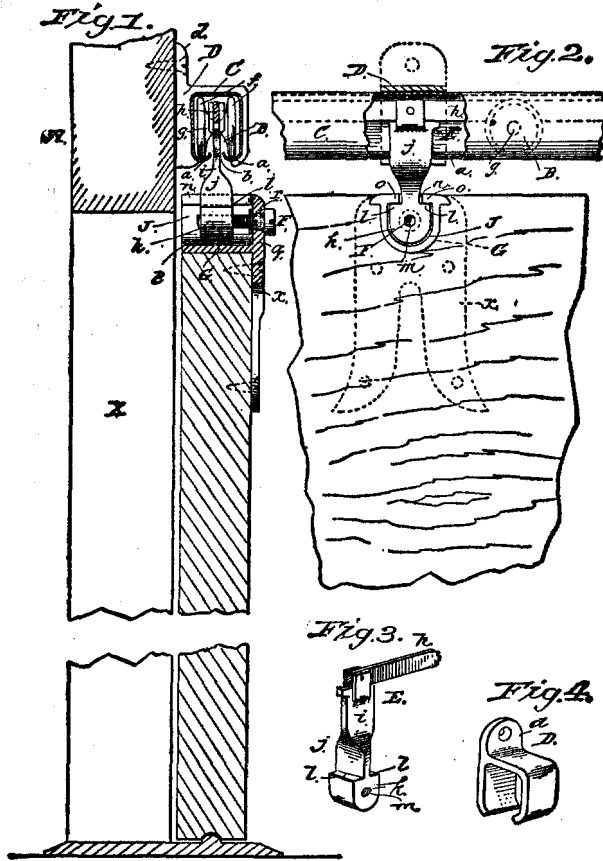
The Sumner patent, No. 455,695, for a door hanger for sliding doors, whereby the door may be laterally adjusted to be slid in a plane at any desired proximity to the partition in which the doorway is formed, was anticipated by the Kasson patent, No. 369,451.

Arthur v. Briesen, for plaintiff.
Thomas Ewing, Jr., for defendant.

WHEELER, District Judge. This suit is brought upon patent No. 455,695, dated July 7, 1891, and granted to William J. Sumner for a door hanger. The specification states:

"This invention relates to improvements in sliding doors, which are suspended through trolley carriers and hangers from a trolley track thereabove, whereby they may slide longitudinally or alongside of the wall or partition,—the main object of the invention being to provide means, comprised in and between the hanger and the door, whereby the said door may be laterally adjusted, in order that it may be supported to be slid in a plane at any desired proximity to the partition in which is formed the doorway to be covered and closed by said door; and the invention consists in the constructions and combinations of parts, all substantially as will hereinafter fully appear and be set forth in the claims. The hanger consists of a longitudinal bar, to extend between and beyond and to rest on the axles of two roller carriers, and posts connected to and vertically suspended from and below said bar, being interme-

diately decreased in thickness, to permit of its free passage in the opening between the troughways of the trolley track, and provided at its extremity with an enlargement whereby shoulders are formed, and said enlargement is transversely and horizontally bored and screw-threaded.



"The door at its upper side is provided with apertures therein, each having a contracted opening at its top, formed by overlying edges, and also open at one end, but closed at the other end by a wall. The head of each post suspended from the trolley track fits into the correspondingly formed apertures, being entered thereinto at the end thereof, and a screw passes loosely through a hole in the said end wall and with a screw engagement into the transverse tapped hole in the post enlargement. It being understood that the hanger posts are practically incapable of any lateral movement, it will be plain that, on turning the said screw (which is to be maintained against endwise movement), the said door will be moved laterally either towards or from the partition, according as said screw is turned to the right or to the left."

The claim in question is for:

"(1) In combination, the trolley track, roller carriers supported thereon, and a hanger supported from said roller carriers, comprising suspension posts hav-