

face of the hammer when it is near the string, the ends of the springs which are bent for striking purposes standing away from the strings  $1\frac{1}{4}$  in. When the rail is at rest, the hammers pass freely through the springs, producing the ordinary tone. When the rail is moved to the right, the springs are brought immediately before the hammers, and, receiving the full force of the blow, the ends of the springs are sent quickly to the strings, and produce a tone resembling the zither. When the rail is released, a spiral spring, attached to the left end, causes it to fall back into its former position. To suit the requirements of the pianoforte, the rail may be placed below the hammers instead of above, and the springs may be bent to any shape or form, up or down, so long as the principle remains,—that, when a key is struck, the springs receiving a blow are sent into swift contact with the pianoforte strings."

This patent does undoubtedly disclose the "secondary or double stroke" referred to in Judge Showalter's opinion as a characteristic of complainant's patent. The tongues, however, being metal springs, apparently are not adapted to discharge the other function of the "nonresonant, soft," flexible strip, which, as the specification points out, "kills the tone which would otherwise be produced by the string," or, as it is elsewhere said, "kills the effect of the blow of the hammer on the string." The patent is an extremely narrow one, and must be confined to a combination which will include the flipped-out hard striker and the soft nonresonant deadening strip, both of which seem to be necessary to a successful result, and, in combination, novel. Inasmuch as the defendant's device infringes this combination as covered by first and second claims, complainant is entitled to the usual decree.

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#### HAWORTH v. STARK et al.

(Circuit Court, S. D. New York. July 5, 1893.)

##### 1. PATENTS—PRIOR USE—EVIDENCE.

While evidence of prior use is always to be closely scrutinized, and accepted with caution, yet the measure of affirmative proof required to establish the defense will be less when, on the conceded facts as to the prior state of the art, it would seem an almost irresistible inference that the patented method was in fact used prior to the date of the alleged invention.

##### 2. SAME—SHIPPING CASES.

The Haworth patent, No. 496,157, for devices for securing packing, storing, and shipping boxes against surreptitious opening and plundering, is void because of prior use.

This was a case in equity by William H. Haworth against Lazar Stark and others, praying an injunction and accounting for alleged infringement of a patent. Final hearing on pleadings and proofs.

Herbert H. Walker, for complainant.

Joseph L. Levy, for defendants.

LACOMBE, Circuit Judge. This is a suit upon letters patent No. 496,157, dated April 25, 1893, to complainant. The specification says:

"My invention relates to packing, storing, and shipping cases, and has especial reference to devices for securing the same against surreptitious opening and plundering. \* \* \* In Fig. 1, A indicates the case, formed of

boards, a, a, properly nailed or otherwise secured together. B denotes a strap around the end of the box. A series of small holes, c, c, are made through the boards, entirely around the case; there being two holes in each board. D is the cord, which, for purposes of security, passes continuously in and out through said holes around the case. The ends of the cords are drawn tightly together and secured, usually by a leaden seal. A cord protection has heretofore been attempted, in which the cord was passed into a hole, as c', and out again through a hole, as c, in the adjacent board; thus crossing the seam, e, between the boards underneath the same, and within the box. But this method has proven to be ineffective, as the cord has been easily cut by a knife or thin file thrust in through the seam, e. Then, when the contents of the box have been removed, the ends of the cord have been tacked to the underside of the boards, so that when they have been replaced upon the box the cord appeared to be intact. In my invention the cord is passed in through a hole, c, and out through a hole, c', in the same board; then is crossed over the seam, e, on the other side of the box, and into the hole, c, in the next board. In like manner the joint at the edge of the box, which has been greatly exposed, is protected equally with the sides of the box. In my system, however, the cord at the edges is liable to injury from abrasion in handling. This difficulty I avoid by making notches or indentations, d, at each edge, in which the cord may lie."

The claims are:

"(1) In a packing and shipping case, a securing cord interlaced through each board, and crossing each seam only on the outer side of the case; its ends being tightly drawn together, and sealed in any manner preferred, as herein described. (2) In a packing and shipping case, a securing device, consisting in a series of holes around the case, and a cord passing in and out through said holes and notches, and continuously around the case, crossing each seam between the boards on the outside of the case, and having its ends drawn tightly together and sealed."

The patent was applied for October 13, 1892, but Haworth described his method of lacing some 18 months earlier to one of the officers in the steamship company where he was employed; and that company and some of its associated lines, approving such method, have sought to enforce it by charging higher rates for freight on boxes not secured in the manner set forth in the patent. Complainant fixes the date of his invention as May 18, 1891, when his attention was drawn to a packing case (containing cigars) which had been laced with the cords crossing seams on the inside, and had been tampered with in the way pointed out in the patent. Efforts to secure such boxes against similar tampering had been going on for years. From the statements in the patent, and from the evidence of complainant's own witnesses, it is manifest that prior to his alleged invention the art had progressed so far that boxes were in common use which had two holes bored in each board to receive a securing cord, and it was also common to lace the cord through each and every hole, into one hole and out of the next. The utmost extent of complainant's alleged invention consists, therefore, in so beginning the operation of lacing that when such operation is completed the securing cord will cross each seam on the outside. This is manifestly an extremely narrow invention, and defendants contend that it is not patentable, but it is not necessary to enter into any discussion upon that branch of the case. The evidence as to prior use seems to be sufficient to defeat the patent. Three witnesses are called who testify that for some time

prior to 1891 packing boxes were occasionally laced so as to cross seams on the outside. One of these is a defendant. Cross-examination brings out some contradictions in the testimony of the other two. The rule is well settled that evidence of prior use must always be closely scrutinized, and accepted with caution. Nevertheless this court is convinced that boxes were occasionally thus laced before May, 1891. The measure of proof required to establish any proposition must necessarily vary with its degree of probability. Here, upon the testimony of complainant's own witnesses, and on the conceded facts, it would seem to be an almost irresistible inference, even without any more direct proof, that boxes were so laced to secure them against thieves. It appears that the only purpose of cording was to obtain such security; that cording, of one sort or another, had been used for years; that, as one of complainant's witnesses states, it was in the early 80's when a series of holes (two to each board), and a cord passing in and out of those holes, came into use. Witness after witness testifies that during the period prior to 1891 packing boxes were "corded in different manners"; "different shippers had different methods"; there was "no systematic way of cording"; "no rule for any special system"; "no standard method"; that "a shipper was guided by his own judgment." When Fig. 1 is referred to, and it is borne in mind that the cord will cross the seams inside or outside according as it is first inserted into one particular hole or the adjacent one, or according as the operation of lacing is begun from the outside or the inside of the box, and that the result may even depend upon whether the man who does the lacing is right or left handed, it surely ought not to require much affirmative proof to establish the proposition that boxes during that period were sometimes laced with the cord crossing seams on the outside. Complainant's witness Walker says:

"There were two holes in each board. By starting the cord in one way, and bringing it out of the same board through the other hole, the cord passed across the cracks inside the case. By reversing the lacing, the cord passed over the cracks on the outside of the case."

Complainant's witness McKeon says:

"Now, to start the cord on the inside of the case, up through one hole, down through the other, would bring the cord over the seam on the inside of the case. On the other hand, if we start the cord on the outside of the case (that is, going down through one hole, and up through the other), it would bring the cord over the seams on the outside of the case."

Surely, before the steamship company prescribed a definite method of lacing, it must have been wholly a matter of chance whether a box was laced the one way or the other; and for that reason the evidence of complainant's witnesses, receiving clerks in freight lines, that they do not recollect seeing, prior to 1891, any boxes so laced that the cord crossed seams on the outside, is not particularly persuasive. The evidence of defendants' witnesses, on the contrary, confirms what the court might almost assume without proof. The bill is dismissed.

## WYCKOFF et al. v. WAGNER TYPEWRITER CO.

(Circuit Court, S. D. New York. July 9, 1898.)

## 1. PATENT SUITS—PLEADING.

An averment that complainant has reason to believe that, unless defendant is enjoined, he "will continue to make and to use and to sell large numbers of the aforesaid typewriting machines, and thereby will cause great and irreparable loss, damage, and injury to your orator's aforesaid exclusive rights," is a sufficient averment of irreparable injury to maintain a bill for injunction.

## 2. SAME—ALLEGATION OF TIME OF INFRINGEMENT.

An averment of infringement "after the issuing of the letters patent as aforesaid, and after the 2d day of July, 1892, and before the commencement of this suit" (December, 1897), does not import that defendant has continuously, and ever since the date named, infringed the patent, and hence does not make the bill demurrable for laches.

## 3. SAME—EQUITY JURISDICTION.

A bill in equity for injunction and accounting may be maintained without averring that complainant has ever put, or allowed others to put, the invention in use, or that the validity of the patent has been acquiesced in, or established by an action at law.

## 4. SAME—AVERMENT OF INFRINGEMENT.

An averment that "said defendant \* \* \* did, as your orator is informed and believes, without the license," etc., "\* \* \* in infringement of the aforesaid letters patent, \* \* \* make \* \* \* and vend the said invention and patentable improvements," is defective, in that it lacks any positive charge that defendant does infringe. The correct form is, "that plaintiff has been informed and believes, and therefore avers," etc.

This was a suit in equity by Wyckoff, Seamans & Benedict against the Wagner Typewriter Company to restrain the alleged infringement of letters patent No. 466,947, issued to Horace K. Lamb January 12, 1892, for a typewriting machine. The cause was heard on demurrer to the bill for want of equity.

H. D. Donnelly, for complainants.

Arthur v. Briesen, for defendant.

LACOMBE, Circuit Judge. The ground of demurrer assigned is "that it appears upon the face of the said bill that the complainant is not entitled to any relief against this defendant in a court of equity." The various propositions upon which it is sought to maintain this demurrer may be separately considered:

1. It is contended that there is not any sufficient averment of irreparable injury. The language of the bill is that:

"Your orator fears, and has reason to fear and believe, that, unless the said defendant is restrained by a writ of injunction, \* \* \* it will continue to make and to use and to sell large numbers of the aforesaid typewriting machines [i. e. Underwood typewriters, already averred in the bill to be infringing machines], and thereby will cause great and irreparable loss, damage, and injury to your orator's aforesaid exclusive rights."

This averment is in the usual form, and no authorities are cited holding it to be insufficient. The cases upon the brief are not patent causes, and go only to the extent of supporting the elementary proposition that a mere allegation that "complainant will suffer irreparable injury" is insufficient, without facts to sup-