

## JENNINGS and others v. LOWENSTINE and others.

(Circuit Court, S. D. New York. May 17, 1887.)

## PATENTS FOR INVENTIONS—PROCESS FOR SHAPING LACE MITTS—PATENTABLE NOVELTY.

The claim relating to a process for shaping lace mitts contained in letters patent granted November 9, 1880, to Warren P. Jennings, for a mitt-shaping machine, is wanting in patentable novelty by reason of the prior known state of the art, and a bill to restrain infringement of said claim will be dismissed.

In Equity.

*Arthur v. Briesen*, for plaintiff.

*W. A. Jenner*, for defendant.

WHEELER, J. This suit is brought upon letters patent No. 234,286, dated November 9, 1880, and granted to Warren P. Jennings for a mitt-shaping machine, the process of shaping lace mitts, and the mitts as shaped. There is no charge that the defendants infringe as to the machine. The case turns principally upon the claim as to the process. That consists in first stretching the mitts lengthwise, and thereby contracting them at the desired point, and in then subjecting them, first to the direct action of steam, and next to heat, for the purpose of setting the fibers to the desired form. From the evidence in the case it clearly appears that similar articles were shaped by stretching them over forms, enlarging them where they were too small, and contracting them where they were too large, and then exposing them, first to steam, and then to heat, according to the method of the patent, for the purpose of setting the fibers in the desired form. The patent is for contracting the mitts where contraction is desired, without mentioning enlargement. This contraction is precisely according to the old process. The only difference between the processes is that by the old process the articles were first made too small for the large parts, as well as too large for the small parts, and then correspondingly enlarged and contracted; while by the process of the patent the articles are first made large enough for the large parts, and shaped only by contraction where they are too large. The treatment of the parts operated upon is precisely the same in each. This is all that this claim of the patent assumes to cover. The machine has new contrivances for holding the ends of the mitts, but they are not covered by this claim. The patentee invented means of applying the process, rather than the process, and this claim, upon this consideration, must fail for want of novelty to support it. The claim for the mitts themselves rests wholly upon their being contracted laterally between their ends, without reducing the number of meshes at their contracted parts. There does not appear to be any patentable novelty about this.

Let a decree be entered dismissing the bill of complaint, with costs.

BENNETT v. LINGHAM.<sup>1</sup>

(District Court, E. D. New York. May 27, 1887.)

## CHARTER-PARTY—TIME OF SAILING—BREACH—PREVIOUS ACQUIESCENCE—LIABILITY.

Defendant agreed to ship cattle by the steamer N. H., "sailing from New York about the middle of September." The vessel was at sea when the contract was made. On September 14th defendant inquired the steamer's probable sailing day, and was told, about September 27th, to which he made no objection. On September 22d, the defendant, being notified that the steamer would sail on the 29th, declined to ship cattle by her, on the ground that his contract did not require him to ship at so late a day. *Held*, that the ship having construed the indefinite phrase, "about the middle of September," to mean as late as the twenty-seventh of the month, and defendant having acquiesced therein, and that, too, on a day before the middle of September, it was not open to the defendant to say that a tender on the 29th was not a compliance with the contract. His refusal to ship was therefore a breach of the contract.

In Admiralty.

*Ulo, Ruebsamen & Hubbe*, for libellant.

*Butler, Stillman & Hubbard*, for respondent.

BENEDICT, J. This action is brought by the owners of the steamer Notting Hill to recover damages of the defendant for an alleged breach of a live-stock freight contract, made by the defendant, whereby he agreed to ship on the said steamer about 460 head of cattle, to be transported in said vessel from New York to Deptford, at a price named. The contract was in writing, and was made in New York on the eleventh of August, 1883, at which time the steamer was upon a voyage from New York to London and back. The contract, when designating the steamer in which the cattle were to be transported, adds to the steamer's name the words, "sailing from New York about the middle of September."

The steamer was unable to get back to New York before September 22d. On September 22d the defendant was notified that the steamer would be ready to sail on the 29th, but declined to ship cattle by her, upon the ground that his contract did not require him to ship at so late a day. I should have been inclined to support the defendant in this refusal were it not for the additional fact that on the fourteenth day of September, in answer to the defendant's inquiry as to the date on which the steamer left London, and also "her probable date of sailing from New York," was informed by telegraph that she had sailed from London on the sixth of September, and would be dispatched from New York about September 27th, and he then made no objection of any kind to shipping his cattle on her.

The phrase in the contract, "about the middle of September," is indefinite. It has no definite meaning in the trade. In this instance it

<sup>1</sup> Reported by Edward G. Benedict, Esq., of the New York bar.