

publicly known long before this patent was applied for. Paper bags being old for various purposes when protection from dirt or wear was desirable, there was no invention in using them to protect blankets; and with an article as flexible as paper, there can be no invention in adapting a bag made of paper to the shape of article it is to cover and protect. In the light of these authorities, I cannot see why, in a suit for infringement of a patent so clearly and baldly void as this, the court ought not to save the defendant from the vexation and expense of a trial upon proofs by sustaining a demurrer to the bill. If, after a case reaches the supreme court, that court can, from its common knowledge, without reference to the pleadings and proofs, but merely from an examination of the patent itself, say that the patent is void, I see no reason why the court of original jurisdiction cannot do the same.

The demurrer is therefore sustained, and the bill dismissed for want of equity.

HUBER and another *v.* MYERS SANITARY DEPOT and others.

(Circuit Court, S. D. New York. December 6, 1887.)

PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION—FOREIGN PATENT.

Plaintiffs purchased an invention upon which a British patent had been obtained, but which had expired before the purchase by reason of the failure to pay the fee to keep it alive. They then obtained American patents, and sought to enjoin defendants from infringing upon them. *Held*, that there was too much doubt of the validity of the American patents to warrant the issuing of a preliminary injunction.

In Equity. Bill for injunction.

Albert Comstock, for complainants.

Wm. H. Sage, for defendants.

LACOMBE, J. This is an application for a preliminary injunction to restrain the infringement of two letters patent, owned by complainants, and issued, the one, June 27, 1882, (260,232,) to Henry Huber, assignee by mesne assignments of Peters & Donald; the other, March 28, 1882, (255,485,) to James E. Boyle. Both patents are for improvements in sanitary water-closets. The application, so far as it concerns the Huber patent, is resisted, *inter alia*, on the ground of abandonment. It appears that on April 7, 1874, Peters & Donald took out a British patent for their invention. On April 9, 1881, this British patent expired by reason of their failure to pay the fee required by the British patent law to keep it alive. Boyle subsequently (October 27, 1881) purchased the Peters & Donald invention, and sold it (November 26, 1881) to Huber, who on November 29, 1881, applied for a patent thereon. The American patent was granted to him June 27, 1882.

It is claimed by the defendants that by reason of the failure of the inventors to keep alive the British patent, their invention was abandoned

to the public, and could not be afterwards reclaimed. The point raised is a new one. The decisions which have heretofore been rendered as to the effect of the lapse of an English patent for non-payment of taxes do not apply; they deal simply with the effect of a lapse subsequent to the issue of the American patent. *Paillard v. Bruno*, 29 Fed. Rep. 864; *Holmes v. Metropolitan Co.*, 21 Fed. Rep. 458; *Reissner v. Sharp*, 16 Blatchf. 383; *Henry v. Tool Co.*, 3 Ban. & A. 501. Without passing upon the objection thus presented by the defendants, it is sufficient to say that it raises too great doubt of the validity of the patent to warrant the issuing of a preliminary injunction, in the absence of an adjudication in its support.

With regard to the alleged infringement of the seventh claim of the Boyle patent, No. 255,485, anticipation is suggested in a prior patent to Owen; the variation between the forms of closet in the two patents being, it is claimed, not such as will support the patentability of the later device. In the absence of adjudication upon the Boyle patent, and in view of all the facts, a preliminary injunction will not issue.

KITTLE v. ROGERS. SAME v. BRUNER. SAME v. SOLOMON and others.
SAME v. FLINT.

(Circuit Court, S. D. New York. November 10, 1887.)

PATENTS FOR INVENTIONS—INFRINGEMENT—INJUNCTION—EXPIRATION OF PATENT.

The fact that a patent has but a few weeks to run is no ground for a demurrer to a bill for injunction of an infringement, and an accounting, and will not take away the jurisdiction of the court to grant such relief as the plaintiff may be entitled to; following *Kittle v. De Graaf*, 30 Fed. Rep. 639.

In Equity. Bill for injunction.

These are actions in equity, asking for a temporary injunction to restrain defendant from infringing a patent, and for an accounting. It appears that the complainant, Samuel Kittle, was the inventor of a spiral spring for use in mattresses, (*Kittle v. Hall*, 29 Fed. Rep. 508;) that January 4, 1870, he obtained a patent for his invention, which patent expired January 4, 1887. The number of the patent was 98,505. Actions were brought against several defendants for infringement, the bills being verified from 30 to 50 days before the expiration of the patent, the day for appearance being about a month before the expiration of the patent, and the day for answering or demurring being January 3, 1887. The defendant demurred on the ground that the patent had so short a time to run that the court had no equity jurisdiction.

James P. Foster, for complainant.

Wheeler H. Peckham, for defendants.