

for the same and like purposes, only in the construction of one or two of the parts, whereby, perhaps, a better but certainly not a different kind of result was accomplished than had been before effected. More than this cannot be justly claimed, as it seems to me. Besides, it appears that Martin's application for a patent was rejected and withdrawn two or more times; the examiner insisting, upon certain references, "that all applicant's novelty in entire device was expressed only by words 'as specified.'" In obedience to this ruling the claim, and perhaps the specifications, was modified, and the patent granted. It follows that the patent cannot now, by a liberal construction, be made to include anything so denied by the patent-office; and without this, the devices of the defendants cannot, I think, be said to infringe.

Bill in each case dismissed.

YODER v. MILLS and others.

(Circuit Court, E. D. Pennsylvania. October 28, 1885.)

PATENT LAW—INVENTOR HAS THE MERIT, NOT THE MACHINIST.

He who conceives the device must have the merit thereof, and enjoy the profit, not he by whose mechanical skill the conception was, at the inventor's request, put into tangible form.

In Equity.

William A. Redding, for complainant.

M. Daniel Connolly, for respondents.

MCKENNAN, J. The subject of this suit is a patent to Lorenzo T. Yoder for an invention relating to the manufacture of candy, dated December 4, 1883, and numbered 289,488. The patent contains four claims, but no evidence is produced to show any infringement of the first two. The third and fourth claims are the only ones touching which there is any contest. They are both for combinations of mechanical devices, and differ only in that to the elements specified in the third claim is added a "cover, A," of peculiar construction; and thus the fourth claim is constituted. Nor is there any substantial controversy between the parties upon the question of infringement. It is clear that the machine made by the defendants is, in every essential feature, identical with that described in the patent.

The only contested inquiry in the case involves the right to the invention itself. All the evidence exhibited relates to it. Both parties claim the merit which the patent apparently accords to the complainant, and, without discussing the evidence, it is enough for us to say that, in view of the decided preponderance of the proofs, it is justly devolved upon him. The conception of the invention belongs

to him, and all that the defendants contributed was the necessary mechanical skill, furnished at his request, to embody it in an operative form. He did not lose the merit which is due to inventive suggestiveness, and devolve it upon the mechanic whose only function was to materialize it. *Watson v. Bladen*, 4 Wash. C. C. 582; *Blandy v. Griffith*, 3 Fish. 609.

But some doubt may be entertained as to the right of the complainant to appropriate the combination covered by the fourth claim of the patent, treating it as an entirety. The cover, A, which is an indispensable constituent of the combination, was not devised by him, but was suggested and constructed solely by one of the defendants. Whether that claim, then, is enforceable against the defendants we do not deem it imperative on us to decide. We will therefore adjudge that the patent is valid in so far as the *third* claim is involved, that an injunction issue against the infringement of that claim, and that the profits or damages accruing from the past infringement thereof be ascertained by a master; and a decree will be prepared accordingly.

WOOSTER v. THORNTON.¹

(Circuit Court, S. D. New York. January 26, 1886.)

1. PATENTS FOR INVENTIONS—PRACTICE BEFORE THE MASTER.

There had been an interlocutory decree declaring a reissued patent valid, finding certain devices to be infringements, and directing an account of profits and damages. The defendant offered the original patent in evidence, for the first time, before the master, and insisted that, upon any construction of the reissue that would be valid on comparison with the original, defendant did not infringe. *Held*, that this evidence was properly rejected by the master.

2. SAME—DECREE AS TO WHAT IS AN INFRINGEMENT BINDING ON MASTER AND PARTIES.

A decree as to what is an infringement is conclusive upon the parties and upon the master, and extends to everything substantially like the infringement decreed against. *Thomson v. Wooster*, 114 U. S. 104; S. C. 5 Sup. Ct. Rep. 788.

3. SAME—WEIGHT OF EVIDENCE IS A QUESTION FOR THE MASTER.

Where the evidence as to the extent of the infringement was conflicting, and sufficient to warrant the master in finding either way, according to what was believed or disbelieved, his conclusions should not be disturbed. *Bridges v. Sheldon*, 7 Fed. Rep. 17.

4. SAME—LICENSE FEE.

An established royalty or license fee is evidence, and not an absolute test, of value.

5. SAME—LICENSE FEE ESTABLISHED BEFORE INFRINGEMENT.

It is for the master to determine, as a question of fact, whether the value of the invention, at the time of the infringement, was equal to the license fee established after the infringement, and the court cannot say, as a matter of law, that the license fee should govern.

In Equity.

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