

KIESELE *v.* HAAS AND ANOTHER.

Circuit Court, S. D. New York.

November 25, 1887.

1. PATENTS FOR INVENTIONS—ANTICIPATION—STATUARY.

Letters patent No. 190,769 of May 15, 1877, to August Kiesele for a new and improved composition for casting ornamental figures consisting of paraffine, stearine, and pulverized sugar, is not anticipated by the patent of March 5, 1872 to Henry Hirsch, the compound covered by which consists of paraffine, bees-wax, and gypsum.

2. SAME—ANTICIPATION—OFFER TO PROVE.

Where a witness called to prove prior use is objected to before the examiner, on the ground that the answer does not conform to the requirements of Rev. St. U. S. § 4920, relating to proof of prior use, and the answer is not amended in that respect, the testimony of the witness will not be considered on the hearing.

3. SAME—INFRINGEMENT—PROOF.

Complainant proved the purchase from defendants at their business establishment of two statuettes which the clerk who made the sale stated at the time were manufactured by defendants. An examination of a piece of one of the statuettes disclosed the ingredients of the composition covered by the patent, and nothing else. Defendants admitted the sale, but claimed that although they did not know what the statuettes sold were made of, the statuettes did not contain the patented composition. *Held*, that the evidence established infringement

In Equity.

Arthur v. Briesen, for the complainant.

Charles F. Holm, for the defendants.

COXE, J. On the fifteenth of May, 1877, letters patent No. 190,769 were granted to the complainant for a new and improved composition for casting ornamental figures consisting of paraffine, stearine, and pulverized sugar.

The defenses are non-infringement and want of novelty. The complainant proved the purchase from the defendants at their business establishment of two statuettes made in imitation of Bartholdi's "Liberty," it being stated at the time by the employe who made the sale that they were manufactured by the defendants. A piece of one of these statuettes was analyzed, and was found to contain the ingredients of the patent and nothing else. The defendants admit that the infringing figures "seem to be" made by them, but they assert generally that they do not use the complainant's composition. When, however, they are asked if these figures contain the ingredients of the patent they answer that they do not know. The denial, in substance, is this: Although the defendants do not know what the statuettes sold by them are made of, they do know that these statuettes do not contain paraffine, stearine, and sugar. A denial so vague, illogical, and incomplete, in circumstances like the present, amounts almost to a confirmation of the proof which it is intended to overthrow.

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One witness was called to prove prior use, but as there is no allegation in the answer under which the testimony is admissible, (section 4920,

Rev. St.) the court is not at liberty to consider it. The objection was taken before the examiner, and the defendants were thus notified at the earliest possible moment of the complainant's position, and yet no motion to amend the answer was addressed to the court.

The patent granted to Henry Hirsch, March 5, 1872, does not anticipate the complainant's patent or affect it in the remotest degree. The compound covered by the Hirsch patent consists of paraffine, bees-wax, and gypsum.

The complainant is entitled to the usual decree.