

Case No. 380.

ANDREWS ET AL. V. SPEAR.

[4 Dill. 472;<sup>1</sup> 3 Ban. & A. 82; 1 N. W. (O. S.) 165.]

Circuit Court, D. Minnesota.

Sept., 1877.

PATENT FOR INVENTION—PRELIMINARY INJUNCTION AGAINST INFRINGERS.

A preliminary injunction in a patent cause was denied where the suit in which it was asked had been pending for many months, and was nearly ready for final hearing, and no ground for the writ was shown which was not known to the complainants at the time the suit was instituted.

In equity. The bill of complaint was filed November 10th, 1876, an answer filed February 5th, 1877, and the case put at issue March 27th, 1877. The testimony of both parties is being taken before a master, with a view to an early submission of the controversy. An application is now made for a temporary injunction [to restrain the infringement of patent No. 73,425, and based] upon the pleadings, affidavits, and a decision of the United States circuit court in the eastern district of New York, rendered in April, 1876, and certain proceedings instituted in the district court of Hennepin county, Minnesota, on the return of an execution against the defendant unsatisfied, March 14th, 1877. [Application denied.]<sup>2</sup>

John Y. Page, for complainants.

Davis, O'Brien & Wilson, for defendants.

NELSON, District Judge. I decline to grant a preliminary injunction at this time. The suit was instituted in November, 1876, and, as appears from the papers before me upon this motion, is in preparation for final hearing at the next term, in December. The evidence of witnesses already taken before the master, has been used as affidavits to be considered in disposing of the motion, and I am asked to examine it with reference to the claim for this preliminary injunction in advance of presentation at the final hearing. I do not think, at this late day, after nearly a year has passed since the commencement of this suit, and it is about to be argued and submitted upon the merits, I am required, in the exercise of a sound discretion, to give complainants the preliminary relief asked.

The principal reason urged upon this application is, that a previous decision has been rendered in a suit in the second circuit sustaining the validity of the patent. This court has recognized the great weight to be given such a decision upon an application for an injunction,—American Middlings Purifier Co. v. Christian, [Case No. 307,]—but, inasmuch as it was rendered six months before the commencement of this suit, and the complainants here were parties thereto, and fully aware of the effect of such decision in their behalf, some more persuasive reason must be urged, which will account for this delay, until the case is now about to be submitted and considered upon the pleadings and all the evidence. The pecuniary condition of the defendant is not changed from what it was in

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March last, and cannot be considered now as a controlling reason for granting the injunction.

The complainants have leave to renew this

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application in case the suit is not heard at the next regular term.

Motion denied.

NOTE, [from original report.] As to preliminary injunction against infringers of patents for invention: *American Middlings Purifier Co. v. Atlantic Milling Co.*, [Case No. 305;] *Same v. Christian*, [Id. 307.]

<sup>1</sup> [Reported by Hon. John F. Dillon, Circuit Judge. and here reprinted by permission.]

<sup>2</sup> [For reference to other suits involving the same patent, see note to *Andrews v. Denslow*, Case No. 372.]