

wood are united by a dovetail joint made in the same plane; and in United States letters patent No. 238,491, issued to G. E. Davis, March 8, 1881, also for a chair-seat rim, the meeting ends of the strips of wood forming the rim are each united by a tongue and groove in the plane of the rim, and evidently for the same object claimed by Marble. This rim is subjected to strain in the same direction as in a wheel rim, although the degrees of strain are quite different. Other patents which are introduced show joints in the general art of striking similarity. But the archery bow exhibits in evidence, which are well authenticated as long antedating the alleged discovery by Marble, show this exact form of tongue and groove structure where the pieces of wood are united to make the bow. And in a book published in 1878, entitled the "Witchery of Archery," by Thompson, the fact is mentioned that archery bows are commonly made of pieces so united by tongue and groove joint. See page 229. Of these exhibits, Mr. Dayton, the expert on behalf of complainant, says: "The principle of the Marble joint is there, but in an undeveloped, unappropriated, and apparently unrecognized form;" although he further insists that the use is not analogous, and would not suggest that employed by Marble. I am satisfied, however, that this use is not fairly distinguishable, and that it clearly anticipates the joint described in the Marble patent. The advantage in the strength of the joint obtained by placing the glued surfaces in the plane of strain was well exhibited at the hearing by means of a testing machine. The utility of a joint so made, and its superiority for the requirements of the bicycle wheel, are unquestioned. But patentable invention can neither be founded on the value of the device, nor be denied because of its simplicity alone as now viewed. The testimony is convincing that the joint so made by Marble was not an original discovery by him, and I am constrained to the view that there is no patentable novelty in the claims. The bill must be dismissed for want of equity. So ordered.

PENNSYLVANIA STEEL CO. et al. v. VERMILYA.

(Circuit Court of Appeals, Third Circuit. November 28, 1898.)

No. 36. September Term.

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.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

This was a suit in equity by Allen G. N. Vermilya against the Pennsylvania Steel Company and its receivers for infringement of a patent. There was a decree for complainant (87 Fed. 481), from which defendants appeal.

Joshua Pusey, for appellants.

A. G. N. Vermilya, in pro. per.

Before ACHESON, Circuit Judge, and BUTLER and KIRKPATRICK, District Judges.

ACHESON, Circuit Judge. This suit was for the infringement of letters patent No. 248,990, dated November 1, 1881, granted to James Brahn for an improvement in railway switches. The patent has a single claim, in these words:

"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 circuit court sustained the patent, and held that the defendants' device was an infringement. Upon the first branch of the case the judge below said:

"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."

We have reached the conclusion that the foregoing views are correct. While Brahn made no great advance in this art, yet his improvement, we think, was patentably new and useful. Under the proofs, the circuit court did not err in adjudging the patent to be valid.

That the appellants (the defendants below) infringe the patent seems quite clear. We agree with the court below that their device "is essentially identical with the device of Brahn." Upon both branches of the case we adopt the opinion of the circuit court, and accordingly its decree is affirmed.

FRY v. ROOKWOOD POTTERY CO. et al.

(Circuit Court, S. D. Ohio, W. D. December 2, 1898.)

No. 4,531.

1. PATENTS—SUIT FOR INFRINGEMENT—ESTOPPEL BY PLEA OF LICENSE.

A defendant is not estopped from denying the validity of the patent sued on by a plea of license, where such plea is withdrawn, before the hearing, by leave of court, and an answer filed in which a license is not pleaded.

2. SAME—INVENTION—PUBLIC HISTORY OF THE ART.

For the purpose of determining the question of invention, a patentee must be presumed to have had knowledge, at the time of the claimed in-