

5 Sup. Ct. 692; Pennsylvania R. Co. v. Locomotive Engine Safety Truck Co., 110 U. S. 490, 4 Sup. Ct. 220; Aron v. Railway Co., 132 U. S. 84, 10 Sup. Ct. 24; and in Briggs v. Ice Co., supra, Judge Coxe, and the court of appeals affirming his decision, stated and applied the same rule. Judge Wallace says:

"When thus assembled together, the elevating mechanism performs no new functions, and the adjusting cutter mechanism performs precisely the functions it did in the Butterfield machine. It is wholly immaterial that the adjusting devices of Butterfield were designed to be used in a machine for planing wood. The application of an old organism to an analogous use is not patentable. * * * It is not invention to use an old combination of devices in a new location to perform the same operations, when no changes or modifications are required to adapt it to the new use, or when only such are required as can be made by the exercise of ordinary mechanical skill."

Since the decision of Briggs v. Ice Co., supra, the expert for complainant has discovered the damaged patent-office model of the Butterfield invention. The experts are at issue as to the purpose for which certain screw-threaded holes and slotted bars were shown in said model, and as to the consequent effect to be given to the statement in the Butterfield specification that the knife is adjusted to set at a required thickness. The evidence is not sufficiently definite to narrow the scope of the Butterfield patent as already construed by the various courts. All the elements of the patented combination were old, the principle of their combined operation was disclosed in the prior art, and the modified adjustment and operation required only mere mechanical skill. Let the bill be dismissed.

VERMILYA v. PENNSYLVANIA STEEL CO. et al.

(Circuit Court, E. D. Pennsylvania. April 23, 1898.) No. 29.

PATENTS—RAILWAY SWITCHES.

The Brahn patent, No. 248,990, for an improvement in railway switches, relating particularly to the crossbar and lugs which serve to connect the pointed or movable rails of the switch, discloses patentable invention, but, in view of the prior art, must be restricted to the particular devices substantially as described. The claim is, however, infringed by a device made according to patent No. 308,373, which merely shows a variation in the form of the jaws.

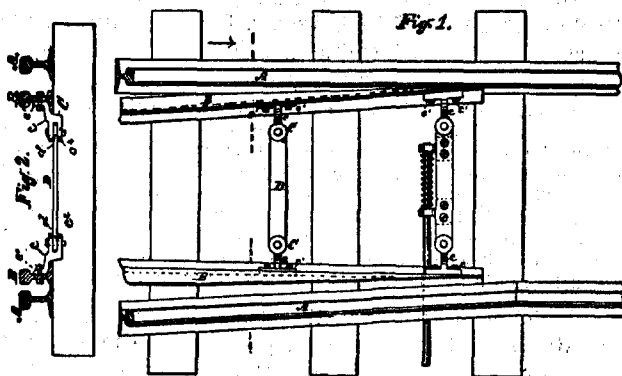
This was a suit in equity by Allen G. N. Vermilya against the Pennsylvania Steel Company and others for alleged infringement of a patent.

A. G. N. Vermilya, in pro. per.
Joshua Pusey, for defendant.

DALLAS, Circuit Judge. The bill in this case charges infringement of letters patent No. 248,990, issued to James Brahn, and dated November 1, 1881. The invention, as the specification states, "relates to railway switches, and more particularly to the crossbar and lugs which serve to connect the pointed or movable rails of the switch." The only claim is as follows:

"In a railway switch, the combination, with the pointed or movable rails, B, B, of the lugs, C, fabricated as specified, and composed of the body, c, adapted to fit upon and depend somewhat below the flange of the rail, and the upwardly reaching flange, c¹, adapted to fit against the body of

the rail, and having the jaws, c², together with the forged bars, D, having the flattened ends, d, all substantially as and for the purpose described."



The evidence, including several prior patents and the Exhibit Pennsylvania Steel Company's Circular, conclusively shows that the invention of Brahn was not a primary one. But I cannot agree that he made no invention at all. He devised, in complete and combined shape, a convenient and improved arrangement of crossbar and lugs, which, though nearly approached, had not been before produced. His contribution to the art involved invention, although not of the highest order, and was both new and useful. The construction he devised was more convenient and better fitted for use than any of the appliances which had preceded it; and what is said in the defendant's circular of the advantages of the socket connecting bar, covered by patent No. 308,373, under which the defendant manufactures, might, in the main, be equally well said of the Brahn device. I am of opinion, therefore, that the patent in suit should be sustained. See the recent decision of the circuit court of appeals for this circuit in *Clinton Wire-Cloth Co. v. Hendrick Mfg. Co.*, 86 Fed. 137. The claim, however, cannot be broadly construed, but must, in view of the prior art, be restricted to the particular devices substantially as described. But the defendant's contrivance, as shown by the models before me, is obviously the same as that described in the Brahn patent, except only that the form of the jaws is somewhat varied. In the defendant's patent this variation is termed a "socket," and by one of the witnesses in this case it is said to be what is "called a 'box jaw.'" But, whatever be its name, the thing is essentially identical with the device of Brahn. It effects the same object in exactly the same way. *Clinton Wire-Cloth Co. v. Hendrick Mfg. Co.*, supra. The defendant's "socket" is nothing but the "jaws" of the plaintiff, having a slot or opening at the end towards the rail, and with the two sides closed. The bar is passed entirely through the open jaws, and it is pivoted thereto as in the Brahn arrangement, and the only difference in result is that the lateral movement of which the bar is capable is much restricted. But, as it allows as much play as the shifting of the point rail requires, this difference is immaterial, unless, indeed, it be true that the restriction is (as defendant asserts) advantageous, in which case a claim for improvement might possibly have been sustained, but not for appropriation of the previously patented subject to which the improvement applies. Decree for complainant.

THE MOUNT EDEN.

BARRON et al. v. THE MOUNT EDEN.

(District Court, N. D. California. March 15, 1898.)

No. 11,418.

1. COSTS IN ADMIRALTY—DOCKET FEES.

A proctor representing more than one libelant on final hearing, though under independent libels, is entitled to but one docket fee of \$20.

2. SAME.

A "final hearing," within Rev. St. § 824, upon which the libelant's proctor becomes entitled to a docket fee, is a submission of the case for determination on the merits, or the submission of some question the disposition of which finally ends the case. A proceeding before a commissioner on a reference is not such a final hearing.

This was a libel in rem by James G. Barron and others against the steamer Mount Eden. The cause was heard on a motion to retax costs.

H. W. Hutton, for the motion.

DE HAVEN, District Judge. Section 824 of the United States Revised Statutes provides that upon a final hearing in admiralty, where the libelant recovers \$50 or more, a docket fee of \$20 may be allowed to his proctor; and, if less than \$50 is recovered, then the docket fee of the proctor shall be only \$10. The docket fee thus allowed is the individual property of the proctor, not that of the libelant (*Aiken v. Smith*, 6 C. C. A. 414, 57 Fed. 423); and where a proctor, upon such final hearing, represents more than one libelant, although such libelants may have filed independent libels in the proceeding, he is entitled to have allowed and taxed but one docket fee. A proceeding before a commissioner upon a reference is not a final hearing, and no docket fee can be allowed a proctor for attendance upon such a proceeding. A final hearing, within the meaning of the statute, is a submission of a case for determination upon its merits, or the submission of some question, the disposition of which finally ends the case. *Coy v. Perkins*, 13 Fed. 111. Motion to retax costs denied.

THE H. C. GRADY.

BLACK DIAMOND COAL-MIN. CO. v. THE H. C. GRADY (HENDRY et al., Intervenors).

(District Court, N. D. California. May 5, 1898.)

No. 11,369.

INTERVENTION—DECREE BY STIPULATION—PROCTOR'S FEES.

Where, in a libel of intervention in an admiralty case, the parties stipulated for a decree in favor of the intervener, and a decree was entered accordingly, there was such a final hearing as would entitle the proctors for intervener to the allowance of a docket fee, under Rev. St. U. S. § 824, which provides that "on a final hearing in equity or admiralty cases a docket fee" should be allowed.