

liquids; if you should find any difference between them. If you should find, however, that they bear a substantial resemblance to sugar, and that they resemble sugar more than they do burnt starch, or gum substitute, then the defendant is entitled to your verdict, because the plaintiffs have failed to show that they most resemble an enumerated article which is assessed at a lower rate of duty than the collector exacted on these importations; and in fact, under his protest, he could not prove a resemblance to anything other than gum substitute, or burnt starch. If you arrive at the conclusion that these importations bear a substantial resemblance to gum substitute, or burnt starch, and that they also bear a substantial resemblance to sugar, and that they equally resemble both of those substances, then again your verdict must be for the defendant, because of a failure to prove that it most resembled the article paying the lowest duty. Of course, if you arrive at the conclusion that it does not bear a substantial similitude to either of the articles, in that case your verdict also must be for the defendant.

Now, then, to recapitulate: In the first place, if you are satisfied that those importations are in fact burnt starch, or gum substitute, as the words are used in this act of congress, determining their meaning in this act according to the rules which I read to you from the supreme court decisions, then your verdict must be for the plaintiffs. If you are not satisfied that they are in fact burnt starch, or gum substitute, within the meaning of the tariff act, then, if you are satisfied that these importations bear a substantial similitude to gum substitute, or burnt starch, and resemble that substance more than they do sugar, then your verdict must be for the plaintiffs. Should you be satisfied, however, from the evidence, that they bear a substantial resemblance to sugar, and resemble sugar more than they do burnt starch, or gum substitute, or equally as much as they do gum substitute, or burnt starch, then your verdict must be for the defendant; and if you are satisfied that they bear a substantial resemblance to neither, then your verdict must be for the defendant.

Verdict for defendant.

STUART v. THORMAN et al.

(Circuit Court, D. Maryland. November 21, 1888.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION—ANTICIPATION.

Complainant's patent was for a composite pavement, formed with depressions in which the pressure of the foot produced a partial vacuum, and prevented slipping. It was especially intended for sidewalks. *Held*, that a patent for a concrete street pavement, formed by passing a corrugated roller over it before it had become cold so as to make indentations to catch the shod feet of horses, was not an anticipation of complainant's patent, and, it having been adjudicated in complainant's favor in a former case, a preliminary injunction should be granted, where the affidavits and specimens exhibited show that defendants' patent is an infringement.

In Equity. On motion for preliminary injunction.

Bill by Peter Stuart against John H. Thorman and one Brumshagen, partners in trade under the firm name of John H. Thorman & Co., to enjoin the infringement of patent No. 269,480, granted to said Peter Stuart, of Glasgow, Scotland, 19th December, 1882, for composite pavements. The claim of the patent is as follows:

"A composite pavement, formed with circular, square, or analogous depressions of equal or nearly equal diameter in each direction, and with even or level margin on the pavement surface, to adapt them to operate in the manner described."

The specification describes the mode of operation as follows:

"My improvement is especially, though not exclusively, intended for application to sidewalks, and it consists in the formation in the surface of pavements of depressions of such a character that in stepping thereon the pressure of the feet will expel the air, causing a partial vacuum, which, supplementing the effect of the roughened surface, will operate to afford an additional hold to the feet, and prevent slipping. This beneficial effect is greater when the pavement is wet, at which time pavements as ordinarily constructed with smooth or grooved surfaces are more than usually slippery."

Price & Stewart, for complainants.

Wm. Pinkney Whyte, for defendant.

MORRIS, J. The complainant exhibits his patent, together with the record of the case of *Vulcanite Paving Co. v. American Artificial Stone Pavement Co.*,¹ in the circuit court of the United States for the Eastern district of Pennsylvania, in which, by the judgment of Judges McKENNAN and BUTLER, his patent was adjudicated and sustained. The same defenses were made in that case as in this, and were considered and passed upon by the court. All the anticipating patents now set up in defendant's answer were set up then, except No. 90,825, dated June 1, 1869, granted to Dolch & Duempleman. I am satisfied that this is not an anticipation of the invention claimed by complainant. The specification of the Dolch & Duempleman patent states:

"The smooth surface of all concrete pavements is very objectionable on account of the liability of horses slipping thereon. To obviate this difficulty, we pass over the pavement, before it becomes perfectly cool, a corrugated roller, or a roller having a series of flanges or projections around its circumference, which indents the surface, leaving it in the condition of the Nicholson or any other well-paved road."

This was simply a method of producing lines of depression or indentations in a composition road-bed, such as would catch the shod feet of horses, and prevent them from slipping. It would not accomplish what the complainant sets out to accomplish, and complainant's invention would be almost entirely useless in preventing horses from slipping, which was the object which Dolch & Duempleman had in view. Complainant's invention is especially intended for sidewalks, and consists in the formation in the surface of a smooth pavement of depressions of such a character

¹Reported in 34 Fed. Rep. 320.

that in stepping on them the pressure of the foot on a number of them at once will expel the air, and, by causing a vacuum, afford by suction an additional hold to the sole of the shoe, to prevent slipping. This result it is claimed is more effectively attained when the pavement is wet, and ordinarily would be more slippery, because then the suction is more complete. It is perfectly plain that continuous corrugated lines, or large depressions, such as would assist the foothold of shod horses, would have no such effect.

The case in the Eastern district of Pennsylvania having been, as appears from the record and the briefs of the very able counsel who took part in its presentation, thoroughly contested, the complainant is entitled now to the benefit of that adjudication in his favor. The affidavits filed in support of this motion for a preliminary injunction, and the specimens of the pavement put down by the defendant, exhibited in court, leave no doubt in my mind as to the infringement. The complainant, therefore, under all the rules of practice governing such applications, is entitled to the granting of a preliminary injunction as prayed.

BRINKERHOFF *v.* ALOE.

(Circuit Court, E. D. Missouri, E. D. December 24, 1888.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—RECTAL SPECULA.

The first claim of the patent granted to A. W. Brinkerhoff, March 2, 1880, on rectal specula, is for a slide extending the entire length of the tube. *Held* anticipated by the older art.

2. SAME—NOVELTY—MATERIAL.

Where an element of a claim does not depend for its novelty in the material of which it is made, it will be anticipated by a like element, in a like instrument, of different material.

3. SAME.

The slide employed in the Brinkerhoff instrument, and covered broadly by the first claim of the patent, is made of metal. The patent makes no mention of any novelty existing in the material of which the slide is composed. *Held*, that the claim is anticipated by a glass slide in a similar instrument.

4. SAME—INVENTION.

Aspeculum consisting of a tube with a slide and a closed end was old. *Held*, that adding an incline to the closed end to prevent the impaction of pile tumors did not involve invention.

5. SAME.

The third claim of the Brinkerhoff patent covers a speculum composed of a tube with a closed end and a slide, and having an incline at the closed end. *Held* void for want of invention.

6. SAME—AGGREGATION.

A claim consisting of a number of elements, which do not co-act to produce a new and useful result, is a mere aggregation, and not a patentable combination.

7. SAME.

Where several old elements are so combined as to produce a better instrument than was formerly in use, but each of the old elements does only what it formerly did in the instrument from which it was borrowed, and in the old way, *held*, that the combination is not a patentable one.