

Without reference to the question whether the improvement was a patentable invention, the advance which the patentee made was important, though apparently slight. He made an universally popular lamp, where none, which met the public demand, had previously existed, and had he known or appreciated the particulars wherein his lamp was in fact an advance he probably would have stated them in his patent.

In consequence of the omission, I think that his patent claims nothing which the public did not have previously, and that the title of his assignee to the exclusive use of his actual improvement is therefore defective. The bill is dismissed.

LOCKWOOD v. HOOPER and others.¹

(Circuit Court, D. Massachusetts. November 24, 1885.)

1. PATENTS FOR INVENTIONS.

The patent to Rhodes Lockwood, No. 167,445, of September 7, 1875, construed and sustained; following *Lockwood v. Cutter Tower Co.*, 11 Fed. Rep. 724, and 18 Fed. Rep. 653; and *Lockwood v. Cleveland*, 18 Fed. Rep. 37.

2. SAME—DISCLAIMER.

A disclaimer limiting the claim of this patent to "a rubber eraser having the soft finished erasive surface produced by tumbling the eraser, substantially as hereinbefore described," does not make this patent a different one from that which was sustained in the cases cited.

3. SAME—PRIOR USE—EVIDENCE.

Affidavits as to a prior use disproved by the fact that the parties making them had accepted and operated under a license from the patentee.

In Equity.

Browne & Browne, for complainant.

Francis Forbes, for defendants.

NELSON, J. This case was heard upon the plaintiff's motion for an interlocutory injunction to restrain the defendants from selling velvet erasive rubber, in violation of the plaintiff's patent, granted September 7, 1875. This patent has been sustained by this court in *Lockwood v. Cutter Tower Co.*, 11 Fed. Rep. 724, and 18 Fed. Rep. 653. After the last decision, that case was reopened upon the defendant's motion, upon the ground of newly-discovered evidence. The original decree has been recently confirmed upon an *ex parte* hearing, the defendant having abandoned the defense of the suit. The patent was also sustained by Judge Nixon in *Lockwood v. Cleveland*, 18 Fed. Rep. 37. The defendants in this case are stationers in Boston, and procure their velvet rubber of one Faber, a large dealer in erasive rubber in New York, and have Faber's guaranty to protect them against the plaintiff's patent. That the rubber which they are sell-

¹ Reported by Charles C. Linthicum, Esq., of the Chicago bar.

ing is an infringement of the plaintiff's patent, if valid, is not disputed.

The patented invention consists in blocks of erasive rubber, from which the glaze or crust, formed on the surface in vulcanization, has been removed by the operation of tumbling described in the patent. Tumbling blocks of erasive rubber, as well as other small articles, sufficiently to clean them, but without removing the crust, is old. But it is alleged by the patentee that tumbling was never so practiced before his invention as to remove the crust and produce such an article, as to the condition of the surface, as he produces. Since the decisions cited from the Federal Reporter, the plaintiff has filed a disclaimer limiting his claim to "a rubber eraser having the soft, finished, erasive surface produced by tumbling the eraser, substantially as hereinafter described." The defendants contend that this disclaimer makes the patent a different one from that which was sustained in the cases cited, and that, therefore, the plaintiff should have no benefit from them in support of his motion. But the disclaimer has only explicitly limited the patent to that which this court held to be the patented invention before the disclaimer was filed. It is shown, on the part of the plaintiff, that the rubber block produced by the tumbling process is distinguishable in appearance from one from which the crust might be removed in any other way; and also that it is the only known way in which it can be produced without such expense as to make it commercially impracticable. Considering, then, the invention in the light of the disclaimer, it appears to be, as this court has already held it to be, patentable.

The defendants read affidavits to prove that one Christopher Roberts made and sold, at his factory, in Newark, New Jersey, erasive rubber, like the patented article, long before the plaintiff's invention, and has done so continuously ever since. It appeared that all the erasive rubber made by Roberts was manufactured for Faber and his predecessors in business; and that Faber has sold only what was manufactured by Roberts. If, therefore, Roberts had made rubber like the plaintiff's, the fact must have been known to Faber. But the letters of Faber to the plaintiff, which were read in evidence, are wholly inconsistent with the claim now made, that this invention was well-known and practiced in Roberts' factory.

The affidavits are also disproved by the fact that in 1884 Faber accepted a license from the plaintiff to make and sell erasive rubber under the patent. Under this license, the plaintiff's rubber was manufactured by Roberts, and sold by Faber, and the latter accounted for and paid the stipulated license fees until the license was revoked by Lockwood, in pursuance of a power reserved to him in the written instrument. As it very plainly appears that this suit is being defended by Faber under his guaranty given to the defendants, his admissions and conduct become important and convincing evidence. This defense was also set up and abandoned in the rehear-

ing of *Lockwood v. Cutter Tower Co.* The plaintiff will derive but little benefit from the former decrees in his favor, if they cannot be used in support of injunctions, *pendente lite*, against palpable infringements, such as Faber's are shown to be. Injunction to issue.

BERWIND and others v. SCHULTZ.¹

(District Court, S. D. New York. October 30, 1885.)

1. MARITIME LIEN—SUPPLIES—PRESUMPTION OF LIEN—BY WHAT REBUTTED.

The furnishing of supplies to a foreign vessel makes a *prima facie* case of lien. This presumption is rebutted by proof that the master or agent ordering the supplies had funds in hand sufficient to meet the bills incurred; that the material-man either had notice of these facts, or had knowledge of facts sufficient to put him on inquiry; and that reasonable inquiry or due diligence would have informed him of the fact that there were such funds and no need of credit.

2. SAME—MATERIAL-MAN—INQUIRY AS TO FUNDS—STATEMENT.

S. & Co. were the regular agents in New York of the S. L. line of steam-ships, charged with attending to the New York business of the line, collecting inward freights, and paying bills. On their order, coal was furnished to the steam-ship K., one of the line, by libelants. There was no express reference made, on ordering the coal, to the owner of the steamer, and both parties expected payment to be made by S. & Co., and at that time S. & Co. had funds of the steamer in their hands sufficient to pay for the coal. No inquiries were made by libelant of S. & Co. as to the terms of their agency, the state of the ship's account, or as to the necessity of any credit. S. & Co. afterwards gave a check for the coal, post-dated, and libelant receipted the bill as paid, which receipt S. & Co. subsequently showed to the owner, asserting that the bill was paid, and on the faith of which the owner made an advance of \$5,000 to S. & Co., which he testified he would not have done had he not supposed this bill was paid. The check not being paid at maturity, and the agency of the line being taken from S. & Co., and their credit becoming poor, libelant brought this action against the ship-owner, who claimed that he was not liable on account of the dealings between libelant and S. & Co. *Held*, that if the ship were liable, respondent, as owner, would also be liable; that the law requires of a material-man reasonable inquiry before presuming to charge the ship, whenever he knows that the person ordering the supplies is in receipt of funds on the ship's account. As S. & Co. had in their hands sufficient funds to pay for the coal, and intended to pay for it, and as reasonable inquiry on the part of libelant would have shown him that there was no need, and consequently no authority, for charging the ship, *held*, that the ship was not bound, so that the owner could not be held liable on the ground that the ship was lawfully charged.

3. SAME—PRINCIPAL AND AGENT—SHIP-AGENTS—AUTHORITY TO CHARGE FOREIGN PRINCIPAL.

S. & Co. being the regular resident agents of the steam-ship, appointed by the foreign owner to conduct the general business of the ship in New York, and it not appearing that either by usage or by the terms of the agent's authority were the libelants precluded from charging the owner personally, *held*, that libelants did not sell the supplies exclusively on S. & Co.'s credit; and if the bill were not paid by S. & Co. within a reasonable time, libelants might lawfully resort to the principal. The English doctrine that, on a sale to the agent of a foreign constituent, the principal is not chargeable, is not applicable. The general rule stated. *The Subiote*, 23 Fed. Rep. 919, distinguished.

¹ Reported by R. D. & Edw. G. Benedict, Esqs., of the New York bar.