

things; that one can "do the same kind of work in half the time." This estimate was the result of an actual experiment where witness had timed sling against tub. Upon cross-examination some light was thrown on the "different kinds" of sling, which earlier witnesses had referred to. The witness was no draftsman, and his sketch of the kind of net sling which he had used is not by itself altogether intelligible; but his evidence leaves no doubt that it was one in which the side ropes ran completely around the net, through thimbles or eyes, not being fastened either at the ends or at the sides of the net. This evidence is most important, as showing the existence of a net sling, apparently free to defendant, and certainly not within the description of the patent, which would double the speed attainable with the tubs. In proving profits, it is necessary to show a saving by the use of the infringing tool over the cost of operating any other tool which defendant was free to use. Potter, a longshoreman laborer, who had worked on defendant's piers, at first testified that the net slings were three times as fast as the herring tubs, but subsequently reduced his statement saying: "Three times is a good deal. That is almost too big an average, you know. But take it double,—double the time. That would be something like it." Evidently, this is mere guesswork, and the witness admits that he never took any time on the nets or the tubs.

In view of this record, it might be possible to make some vague guess, as many of the witnesses have, as to how much faster some one appliance would work than another, under favorable circumstances; but there seems to be absolutely no proof which would warrant the court in finding that by the use of the infringing nets defendant saved any specific number of hours out of the time it would have taken to do the work with one or other of the cargo-hoisting appliances available to defendant. The testimony falls far short of the reliable and tangible proof which is required to establish profits. The decree of the circuit court is affirmed, with costs.

HUNTINGTON DRY PULVERIZER CO. et al. v. NEWELL UNIVERSAL MILL CO. et al.

(Circuit Court, S. D. New York. January 23, 1899.)

1. PATENTS—STONE CRUSHERS.

The Huntington patent, No. 277,134, for a machine for crushing stones and ores, *held* valid and infringed as to claim 1, on motion for preliminary injunction.

2. SAME—LACHES.

Laches is not to be imputed to a patent owner because of his failure to prosecute to judgment a suit against an infringer, after the latter has become totally insolvent, and has disappeared.¹

This was a suit in equity by the Huntington Dry Pulverizer Company and Laura C. Huntington against the Newell Universal Mill

¹ As to laches as a defense in infringement proceedings, see note to Taylor v. Spindle Co., 22 C. C. A. 211.

Company and others for alleged infringement of two patents relating to stone and ore crushers. The cause was heard on motion for preliminary injunction.

Frederick S. Duncan, for the motion.
J. Hampden Dougherty, opposed.

LACOMBE, Circuit Judge. The application is made to enjoin an infringement of patent No. 277,134, claims 1 and 2, and patent No. 325,804, claims 1 and 2. The later patent has never been adjudicated. The earlier patent was sustained in the circuit court, district of New Jersey (89 Fed. 323), but an examination of Judge Kirkpatrick's opinion indicates that claim 1 only was considered. In the case at bar, therefore, it is only necessary to inquire whether there has been infringement of the first claim of No. 277,134. All inquiries as to infringement of the second claim of that patent, or of the two claims of the later patent, are reserved for final hearing. Defendant has sold and offered for sale two types of machine, but it is not seriously disputed that both of them infringe the first claim of No. 277,134.

In defense it is insisted that the circuit court of New Jersey erred in sustaining the validity of the patent before it. The record in the case was quite voluminous, and Judge Kirkpatrick discusses the patent and the state of the art at considerable length, finding in the suspension of the rollers the application of a new principle to the art, to accomplish a result long sought, but until then never satisfactorily attained. Defendant has presented here some additional patents, which were not before Judge Kirkpatrick, and relies particularly upon two of them. A careful examination of the Ambler patent, No. 11,109, shows that the balls (which operated as crushers) rested on the bottom of the pan. They were not suspended, as are the crushers in No. 277,134. The other additional patent relied on (Huntington, No. 251,442) is radically different from the one it is claimed to anticipate.

I do not find that the complainants were guilty of such laches as to disentitle them to the relief now asked for. Certainly, they were under no obligation to go to the expense of prosecuting their original suit against Rice after he was found to be totally insolvent, and had disappeared. I am unable, after careful study, to comprehend the alleged special equity in favor of the defendant arising upon the offer of Manning, Maxwell & Moore to sell Narod mills. The facts are briefly these: Subsequent to the issue of the Huntington patent, one Rice obtained a patent for a mill, which disclosed improvements upon the original mill of the Huntington patent. This was all right enough, and the patent may be good for that improvement (if improvement there were), although the machine made under it might be an infringement of the Huntington patent. Under this patent, Rice made mills, which he called the "Narod Mills." Being infringements of the Huntington patent, he had no right to sell them, except by license of the holders of that patent. Subsequently, the firm of Manning, Maxwell & Moore (which, for the purposes of the argument, it may be conceded, was really identical with the Huntington Dry Pulverizer Company) made an arrangement with Rice for some 30 of his mills. That firm

also acquired a license from the holders of the Huntington patents, and thereupon advertised the Narod mills for sale. In other words, a structure which infringed two patents was offered for sale by a concern which held a license from the owners of both patents. Why it should be contended that, by so doing, declaration was made to the world that the mill did not infringe the earlier patent, it is difficult to understand. The complainants may take injunction under the first claim of the earlier patent.

WAY v. McCLARIN.

(Circuit Court, E. D. Pennsylvania. January 18, 1899.)

No. 28.

1. PATENTS—INVENTION.

Where a manufacturer of sweaters undertook to devise a substitute, for use in bicycle riding, which should be free from the disadvantages of the increased clothing over the shoulders, neck, arms, and stomach, *held*, that there was no invention in devising a chest and neck protector, consisting of a collar fastening at the back, with a flap depending in front, and united to the lower edge of the collar for a portion only of the width of the flap.

2. SAME.

The Way patent, No. 593,954, for chest and neck protectors, is void for want of patentable invention.

This was a suit in equity by John Howard Way against George D. McClarin for infringement of a patent for chest and neck protectors.

Joseph C. Fraley and Henry N. Paul, Jr., for complainant.
Ernest Howard Hunter, for respondent.

DALLAS, Circuit Judge. The bill in this case charges the defendant with infringement of letters patent No. 593,954, dated November 16, 1897, granted to the complainant, for "chest and neck protectors." The claims involved are as follows:

"(1) A chest and neck protector, comprising a collar and a depending flap, the collar being elastic in the direction of its length, and the upper edge of the flap being united to the lower edge of the collar centrally for a portion of the width of said flap, whereby the latter is free from the collar for a portion of its width at each side of the point of union, and the collar free to be fastened about the neck of the wearer, substantially as described." "(3) A chest and neck protector, comprising an upper or neck portion folded over at its upper edge to form a two-ply collar, and a depending flap, said collar being elastic in the direction of its length, and the upper edge of the flap being united to the lower edge of the collar centrally for a portion of the width of said flap, whereby the latter is free from the collar for a portion of its width at each side of the point of union, and the collar free to be fastened about the neck of the wearer, substantially as described."

The principal question presented is one which frequently arises, and is often perplexing. Did Way, in making the patented article, exercise the faculty of invention, or merely the skill of an artisan? He says in his testimony that he had been manufacturing "sweaters" for some years, and that he had worn them himself when riding a