

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.

COXE, J. There is nothing in these causes which distinguishes them from *Kittle v. De Graaf*, 30 Fed. Rep. 689. It is thought that the language there quoted from *Clark v. Wooster*, 119 U. S. 322, 7 Sup. Ct. Rep. 217, is sufficiently comprehensive to include a case where the objection disputing the jurisdiction of the court is taken at the earliest possible moment. Although the point was in that case first presented upon appeal, the decision is clearly to the effect that the trial court may retain jurisdiction, if, at the time the bill is filed, the complainant may obtain the equitable relief prayed for.

The demurrers are overruled. The defendants may answer within 20 days.

KORN v. WIEBUSCH and others.

(Circuit Court, S. D. New York, December 19, 1887.)

PATENTS FOR INVENTIONS—INFRINGEMENT—PLEADING.

In an action for the infringement of a patent, the question of infringement cannot be determined upon a plea. It is not the province of a plea to interpose defenses which go to the merits, and relate in nowise to matters in abatement or in bar. Such defenses must be raised by answer.

Plea in Equity.

This is an action for the infringement of letters patent No. 247,766, granted to the complainant October 4, 1881, for an improvement in button-hole cutters. The object of the inventor was to construct a pair of button-hole scissors, with the screw-shaft and nut, which fix the definite play of the arms of the scissors, located between the arms. One end of the screw-shaft is firmly attached to one arm of the scissors; the other end fits into a funnel-shaped hole in the arm opposite, which gives a support to that end of the shaft. The claim is as follows:

"As an article of manufacture, a button-hole cutter, having the screw-shaft, D, securely fastened to one arm of the cutter at one end, and the other end resting in a conical recess in the other arm of the cutter, the nut, C, working on the shaft, D, between the two arms; all constructed and arranged substantially as and for the purpose described."

The application as first filed was rejected upon reference to two prior patents, the examiner holding that the change was a "mere work-shop expedient" not involving invention. The complainant then changed the claim to its present form, and forwarded the amendment to the commissioner, with a letter in which he thus distinguishes his invention from the examiner's references:

"The construction in applicant's case is different. One end of the screw-shaft is securely fastened to the inside of one arm, and the other end rests in a conical recess in the other arm, and forms a support for this end, and the nut works on this screw shaft, and forms the seat fixing the limit of the cut of the cutter; and the entire length of the screw-shaft is between the external sides of the arms of the cutter, thus making the cutter more compact and less cumbersome."