

ther's process for purifying fats and oils preparatory to soap making are of the same character. They revealed no process for the manufacture of fat acids. If the acids were accidentally and unwittingly produced, whilst the operators were in pursuit of other and different results, without exciting attention and without its even being known what was done or how it had been done, it would be absurd to say that this was an anticipation of Tilghman's discovery."

In *Clough v. Manufacturing Co.*, 106 U. S. 166, 175, 176, 1 Sup. Ct. 198, the Clough patent was held valid, notwithstanding the prior Barker burner. The court said:

"The testimony * * * amounts really to this only: that if that burner is used now in a way it which it was never designed to be used, and it is not shown to have ever been used before Clough's invention, it may be made to furnish a supplementary supply of gas. * * * Any further raising of the tube was accidental, and not a part of the law of the structure. * * * The structure was not designed for the same purpose as Clough's, no person looking at it or using it would understand that it was to be used in the way Clough's is used, and it is not shown to have been really used and operated in that way."

In *Pittsburgh Reduction Co. v. Cowles Electric Smelting Aluminum Co.*, 55 Fed. 301, 307, the court said:

"Suppose it to be a fact that in De Ville's process alumina was dissolved in the bath from the anode, and that thereupon it was electrolyzed as in the Hall process, it was a mere accident of which De Ville made no note, and which therefore, we may reasonably infer, he did not observe. Accidents of this character cannot be relied on as anticipations of a patented process, when the operator does not recognize the means by which the accidental result is accomplished, and does not thereafter consciously and purposely adopt such means as a process for reaching the result."

Upon careful consideration, we are of opinion that the Francillon patents do not anticipate the Schultz patents, and that the decision of the circuit court of appeals for the Third circuit in the Zahn Case was correct, and should be followed by this court. Decree for complainant.

UNITED STATES PLAYING-CARD CO. v. SPALDING et al.

(Circuit Court, S. D. New York. February 28, 1899.)

PATENTS—SUITS FOR INFRINGEMENT—VIOLATION OF INJUNCTION.

Where the question of the violation by a defendant of an injunction issued in a suit for infringement of a patent depends on whether or not a new article sold by defendant since the granting of the injunction is an infringement of complainant's patent, which is an intricate question, dependent on structure, and requiring a comparison of the article with others, and a consideration of other patents, the court will not undertake to determine it on a motion for an attachment, but, no intentional violation being claimed, will deny the motion, and leave the complainant to his remedy by a new bill.

In Equity. On motion for attachment for violation of injunction.

Arthur v. Briesen, for the motion.

Fred. L. Chappel, opposed.

WHEELER, District Judge. The statement in the opinion heretofore filed (92 Fed. 368) upon the motion for an attachment herein,

that Spalding & Bros. appear to have respected the injunction, was founded upon that of plaintiff's counsel at the argument, which was understood to mean that they had not done anything that was now complained of. Attention has since been called to the answering affidavit of their manager, which states that since the injunction Ihling Bros. & Everard have sold to them "a tray known as the 'New Kalamazoo Tray,' which this deponent is informed and believed was manufactured under a patent antedating the Bisler patent, here in suit, and was therefore obviously not included or contemplated in the decree of the court, or in the above-named injunction, as an infringement." This tray is the one complained of, and a mere denial of the motion would leave the decision to look like an adjudication that it is not an infringement, which would not be correct; for, in the view taken, that would be immaterial, and no conclusion was reached upon it. That prior patent was the Butler patent, and, in view of that statement now noticed in the affidavit, that structure becomes material, and the question arising upon it has been further examined. The Butler patent was for an open tray in the form of a cross, into the arms of which the hands of cards were to be pushed from the interior between guides, and to be held down there by elastic bands around the arms above the cards. This New Kalamazoo tray is open, and in the form of a cross, and in appearance somewhat like the Butler patent; but it has a block in the interior, forming, with the sides, cribs for holding the hands of cards, which are pushed from the exterior under bars which hold them down; and it has the features of the Bisler patent, and of the structure which has been held to be an infringement, except that it is open, and the bars hold the hands down in place, instead of the cover. So, it does not appear to be made according to the Butler patent, and it may be an infringement of the Bisler patent, and its sale a violation of the injunction, in which Spalding & Bros. and Ihling Bros. & Everard had part. But the Bisler patent is for improvements upon the Butler trays and others, and this new tray cannot be definitely determined to be an infringement without comparing it, in the light of evidence, with that and still other patents and structures. This cannot be safely and properly done on this motion, which is in its nature criminal, and in result sought punitive, requiring full proof of a violation that is obvious to the senses, without intricate comparison or study. The position of Spalding & Bros. here, who are acquitted by counsel of the plaintiff of any intentional, although not of actual, violation of the injunction, shows that this question of violation is intricate, and cannot be determined upon merely obvious appearances. As now considered, such an alleged infringement should be left to a new bill.

The conclusion reached is that the motion for an attachment must be denied, as before, except that it should be without prejudice, instead of as an adjudication in respect to infringement by the sale of this now new tray. "Without prejudice" to be added to denial of motion.

THOMPSON v. SECOND AVE. TRACTION CO. et al.
(Circuit Court of Appeals, Third Circuit. May 1, 1899.)

No. 32, March Term.

1. PATENTS—INFRINGEMENT—ROLLER COASTERS.

A patent for a roller-coasting structure, claiming tracks "running parallel with each other, and having the starting and terminal stations at the same elevation," is infringed by a similar structure in which the terminal station is only from six inches to a foot lower than the starting station.

2. SAME—MECHANICAL EQUIVALENTS.

In a roller-coasting structure, having parallel tracks, the use of turntables or pivoted switch tracks, instead of fixed switch tracks, does not avoid infringement, since these devices are well-known equivalents.

3. SAME.

The Thompson patent, No. 310,966, for an improved roller-coasting structure, construed, and held valid, and infringed as to claim 1.

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

This was a suit in equity by La Marcus A. Thompson against the Second Avenue Traction Company and James A. Griffiths for alleged infringement of a patent for a roller-coasting structure. The circuit court found that there was no infringement, and entered a decree dismissing the bill (89 Fed. 321), from which decree the complainant has appealed.

Frank S. Busser, for appellant.

Henry E. Everding, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and McPHERSON, District Judge.

ACHESON, Circuit Judge. The bill in this case charges the defendants, the Second Avenue Traction Company and James A. Griffiths, with infringement of letters patent No. 310,966, granted on January 20, 1885, to the complainant, La Marcus A. Thompson. The invention of this patent relates to an improved roller-coasting structure. The specification describes, and the drawings illustrate, a structure in which there are two parallel undulating tracks, extending from an elevated starting station at one end of the structure to a terminal station having the same elevation at the other end of the structure, each end of the structure being provided with a switch track, by means of which the car may be transferred from one track to the other, the object being to have each car make a round trip, "going out on one track and returning on the other." The specification, referring to the attached drawings, states:

"The starting end, D, of the outgoing track, B, is of a gradual decline to b, where the track takes a short rise, which, however, is not steep enough to materially check the momentum gained by the car from the start. From this point the track takes quite a sudden or steep descent to the lowest part, d, and then a gradual and regular rise to the terminal point. The momentum or acceleration acquired on the down grade will carry the car nearly to the top of the ascending end, means being provided to continue the car to the top when its collected force has been expended. The car is then transferred to