

CELLULOID MANUF'G Co. v. AMERICAN ZYLONITE Co. et al.

(Circuit Court, S. D. New York. April 18, 1888.)

PATENTS FOR INVENTIONS—INVENTION—CELLULOID.

The discovery by Stevens that fusel oil was an efficient and cheap solvent of camphor, in conjunction with nitro-cellulose, was patentable, although it was known previously that fusel oil was a solvent of camphor, and that various essential oils could be used in conjunction with camphor in the manufacture of pyroxyline.

In Equity. Bill for infringement of patent.

C. Wyllys Betts and Frederic H. Betts, for complainant.

T. W. Osborn and H. M. Ruggles, for defendants.

WALLACE, J. Stevens was the first to discover the value of fusel oil as a solvent of camphor in conjunction with nitro-cellulose. It was known previously that fusel oil was a solvent of camphor, and that various essential oils could be used in conjunction with camphor in the manufacture of pyroxyline; but some of these oils were not efficient, and some were useless as substitutes for the *menstrua* used in producing the conversion of pyroxyline when mixed with camphor. It is doubtless true that by experimenting with the whole list of essential oils any competent chemist could have ascertained that fusel oil would, while acting as a solvent of the camphor, be efficient in producing the proper conversion of pyroxyline, and could have reached the discovery by a process of exclusion. But this is not enough to defeat a patent. By his experiments Stevens obtained a menstruum which gave a better result than the *menstrua* previously used, and at less expense. The fact that alcohol had been used for many years as a menstruum, when a cheaper solvent could have been used, and would have been, if the availability of fusel oil as a substitute had been obvious to those skilled in the art, is inconsistent with the suggestion that nothing but the mere exercise of judgment was involved in selecting it as a substitute. There should be a decree for the complainant.

WELLING v. LA BAU.

(Circuit Court, S. D. New York. June 18, 1888.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRACTICE—MASTER'S REPORT—REVIEW.

In suit for infringement of a patent, the issue being referred to a master as to whether defendant's alleged infringing article is composed of equal parts of talc and shellac, there being proof that defendant consumed in his business nearly equal amounts of each, and plaintiff's experts testifying positively, and defendant's by fair implication, that defendant's article is composed of the two ingredients in equal parts, the master's decision to that effect will not be disturbed.

In Equity. On motion for a rehearing.

This was a suit by William M. Welling against John H. La Bau for infringement of a patent. The report of the master in favor of the complainant was, on the 25th of February, 1888, confirmed, and the defendant's exceptions thereto were overruled. 34 Fed. Rep. 40. See, also, 12 Fed. Rep. 875, 32 Fed. Rep. 293, and *infra*. The defendant now moves for a rehearing upon the sole ground that the court fell into error in not sustaining the exception to the master's third finding of fact, which is as follows: "That the said white checks so manufactured and sold by the defendant, assuming the fiber white to be talc, contained shellac and talc in substantially equal parts."

Frederic H. Betts, for complainant.

Lucien Birdseye and *James C. Cloyd*, for defendant.

COXE, J. To what was said upon the argument but little need be added further than the statement that, after a re-examination of the record, in the light of the elaborate argument and brief addressed to this single proposition, the court adheres to the conclusion that there is sufficient evidence to sustain the master's finding. The reasoning of the defendant, it is thought, gives undue prominence to the testimony produced by him, and practically ignores that of the complainant. The master might have credited the former, but evidently he was not convinced of its truth, and was therefore justified in rejecting it, and in accepting as true the statements of the complainant and his witness, confirmed as some of them were by the defendant's testimony. The analysis of the experts, that of Prof. Chandler positively, and that of Dr. Ledoux by fair implication, show the white checks to be composed of shellac and talc in substantially equal parts. In addition to this there was proof that during the period in question the defendant had consumed in his business nearly equal amounts of these ingredients,—about 16,000 pounds of each. The question was one of fact, and the master's decision, sustained as it is by evidence, ought not to be disturbed. The motion is denied.

WELLING v. LA BAU.

(*Circuit Court, S. D. New York.* June 13, 1888.)

1. PATENTS FOR INVENTIONS—INFRINGEMENT—MOTION TO INCREASE DAMAGES—EVIDENCE.

Where, in a suit for infringement, for the first time upon the hearing of exceptions to a master's report upon the accounting the objection has been presented that the reissue patent is void, and, the original patent not having been put in evidence, the court has held that though the reissue is manifestly void the evidence cannot be considered because of the inexcusable laches of defendant in failing to present it to the court at an earlier day, yet on motion for the court, in its discretion, to increase the damages under Rev. St. U. S. §§ 4919, 4921, the fact that the patent is void should be taken into consideration.