

defendants might not be adjudged guilty of contempt of the former one, and especially where the proof would consist of *ex parte* affidavits. But the processes of courts of equity are so flexible and capable of being tempered to the justice and necessities of every case, at all its stages and in all its phases, that the difference between the forms does not seem to be important. As these cases are now situated the modes of proof on proceedings for contempt of the former injunction would or might be precisely the same as upon this motion. The question whether the device sought now to be restrained infringes the second claim is precisely the same as that whether it violates the former injunction. If it is not willful it need not be visited with punishment as such. As the case is presented the question to be decided is precisely the same as that before decided between the same parties, the adjudication of which is in force and covers all that is asked for here. If it were necessary, or more fair, or more desirable, to make the former injunction more specific by being directed at some device which the orators claim to be an infringement and the defendants that it is not, that end can be reached by motion in the pending cause as well as by a new bill. Multiplicity of suits should be avoided when practicable, and this multiplicity may well be avoided here.

Under the circumstances of this case this motion is denied, but without prejudice to any motion or proceeding in the original cause.

GREEN *v.* BARNEY.

(Circuit Court, D. Massachusetts. February 28, 1884.)

PATENT—LACHES—PENDING LITIGATION.

When the validity of a patent is in litigation, the patentee may, without being guilty of laches, wait until a decision is rendered before bringing suit against infringers.

In Equity.

Allen Webster, for complainant.

B. F. Thurston, for defendant.

LOWELL, J. This suit is brought upon the much-litigated reissued patent, as both counsel have called it, granted to the plaintiff for driven wells, May 9, 1871, No. 4,372. The validity of the patent is not denied. The sum in dispute being small, it is made a question whether the plaintiff should not be remitted to his action at law. The evidence tends to show a technical right to an injunction, and a claim for some profits; and I do not conceive that I have a right, under these circumstances, to dismiss the suit, though, as to the costs, I will hear the parties. The usual license fee for a well for domestic uses is \$10, and for one for supplying water for steam-en-

gines, \$125. The complainant understood the defendant to say, in an interview which they had before suit was brought, that he had paid the complainant's agent the usual fee of \$10 for one domestic well, and had afterwards moved it, as the defendant called it,—that is, had taken up the pipes, and put them down in another place,—which, according to the meaning of a license, as the plaintiff interprets it, requires a second royalty to be paid. The fact is not proved. There was a domestic well which was abandoned in 1873 and a new one driven, but the evidence does not explain when, or by whom, the first well was driven, or whether it had been licensed. The defendant had recently bought the place in 1873, and there is an intimation that the well was already there at that time. He paid the royalty in 1876 for the only domestic well which he now uses, or has used, since 1873; and in the absence of proof to the contrary, the presumption is that he paid all that the agent asked him to pay. Certain it is that he did not move the well after he paid the royalty, but before. In the same year (1873) the defendant made a driven well in the cellar of his workshop, to supply his boiler, and used it for seven months, when he discontinued the use of it, which he has never resumed. It does not appear that he has destroyed it, or taken up the pipes. There is no reason to suppose that he will ever use it again; for the water injured his boiler, and he laid pipes to the adjacent river, which furnishes a purer and better supply. In this state of facts, the plaintiff understood the defendant to be ready and to offer to pay \$10 for the double use of the domestic well; and he charged him with the usual royalty of \$125 for the "well used for engine," and says that he refused to accept anything unless the whole was settled. How near the parties came to an agreement is not proved, nor whether the defendant offered to pay anything for the seven months' use of the larger well. It is plain, however, that the charge of \$125, which is the price of a perpetual license, was excessive, unless it could be shown (which seems highly improbable) that the defendant's profits for the seven months were equal to that sum.

As to the point of laches, so ably argued by the defendant's counsel. This suit was brought in 1879, and the complainant's patent having been and being still severely litigated, he could not be bound to proceed against all supposed infringers, until at least the first decree in his favor, which was made by Judge BENEDICT in 1876, (*Colgate v. Gold & Stock Tel. Co.* 4 Ban. & A. 415;) and between that date and 1879 he had, I do not doubt, a great deal of information to obtain as to the facts of the numerous infringements.

I shall make an interlocutory decree for the plaintiff; but neither refer the case to a master, nor settle the costs, until the parties have had further opportunity to adjust their differences without more expense.

BRAINARD v. EVENING POST ASS'N.

(Circuit Court, D. Connecticut. February 14, 1884.)

PATENT—PREVIOUS STATE OF THE ART—COPY—DISTRIBUTOR.

Letters patent No. 149,092, for an improved galley-holder, designed to facilitate the orderly assortment of compositors' copy, are invalid for want of patentable novelty in the invention.

In Equity.

Chas. Rollin Brainard, for plaintiff.

Wm. Edgar Simonds, for defendant.

SHIPMAN, J. This is a bill in equity for relief against the alleged infringement of letters patent to Charles Rollin Brainard, No. 149,092, dated March 31, 1874, for an improvement in compositors' copy distributors. The plaintiff is the owner of the patent.

The invention is described in the specification as follows:

"My invention * * * consists in a galley-holder provided with a series of compartments and pins or hooks, correspondingly lettered or numbered, as hereinafter more fully set forth, the object being to keep the copy properly assorted, thus greatly facilitating and reducing the expense of proof-reading. * * * It is well known to all practical printers and proof-readers that, as the compositors empty their matter into the different galleys on the stand, the copy is usually deposited into a common receptacle, without regard to the nature of the article or the order of setting. From this receptacle the proof-reader is obliged to hunt up or select the copy corresponding with his proof, frequently causing much confusion and delay when time is very important, especially when the 'takes' are small. In the drawing it is an ordinary galley-stand, or holder, provided with compartments or slips, lettered in regular order from A to M. Disposed in the upper part of the stand are a series of pins or hooks or copy-holders, lettered to correspond with the compartments. * * * When the compositor goes to the 'bank' or 'dump' to empty matter, instead of depositing his copy in a drawer, it is impaled on the pin or hook in the stand corresponding with the slip in which the galley is located. * * *"

The claim is for "the copy-distributor described, consisting of the galley-holder, N, provided with compartments for galleys, and pins or hooks for copy, correspondingly lettered, substantially as and for the purpose specified." The important question in the case is that of patentability. To determine this question, a knowledge of the exact relation which the invention bore to the previous state of the art is necessary. The case of *Brainard v. Pulsifer*, 7 FED. REP. 349, was tried before Judge LOWELL upon the patent and a "short stipulation as to the state of the art and the thing which the defendants use." So much of the stipulation as related to the history of the art is as follows:

"It is further stipulated and agreed that, prior to the grant of the complainant's, patent, it was customary to conduct the business of sorting copy in daily newspaper printing offices substantially as follows: 'The copy was