

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.

of its length,—one end of the shaft lying over the pen, so that, when the latter is pressed upward in writing, it comes in contact with the shaft to produce capillary attraction, and cause the feeding of the ink downward upon the pen, the shaft that lies over the pen extending to but not into the ink reservoir. Added to this is a second shaft, separated from the upper shaft by the metal of the gold pen, and which passes through the nozzle under the pen, up into the ink reservoir. In this way the ink is drawn downward, and to the under side of the pen, and also drawn down to the end of the upper shaft, along which it proceeds by capillary attraction so as to cause the ink to feed downward upon the upper side of the pen, precisely as in the plaintiff's patent. Some effort was made, on behalf of the defendant, to claim that in his device the pen was not fed ink from above, but only from below. It is quite clear, however, that in the defendant's pen the ink is, by his arrangement of shafts, fed upon the pen from above by capillary attraction, and also from below.

The plaintiff's combination will make a practical pen, fed only from above by capillary attraction. It is a combination adapted to produce a certain result. The defendant uses the same combination to produce the same result, and he has added a second combination which produces at the same time a result differing from that produced by the plaintiff's combination only in this: that it feeds the pen from below. It is true that the defendant, in using the plaintiff's combination, has shortened the shaft, but in the added combination he has a shaft which, while it draws ink down to the lower side of the pen, also draws ink down to the shortened upper shaft, whence it goes to the upper side of the pen. This slight modification affords no ground for the defendant to contend that he does not use the plaintiff's combination. The most that he can pretend is that, while he uses the plaintiff's combination to feed the upper side of the pen, he at the same time feeds the pen from the under side by a combination of his own. In so doing, however, he infringes upon the plaintiff's patent, for he uses the combination described in the plaintiff's patent to produce the same result, namely, to feed the pen with ink drawn down to the nib, upon the upper side of the pen, by means of capillary attraction. It seems to me that a clear case of infringement of the plaintiff's patent is shown.

Several patents were referred to by the defendant to show the state of the art, viz.: Stewart's patent, No. 237,454; Friedmen's patent, No. 267,180; Purdy's patent, No. 232,545; and Wales' patent, No. 291,964,—but I find nothing in these patents calculated to deprive the plaintiff of the right asserted in the patent sued on.

The motion for injunction is granted.

DETROIT LUBRICATOR CO. v. LUNKENHEIMER.

(Circuit Court, E. D. Michigan. November 29, 1886.)

PATENTS FOR INVENTIONS—ANTICIPATION—PUBLIC USE.

Letters patent No. 196,650, issued to George H. Flower for an improvement in lubricators, held to be invalid by reason of anticipation, and also of prior use two years before application made.

In Equity.

This was a bill in equity for the infringement of letters patent No. 196,650, issued to George H. Flower, October 30, 1877, for an improvement in lubricators. Application for this patent was filed on the third day of September, 1877. The object of the improvement, as stated by the patentee, was "to obtain a perfectly regular, and at the same time a sure, flow of the oil into the cylinder and valves." This was attained by forcing the oil from the oil-cup or reservoir, through a water tube, in visible drops. The oil in the reservoir was displaced by condensed steam entering the reservoir in drops, and displacing an equal amount of oil, which flowed out towards the bottom of the water tube, being there delivered in drops, rising through the water, and constituting what is termed a "sight-feed."

On the twenty-sixth day of June, 1886, an interlocutory decree was entered upon the pleadings and testimony then before the court, affirming the validity of the patent, the infringement by the defendant, and ordering the usual accounting of profits and damages. Very soon thereafter the defendant, upon affidavits showing newly-discovered evidence of an anticipatory devise, was permitted to amend his answer, and take the newly-discovered testimony in the ordinary method. The case again came before the court upon a rehearing. The defenses set up in the pleadings, and in support of which this testimony was offered, were (1) that Flower was not the first inventor of the improvement described in the patent sued upon; and (2) that said improvement was in public use in this country for more than two years prior to his application for such patent.

W. W. Leggett, for plaintiff.

Stem & Peck, for defendant.

Brown, J. The testimony offered by the defendant in this case tends to show that in the early part of May, 1875, and more than two years before plaintiff applied for his patent, one Clark Cornwell, a large paper and pulp manufacturer, caused to be made and put upon the engine of a pulp-mill at Jackson, Michigan, a sight-feed lubricator, embodying the invention and improvements claimed in the Flower patent, and differing from it only in the fact that the condensing pipe was carried down the outside instead of the inside of the reservoir, entering it at the bottom, but delivering the water at the same point as in the plaintiff's device, as the lubricators were actually manufactured by him, though