

KIESELE *v.* HAAS and another.

(Circuit Court, S. D. New York. November 25, 1887.)

1. PATENTS FOR INVENTIONS—ANTICIPATION—STATUARY.

Letters patent No. 190,769 of May 15, 1877, to August Kiesele for a new and improved composition for casting ornamental figures consisting of paraffine, stearine, and pulverized sugar, is not anticipated by the patent of March 5, 1872 to Henry Hirsch, the compound covered by which consists of paraffine, bees-wax, and gypsum.

2. SAME—ANTICIPATION—OFFER TO PROVE.

Where a witness called to prove prior use is objected to before the examiner, on the ground that the answer does not conform to the requirements of Rev. St. U. S. § 4920, relating to proof of prior use, and the answer is not amended in that respect, the testimony of the witness will not be considered on the hearing.

3. SAME—INFRINGEMENT—PROOF.

Complainant proved the purchase from defendants at their business establishment of two statuettes which the clerk who made the sale stated at the time were manufactured by defendants. An examination of a piece of one of the statuettes disclosed the ingredients of the composition covered by the patent, and nothing else. Defendants admitted the sale, but claimed that although they did not know what the statuettes sold were made of, the statuettes did not contain the patented composition. *Held*, that the evidence established infringement.

In Equity.

Arthur v. Briesen, for the complainant.

Charles F. Holm, for the defendants.

COXE, J. On the fifteenth of May, 1877, letters patent No. 190,769 were granted to the complainant for a new and improved composition for casting ornamental figures consisting of paraffine, stearine, and pulverized sugar.

The defenses are non-infringement and want of novelty. The complainant proved the purchase from the defendants at their business establishment of two statuettes made in imitation of Bartholdi's "Liberty," it being stated at the time by the employe who made the sale that they were manufactured by the defendants. A piece of one of these statuettes was analyzed, and was found to contain the ingredients of the patent and nothing else. The defendants admit that the infringing figures "seem to be" made by them, but they assert generally that they do not use the complainant's composition. When, however, they are asked if these figures contain the ingredients of the patent they answer that they do not know. The denial, in substance, is this: Although the defendants do not know what the statuettes sold by them are made of, they do know that these statuettes do not contain paraffine, stearine, and sugar. A denial so vague, illogical, and incomplete, in circumstances like the present, amounts almost to a confirmation of the proof which it is intended to overthrow.

One witness was called to prove prior use, but as there is no allegation in the answer under which the testimony is admissible, (section 4920,

Rev. St.,) the court is not at liberty to consider it. The objection was taken before the examiner, and the defendants were thus notified at the earliest possible moment of the complainant's position, and yet no motion to amend the answer was addressed to the court.

The patent granted to Henry Hirsch, March 5, 1872, does not anticipate the complainant's patent or affect it in the remotest degree. The compound covered by the Hirsch patent consists of paraffine, bees-wax, and gypsum.

The complainant is entitled to the usual decree.

BALDWIN v. CONWAY & Co., Limited.

(Circuit Court, S. D. New York. December 1, 1887)

PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION.

The plaintiff applied for a preliminary injunction to restrain the infringement of a patent. The patent had not been adjudicated on, and it was questionable if the invention was patentable. *Held*, that a preliminary injunction should not issue.

G. G. Frelinghuysen, for complainant.

John H. Kitchen, for defendant.

LACOMBE, J. This is an application for a preliminary injunction to restrain the defendant from infringing the patent for improvement in police nippers granted to the plaintiff July 7, 1874, and numbered 152,822.

It appears that police nippers consisting of a small chain of suitable length with a cross-bar attached at each end, similar to those used on chain halters and trace chains, were in use for many years prior to plaintiff's application. When nippers thus made were used, the links of the chain being twisted between the fingers of the policeman, pinched and hurt them, thus preventing his keeping as firm a hold as necessary. When, also, for any cause it became necessary to twist the chain more or less, in order to adapt the nippers to prisoners having small hands or wrists, the difficulty was increased. In the original nippers the chain is fastened to an eye which projects inwardly from the cross-bar about three-eighths of an inch. The plaintiff's alleged invention consists merely in elongating this eye to about four times its original length, thus bringing the chain entirely without the hand, and preventing the injury to the fingers from the movement of the links.

There has been no adjudication upon the patent; and, while it may be that the elongation of this eye is, as the plaintiff claims, a patentable invention within the decisions, and not obnoxious to the criticisms so forcibly expressed in *Atlantic Works v. Brady*, 107 U. S. 200, 2 Sup. Ct. Rep. 225, still its claim to be considered such rests on so slender a foun-