

themselves or by the aid of other devices; but that if one party consented to make the burner, and another party the chimney, and each was sold to be used with the other, the parties must be deemed to be joint infringers of the patent, and that each was liable for all the damages. The learned judge drew the inference of an actual concert between the parties from the nature of the case, and the distinct efforts of the defendants to bring the burner in question into use, which could only be done by adding the chimney. He admitted that he found no proof that the defendants had made an actual pre-arrangement with any particular person to supply the chimney to be added to the burner; "but," says he, "every sale they make is a proposal to the purchaser to do this, and his purchase is a consent with the defendants that he will do it, or cause it to be done. The defendants are, therefore, active parties to the whole infringement, consenting and acting to that end, manufacturing and selling for that purpose."

The principle of the above case, after careful consideration, was indorsed by this court in *Turrell v. Spaeth*, 8 O. G. 986; by Judge SHEPLEY in *Saxe v. Hammond*, 1 Ban. & A. 652; by Judge LOWELL in *Bowker v. Dows*, 3 Ban. & A. 518; and again by the same learned judge in *Richardson v. Noyes*, 10 O. G. 507.

Let a decree be entered for the complainant, with costs.

HAVEMEYER v. RANDALL.

(Circuit Court, D. New Jersey. July 31, 1884.)

1. PATENT—TOPHAM'S PATENT FOR "IMPROVEMENTS IN SPITTOONS."

The invention claimed by Topham in his second claim of reissued letters patent (No. 5,514) is void for want of novelty.

2. SAME—VOID EXPANDED CLAIM—EFFECT AS TO OTHER CLAIMS.

Although a reissue may be void as to new or expanded claims, it may still be held good for claims that are not expanded, or which do not show a different invention from the original patent.

In Equity.

Wetmore, Jenner & Thompson, for complainant.

A. B. Cruikshank, (with whom was *F. P. Fitch*), for defendants.

NIXON, J. This bill is filed for the alleged infringement of the second claim of Topham's reissued letters patent No. 5,514, and dated July 29, 1873, for "improvement in spittoons." The claim is as follows:

"(2) The arrangement of the weight between the two layers or thicknesses of material of which the bottom of the spittoon or similar vessel is composed, substantially as and for the purposes specified."

Three defenses are set up: (1) The invalidity of the reissue, as for a different invention from the original; (2) the want of novelty of the invention, in view of the prior state of the art; (3) non-infringement.

1. The first cannot be maintained. The objection to the reissue is that the first claim thereof is an expansion of the first claim of the original patent, which applied the invention only to spittoons, pails, and vessels made of paper; whereas, the reissue is designed to make it applicable to all spittoons, pails, or vessels, liable to be overturned, without regard to the material of which they are composed. As the present suit is not upon the first claim, it is unnecessary to express any opinion concerning the correctness of such an objection. The second claim of the reissue, for the infringement of which damages are demanded, is the same as the second claim of the original, and it is now well settled that, although a reissue may be void as to new or expanded claims, it may still be held good for claims that are not expanded, or which do not show a different invention from the original patent.

2. The second alleges a want of novelty. Waiving any expression of opinion in regard to the several patents which the defendant put in evidence to show anticipation of Topham's second claim, I cannot resist the conviction that his alleged invention was in public use in Chicago before the date of the issue of his patent, to-wit, August 2, 1870, which, in the absence of all proof to the contrary, must be regarded, for the purposes of this case, as the date of his invention.

Six witnesses have been called—three by the complainant and three by the defendant—in regard to the manufacture and sale of cuspidors by the firm of Crerar, Adams & Co., carrying on business at Nos. 11 and 13 Wells street, Chicago, during the years 1868, 1869, and 1870. They all agree in the statement that during these years large quantities of cuspidors with weighted bottoms were sold to railroads and hotels, and that they were generally loaded with lead, or mixtures of scrap metal melted together. But Sararan Muller, who packed all the goods manufactured by the firm, and Joseph Kruselin, one of the workmen, testify that at the beginning and during the year 1868 a number of spittoons or cuspidors were manufactured, loaded with sand in the bottom, and that when sand was used it was secured and held in place by a tin plate, which was soldered above and on the top of the sand, and which formed the inside bottom of the vessel. One of the members of the firm, Mr. McGregor Adams, confirmed their testimony to the extent of asserting that, while he does not remember seeing the sand used, he has a positive recollection that the workmen told him, during the year, that they were making cuspidors and loading their bottoms with sand, secured by a metal plate over the sand. Muller and Kruselin enter into such particulars in regard to the sand being brought from the lake to the manufactory in barrels, and its frequent use by them in the manu-

facture, that their evidence must be accepted as true. The fact is uncontradicted, except by the negative statement of the three witnesses summoned by the defendant, who are able only to say that they have no recollection that sand was ever used by the firm in weighting the bottom of spittoons or cuspidors.

The invention claimed by Topham in his second claim is so accurately described by these manufactures of the Chicago firm, anticipating the date of his patent, that I must hold the claim to be void for want of novelty, and dismiss the bill of complaint, with costs.

HAVEMEYER *v.* BONNELL and others.

(Circuit Court, D. New Jersey. July 31, 1884.)

PATENT—BOTTOMS OF CUSPIDORS—DISMISSAL OF BILL.

Law announced in decision in case of *Havemeyer v. Randall*, ante, 404, applied to this case.

In Equity.

NIXON, J. For the reasons assigned in the case of *The Same Complainant v. Randall*, ante, 404, in which the same questions are involved, the above bill of complaint must be dismissed, with costs; and it is ordered accordingly.

WORDEN and another *v.* SEARLS.

(Circuit Court, D. New Jersey. July 22, 1884.)

1. PATENT LAW—JUDGMENT IN TRIAL OF SAME ISSUES BEFORE ANOTHER COURT.
In hearing a case formerly tried before another court, no new question being suggested or newly-discovered evidence adduced, the judgment of the former court should be assumed to have been correct.
2. SAME—PATENT WHIP-HOLDERS—INVALID CLAIM—COSTS—REV. ST. § 4922.
The invalidity of a new claim in a reissue does not render a patent void or impair the validity of the first claim, and suits may be maintained on the parts which the patentee is entitled to hold, although if such suits are commenced before a disclaimer is entered no costs can be recovered.

In Equity.

Sprague & Hunt, for complainants.

T. P. Fitch, for defendant.

NIXON, J. This is a suit in equity, brought for the infringement of the first, second, and third claims of certain reissued letters patent, dated February 18, 1879, and numbered 8,581, for "improve-