

That the court may order an article made in infringement of a patent right to be delivered up to be destroyed. *Frearson v. Loe*, 9 Ch. Div. 48, 67; *Birdsell v. Shallol*, 112 U. S., at page 487, 5 Sup. Ct. 244.

James R. Ely, Asst. U. S. Atty.

Hatch & Wickes (Walter C. Low, of counsel), for claimant.

**BROWN**, District Judge. The petitioner has a sufficient interest to justify his intervention on giving security; the other parties should then answer the petition unless they admit the facts stated in it. If its statements are denied and any issues are presented not appropriate for trial in this court, they can be sent to the appropriate court and the proceedings here stayed in the meantime.

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DRAPER et al. v. WATTLES.<sup>1</sup>

(Circuit Court, D. Massachusetts. February 21, 1879.)

1. COSTS IN EQUITY—APPORTIONMENT.

A plaintiff is not to be refused costs merely because he may not have recovered all that he has in good faith and with reasonable prudence supposed himself entitled to.

2. SAME—PATENT SUITS.

Where three patents were sued on, and two were held valid and infringed, but as to the third it was found that infringement had not been fully made out by a preponderance of evidence, *held*, that plaintiff would not be denied full costs, especially as there had been no attempt to discriminate sharply the infringements of the third patent from the others.

This was a suit in equity by George Draper and others against Joseph W. Wattles for alleged infringement of three patents. The cause was heard upon a question as to the allowance of costs.

Thomas L. Livermore, for complainant.

David Hall Rice, for defendant.

**LOWELL**, Circuit Judge. The bill of complaint was brought upon three patents, and in the opinion of the court two of them were valid and had been infringed, and as to the third the finding was that the infringements had not been fully made out by a preponderance of the evidence. Under these circumstances the respondent contends that the costs should be apportioned in some equitable mode, and the complainants maintain that they should have full costs.

The court, undoubtedly, has control over the subject of costs, excepting when the case comes within section 4922, Rev. St., which provides that, if the patentee has claimed in his specification more than that of which he was the first inventor or discoverer, he shall recover no costs, unless he shall have entered a proper disclaimer at the patent office before suit. This power to award or refuse costs, in whole or in part, may prove to be useful in the very long and expensive litigations which are so much in vogue at the present time, and I should be unwilling to abdicate that power. But this case

<sup>1</sup> Not previously reported, and now published by request.

seems to come within that general rule, which is adopted in all courts of equitable jurisdiction, that a plaintiff is not to be refused his costs merely because he may not have recovered all that he has in good faith and with reasonable prudence supposed himself to be entitled to. The parties cannot always foresee what the evidence may be to meet their apparently sound case. Especially is this true in patent causes, in which the history of the art is often developed for the first time in the course of the suit. If the invention has been anticipated in any substantial part, the statute deals with the costs. Here, the court may be said to have determined a single issue out of many upon a failure to sustain the burden of proof, rather than upon any decided opinion that the plaintiffs had no right to complain of the defendant's acts.

It was for the interest of both parties that the plaintiffs should unite all their claims in one suit in equity, and there was no action taken to discriminate sharply the issue of infringement under the third patent from the others. The validity of all the patents was assailed, as well as the infringement of all, and the result has been to sustain the plaintiffs in a great majority of the many points which were raised by the pleadings. It would operate as a surprise and a hardship upon the plaintiffs, under these circumstances, to undertake to pick out the costs of the single issue upon which they have failed to make out their case to the satisfaction of the court. Costs to be taxed in full.

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WARREN CHEMICAL MANUF'G CO. V. UNITED STATES.

(Circuit Court, S. D. New York. February 16, 1897.)

CUSTOMS DUTIES—CLASSIFICATION—COAL-TAR PRODUCT.

The merchandise known as "coal-tar product," or "dead oil," is not dutiable under the provision for "products known as distilled oils" in paragraph 60 of the act of August 28, 1894, but is entitled to free entry under paragraph 443, as a product of coal tar not a color or dye, and not specifically provided for.

This was an appeal by the Warren Chemical Manufacturing Company from a decision of the board of general appraisers in respect to the classification of certain merchandise.

Albert Comstock, for importers.

James T. Van Rensselaer, for the United States.

TOWNSEND, District Judge (orally). The merchandise in question is known as "coal-tar product," or "dead oil." The finding of the board of general appraisers that it is a product of coal tar is supported by the preponderance of the evidence, and is affirmed. It was assessed for duty at 25 per centum ad valorem, under the provision for "products known as distilled oils" in paragraph 60 of the tariff act of August 28, 1894. The importer has protested, claiming that it is free, as a "product of coal tar, not a color or dye, not specifically provided for," under the provisions of paragraph 443 of said act. Counsel for the United States contends that the term "distilled oils"

has in the trade a definite meaning, synonymous with "essential oils," or oils derived from vegetable substances, and that, as congress has included in paragraph 60 both the terms "essential oils" and "distilled oils," it must thereby have intended to include under the two terms something more than the commercially known distilled oils, namely, oils in fact distilled from nonvegetable substances, such as oils distilled from coal tar. Whether the contention of the importer, that the word "known" necessarily means, in this connection, "commercially known," it is unnecessary to determine. It has not been shown, however, that this article is an oil in fact, or that it is chemically or commercially or commonly known as "distilled oil." The decision of the board of general appraisers is therefore reversed, and the article should be admitted free, under paragraph 443 of said act.

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### MICHIGAN STOVE CO. v. FULLER-WARREN CO.

(Circuit Court, E. D. Wisconsin. June 22, 1896.)

#### 1. PATENTS—COMBINATIONS—AGGREGATIONS.

Where a patent for an improvement in stoves includes as part of the combination an in-turned, mica-filled section over the fire pot, and a reflector, which, as their joint product, give a new illuminating effect, making the stoves attractive and popular, this is sufficient to show a patentable combination, as distinguished from a mere aggregation of old elements.

#### 2. SAME—EVIDENCE OF POPULARITY—REBUTTAL.

Testimony as to the popularity of an improved structure may be received in rebuttal to overcome any doubt which may arise because the patent is so close to the line between true combinations and mere unpatentable aggregations.

#### 3. SAME—IMPROVEMENT IN STOVES.

The Keep mechanical patent, No. 368,770, for an improvement in stoves, construed, and *held* not anticipated, valid, and infringed as to the second and fifth claims, and not infringed as to the third claim.

#### 4. SAME—DESIGN PATENT—STOVES.

The Keep and Wipfler patent, No. 18,190, for a design for a heating stove, *held* not infringed.

This was a suit in equity by the Michigan Stove Company against the Fuller-Warren Company for alleged infringement of certain patents for improvements in stoves.

The bill alleges infringement of two letters patent owned by the complainant: (1) Mechanical patent, No. 368,770, for improvement in stoves, granted to William J. Keep, August 23, 1887; and (2) design patent, No. 18,190, for heating stove, granted to William J. Keep and Charles Wipfler, March 21, 1888.

First. Of the mechanical patent infringement is alleged of the second, third, and fifth claims, which read as follows: "(2) The combination, in a stove, of a vertical section, as, A, B, inclosing the fire pot, an in-turned section, C, arranged over the fire pot, a reflector, E, arranged above said in-turned section, and mica interposed between the fire and reflector, substantially as described. (3) The combination, in a stove, of a vertical section, an in-turned section, C, having mica-filled openings, an overhanging section, D, and a reflector set in front of said overhanging section, and with a space between the two, substantially as described." "(5) The combination, in a stove, of a vertical section, an in-turned section, C, having openings filled with mica, and multiple reflectors, as, E', E', arranged to diffuse and spread the rays of light and heat in various directions substantially as described."