

during the operation of plugging. In this device a clay plug is used. In the old Brown cracker the fuse is retained in place by tamping or driving down the inner portion of the end of the tube; in other words, the fuse is held by a plug integral with the tube. We find, therefore, that at the date of the Hunt invention in suit, the rosette plug for closing the end of the tube was old; that a hole in the center of the tool to hold the fuse was old; and that the holding of the fuse by pressing down and around it the inner portion of the end of the tube was old. Assuming that Hunt had before him his prior tool for making a rosette plug, the old Brown cracker, in which the fuse was firmly held by crushing down the layers of paper composing the inner portion of the tube, and the Masten anvil, with a central or axial hole, it does not seem to me that there was any invention in the combination of the tube, fuse, and rosette plug, which constitutes the patent in suit; or, to state the proposition in another form, there is no invention in the application of the old Hunt rosette plug to the fuse end of a firecracker. Indeed, Hunt himself says that he made the first crackers like that described in the patent in suit with his old tool. His testimony on this point is:

"I used the same tool that I used previously in making the cracker before. I placed the case over the mandrel; then I put my fuse in, and drove the choking tool down upon it, and found that that closed the end of the case. The tool that I used for this occasion was a solid tool; a tool that I had."

In view of the prior state of the art, the patent in suit is held to be void for want of patentable novelty. Bill dismissed, with costs.

GREEN v. CITY OF LYNN.

(Circuit Court, D. Massachusetts. April 28, 1897.)

1. PATENTS—INFRINGEMENT SUITS ON DIFFERENT PATENTS.

The joinder in one suit of claims for infringement of two patents relating to the same subject-matter is in the interest of the public, as well as of private litigants, and should not be discouraged by too stringent rules as to costs or otherwise.

2. COSTS IN PATENT SUITS—APPORTIONMENT.

Where two patents relating to the same subject-matter were sued on in the same suit, and a decree was entered for complainant on one of them, and for defendant in respect to the other, the costs disbursed in regard to the patent adjudged against the complainant were not, under the circumstances, adjudged in favor of either party.

This was a suit in equity by Nelson W. Green against the city of Lynn for alleged infringement of two patents. The cause was heard upon complainant's claim in respect to the taxation of costs.

Harvey N. Pratt, for complainant.

Fish, Richardson & Storrow and Guy Cunningham, for defendant.

PUTNAM, Circuit Judge. The complainant brought a bill in equity for alleged infringements of two patents relating to the same subject-matter, and therefore very properly included in the same suit. A consolidation of this character within reasonable limits is

for the interest of the public, as well as of private litigants, and should not be discouraged by too stringent rules as to costs or otherwise. One patent was sustained, but the other contained three claims, of which two were found invalid, by reason of not covering a patentable invention, and the third was not infringed. The final decree, so far as this patent is concerned, was against the complainant. The complainant disbursed, for the taking and printing of proofs with reference to the patent on which the judgment of the court was against him, \$544.50, and he now claims that this sum should be taxed in his costs against the respondent. That, under circumstances of this character, costs may be equitably apportioned, is too well settled to require any special observations. Numerous cases illustrating the practical application of this equitable discretion in patent suits will be found in the notes to Rob. Pat. § 1162. Some of the decisions there cited, and elsewhere found, seem to us too severe, as against complainants; and, moreover, where the amounts are small, or the issues much complicated, there may not be sufficient involved, or the apportionment may not be capable of being made with sufficient clearness, to appeal to the equity powers of the court. Yet some practical method of preventing substantial injustice can always be found. On the one hand, the advantages to come from the consolidation of several claims, made in good faith, which we have already spoken of, and the analogy of the common law, where a plaintiff who recovers only a portion of his demands is ordinarily entitled to all his costs, are not to be overlooked; while, on the other hand, the apparent injustice of saddling respondents with substantial costs of issues which are easily distinguished and severed, and which they have successfully defended, and the necessity of warning complainants in equity that considerable additions to the record which prove unnecessary may be at their own risk, demand the exercise of a sound discretion with reference to questions like that now before us. We do not think that there are any such exigencies as require us to award the respondent costs on account of the issues raised with reference to the patent which was adjudged against the complainant; but the amount which the complainant claims in that behalf is so substantial, and is so easily severable from the rest of the cause, that we think it would be inequitable to allow it in his behalf, under the circumstances of the case.

The respondent urges on us the statutory provisions with reference to costs in suits where claims are found invalid which have not been disclaimed; but, as the complainant is entitled to recover costs generally, these provisions do not apply, unless possibly by analogy. Our conclusion gives them full effect in that aspect. It is ordered that the clerk disallow the amount of \$544.50, claimed in complainant's bill of costs.

LAMB et al. v. STEVENS.

(Circuit Court, D. Massachusetts. May 21, 1897.)

PATENTS—VALIDITY AND INFRINGEMENT—EYE SHIELDS.

The Lamb patent, No. 540,746, for an improvement in eye shields, whereby the device is made to cover, protect, and practically inclose a considerable portion of the face adjacent to the eyes, without obstructing the vision in any direction, discloses a patentable, though somewhat narrow, invention.

This was a suit in equity by Benjamin F. Lamb and others against Edward G. Stevens for alleged infringement of a patent for an improvement in eye shields or guards.

Lange & Roberts, for complainants.

Louis W. Southgate, for defendant.

COLT, Circuit Judge. This suit is brought for the infringement of letters patent No. 540,746, issued June 11, 1895, to the complainant Benjamin F. Lamb, for an improvement in an eye shield or guard. The claims relied upon are numbered 1, 2, 12, 13, and 15.

The specification says:

"My invention relates especially to a flexible nonheat conducting eye shield, which is particularly adapted for use as protection from the weather, and by mechanics in various occupations as a guard against sparks, dust, or other flying substance, and is designed as an improvement on the device shown in my United States letters patent numbered 450,515, dated April 14, 1891. * * * My device is particularly applicable for use in driving, as a protection against rain, snow, and flying particles, and in such use perfect ventilation is absolutely essential. Extreme lightness and flexibility and enlarged lenses are also essential for such uses, none of which properties are possessed by devices heretofore made."

Adopting in part the description of Mr. Livermore, complainants' expert, the patented device is so constructed as to cover, protect, and practically inclose a considerable portion of the face adjacent to the eyes, without obstructing the vision in any direction. It is made flexible, so as to conform readily to the general curvature of the face. It is of light weight, and is held securely in place before the eyes, so as in no wise to incommode the wearer. It has two lenses or plates, constructed of mica or other similar flexible, transparent material. In order to enable the lenses to be securely held in proper position before the eyes, they are provided with a binding or frame extending around their edges, and serving to connect them together, and to afford a protection for their edges; and, in order that the lenses may be supported at a sufficient distance from the eyes to prevent contact with the eyelids, they are provided with a cushion or strip extending around their periphery, and projecting from the inner surface thereof. The cushion thus supports the lenses a short distance in front of the eyes, and at the same time closes the space between the face of the wearer and surface of the lenses sufficiently to afford protection to the eyes. This cushion has to be flexible in order to conform to the general curvature of the face, and it should also be soft, so as not to discomfort the wearer, and it should be of light weight. "Felt or other light, flexible material" is named in the patent as the material of which