

MACK *v.* SPENCER *ET AL.*

*Circuit Court, S. D. New York.*

December 11, 1890.

PATENTS FOR INVENTIONS—INFRINGEMENT—PRELIMINARY INJUNCTION.

A preliminary injunction should not issue in a suit for infringement, where upon the issue of privity of invention the evidence is merely oath against oath.

In Equity. Motion for preliminary injunction.

*H. A. West*, for complainant.

*Chas. C. Gill*, for defendants.

LACOMBE, Circuit Judge. Patent No. 268,112 was upheld by Judge Shipman, (43 Fed. Rep. 69,) but not as a pioneer invention, the invention of the complainant being found to consist in the combination with a detachable opera-glass handle made in telescopic sections, of the fastening device, consisting of a piston, hook, and slot, or their equivalent. I am not satisfied that the fastening devices used by the defendant in the exhibits put in evidence are such an equivalent for that of the patent as will warrant the claim that they infringe. They seem to be a pretty plain infringement of the devices described in the other patent sued upon, No. 399,543. Conceding that this latter patent was sustained by Judge SHIPMAN as showing patentable invention, (and that is by no means clear,) the fact remains that his decision was rendered in a case where there was not before him the question of priority of invention as between complainant and this defendant. Here it is a distinct issue; and, as upon that issue there is merely oath against oath, a preliminary injunction should not issue.