

use by the defendants may render the taking of an account the more difficult, but the mere intricacy of an account will not furnish ground for equitable interference in the absence of jurisdiction of the principal cause, of which the account is only an incident. *Hipp v. Babin*, 19 How. 271; *Root v. Railway Co.*, *supra*; *Campbell v. Ward*, 12 Fed. Rep. 150; *Lord v. Whitehead & Atherton M. Co.*, 24 Fed. Rep. 801; *Adams v. Bridgewater I. Co.*, 26 Fed. Rep. 324; *Consolidated, etc., Co. v. Ashton, etc., Co.*, Id. 319; *Brooks v. Miller*, 28 Fed. Rep. 615.

In *Clark v. Wooster*, 7 Sup. Ct. Rep. 217, cited by the complainant's counsel, the court below had jurisdiction at the inception of the suit, though on a narrow ground, as the patents had but a short time to run; yet, as the defendants did not ask for the dismissal of the bill for want of jurisdiction, the appellate court refused, after the case had been tried and determined, to reverse the decree. The supreme court, speaking by Justice BRADLEY, said:

"The court below had jurisdiction of the case, and could retain the bill, if, in its discretion, it saw fit to do so, which it did. It might have dismissed the bill if it had deemed it inexpedient to grant an injunction; but that was a matter in its own sound discretion, and with that discretion it is not our province to interfere, unless it was exercised in a manner clearly illegal. We see no illegality in the manner of its exercise in this case."

In the case at bar, as already indicated, this court never had jurisdiction of that portion of the bill which prays for an injunction to restrain the infringement of the ventilator patent, and it was equally without power to order an account as incident thereto. An order will therefore be entered to open and reform the interlocutory decree heretofore made, in accordance with the petition, but without costs to the defendants.

WIRT v. BROWN.¹

(Circuit Court, E. D. New York. January 5, 1887.)

PATENTS FOR INVENTIONS—INJUNCTION—NEW PATENT—CONTEMPT.

Where defendant was enjoined from making a certain kind of pen, and thereafter made a different pen, on which he obtained a patent, *held*, on motion to attach for contempt of injunction, that the fact that a patent had been issued to defendant entitled him to have the question of infringement determined on a motion to prevent the making of this form of pen, and that the present motion should be denied.

In Equity. On motion to attach for contempt.

W. S. Logan, for plaintiff.

Charles H. Bulkley, for defendant.

BENEDICT, J. The motion for an attachment in this case presents the same question that arose in *Onderdonk v. Fanning*, 2 Fed. Rep. 568.

¹ Reported by Edward G. Benedict, Esq., of the New York bar.

The defendant has not, since the injunction was issued, made any pen similar in all respects to the pens he made prior to the injunction. The pen he is shown to have made since the injunction was not presented when the injunction was granted. Since then the defendant has obtained a patent for the form of pen presented on this motion. It may be that the pen now complained of infringes upon the plaintiff's patent, but the fact that a patent has been issued to the defendant, which covers this form of pen, should, I think, entitle the defendant to have the question of infringement determined on a motion for an injunction to prevent the making of this form of pen, instead of by a motion to attach him for contempt by violating an injunction issued to prevent the making of another form of pen. Motion denied.

WIRT *v.* BROWN.¹

(*Circuit Court, E. D. New York. January 21. 1887.*)

PATENTS FOR INVENTIONS—INFRINGEMENT—SIMILAR COMBINATION—MODIFICATION—INJUNCTION.

The fact that defendant used a combination of his own in his self-feeding pen was not sufficient to overcome the fact that his combination was merely additional to plaintiff's combination, which he was using, and to prevent which an injunction would be granted.

In Equity. On motion for injunction.

W. S. Logan, for plaintiff.

Charles H. Bulkley, for defendant.

BENEDICT, J. This is a motion for an injunction, founded upon letters patent No. 311,554, issued to Paul E. Wirt, dated February 3, 1885. The first claim of the patent is for a combination, the elements of which are (1) the ink reservoir; (2) a nozzle fitted to the ink reservoir, and carrying a pen; (3) a rubber shaft extending through the nozzle and the upper space between the inner face of the nozzle and the upper part of the pen, and held within the nozzle at an intermediate point of its length,—one end of the shaft extending beyond the nozzle into the ink reservoir, so as to draw the ink downward from the reservoir, while the other end lies over the pen, so that, when the pen is pressed upward in writing, it comes in contact with the shaft to produce capillary attraction, and cause the feeding of the ink down upon the pen.

The pens made by the defendant, of which the plaintiff complains, have in combination (1) an ink reservoir; (2) a nozzle fitted to the reservoir, and carrying a pen; (3) a rubber shaft extending through the nozzle in the space between the inner face of the nozzle and the upper surface of the pen, and held within the nozzle at an intermediate point

¹Reported by Edward G. Benedict, Esq., of the New York bar.