

have not made any distinctions between the kinds of inventions, nor provided that the being on sale of the patent shall avoid it where the thing patented is not capable of being sold. If the thing aimed at does not take place, nothing else is substituted, and the reason why it does not, whether because it cannot, or is not permitted to, is immaterial. This ground of demurrer does not appear to be tenable.

As to the other ground, the bill does not allege that the inventor abandoned his invention. It shows the date at which it is alleged to have been made, and the date of his application. From these dates the defendant argues that he abandoned it. The statute does not make such delay a bar to the patent. As to this the patent is to be granted, unless the invention is proved to have been abandoned. This question was open in the interference, and the abandonment does not appear to have been there proved. Now, that the patent has been granted, nothing is left to an infringer, as to abandonment, but to set it up as a defense and prove it, as is provided in the other branch of the statute. The cases cited in behalf of the defendant show that this is a defense to be set up and proved. *Kendall v. Winsor*, 21 How. 322; *Jar Co. v. Wright*, 94 U. S. 92; *Rifle Co. v. Arms Co.*, 14 Blatchf. 94. It cannot avail on demurrer to a bill that does not allege it.

Demurrer overruled, and the defendant assigned to answer the bill by the next rule-day.

SHANNON v. BRUNER.

(Circuit Court, E. D. Missouri, E. D. February 17, 1888)

PATENTS FOR INVENTIONS—INFRINGEMENT—DAMAGES.

Plaintiff's patent was a device intended for use in laying a particular kind of pavement, in common use, and which any one might lay. In an action for damages for an infringement of his patent, the measure of damages is the profits received by the infringer over what would have been derived by adopting some other available method, he not being required, by the terms of his contract, to use this particular device.

On Exceptions to Master's Report.

Upton M. Young, Albert Blair, and Alexander Young, for complainant.
George H. Knight and F. N. Judson, for defendant.

THAYER, J., (*orally*.) Under an order of reference, requiring the master to ascertain and report the amount of the gains and profits which accrued to the defendant by reason of an infringement of complainant's patent heretofore adjudged, (*ante*, 290,) the master has reported in favor of an allowance of merely nominal profits. Complainant has taken five exceptions to the report, but, practically, there are only two grounds of objection specified, and they may be conveniently and substantially stated as follows: *First*. The patent involved is the reissued Schillinger patent,

No. 4,364, and "relates to a concrete pavement, * * * laid in sections, so that each section can be taken up and relaid without disturbing the adjoining sections." The master held that for the infringement complained of, the defendant was not liable to the patentee for the entire profit realized on those jobs in which the device covered by the patent had been used, but only for such portion of the profit as was clearly traceable to the use of the patented device or process. To such ruling the complainant excepts, and insists that he is entitled to the entire manufacturer's profit, which, in this case, amounts to over \$8,000. *Second.* He insists that if his first position is untenable,—that is to say, if he is compelled to accept such portion of defendant's business profit as is clearly traceable to the use of the patented device,—that there is evidence in the case showing what such profit was, and warranting a decree for a substantial amount.

The first exception is based mainly on the case of *Elizabeth v. Pavement Co.*, 97 U. S. 121. The subsequent case of the *Manufacturing Co. v. Cowing*, 105 U. S. 253, is also referred to, but that decision was predicated on a special state of facts, and is irrelevant to the matter in hand. To my mind, at least, it seems clear that this case is not controlled by the principle of the decision in *Elizabeth v. Pavement Co.*, but by the rule announced in *Mowry v. Whitney*, 14 Wall. 648; and such was also the opinion of Mr. Justice BLATCHFORD, as circuit judge, in *Schillinger v. Gunther*, 15 Blatchf. 303. It is, perhaps, unnecessary to point out the distinction between this case and the one relied upon by the complainant, but the apparent confidence with which the case of *Elizabeth v. Pavement Co.* is cited justifies such a course. In the latter case, as has many times been remarked, the patent involved covered a combination that was complete in itself, and constituted a new pavement, commonly called the "Nicholson," which differed from any other then in use. As combined and arranged, the Nicholson pavement was a new structure,—“a new thing, like a new chemical compound.” It was this new thing, or pavement, complete in itself, which the defendant made, and he made it as a complete structure. He did not embody it as an improvement in some other pavement which he was employed to construct. Under such circumstances, it followed that whatever the defendant realized above the cost of construction was a profit realized by the infringement. The principle that controlled the case, so far as the estimate of the profits was concerned, is the same that governs when a manufacturer makes and sells an entirely new machine, which, as an entirety, is protected by letters patent. In such case the profit recoverable is the difference between the cost to the manufacturer and the price realized on sale. Walk. Pat. §§ 717, 735; *Rubber Co. v. Goodyear*, 9 Wall. 804. The case at bar is an essentially different case. Schillinger simply devised a new method of laying a particular kind of pavement, to-wit, concrete, which was before well known, and in common use. He did not invent a new pavement. His device was, according to his own admission, an improvement on a pavement already in common use, which any one might lay; and as an invention it was not susceptible of use, and