

plainants, are valid claims, and that they have been infringed by respondents. It is claimed that this patent is anticipated by respondents' patent to Angel and Kendall as it is older in date, because it is claimed that the date of the filing of the Solter patent found on the patent, is not evidence of the date of filing. This objection was not made till the testimony was all in, and till the argument made by defendants' counsel. The date of filing is always indorsed on the specifications, and a copy of the specifications and drawings is required by the statute to be annexed to the patent. I do not see why the specifications and indorsements thereon, required by the statute, constituting a part of the patent issued under the signature and seal of the proper officer, are not evidence of the date of filing. It is an official document, and the indorsement is a part of the record. No such objection has ever been taken before me before, and the date of filing has without objection, heretofore, been taken as true. I know of no decision of the courts holding that it is not legal evidence of the date of filing. But, however that may be, this patent was not pleaded as an anticipation, and was not put in evidence for any such purpose, and it cannot now be considered for that purpose.

It is not necessary to determine *at this time* whether respondents continue now to use all the elements of each of these claims, or substitutes therefor. It is enough that prior infringements are shown. If one element of any claim has been wholly omitted in machines now in use, and no substitute therefor used, of course respondents have ceased to infringe that claim, and respondents are only liable for infringements of such claims as have been actually infringed, while the infringement continued. What the extent of the infringement has been, and how long it was continued, will be questions for the consideration and determination of the master, on the accounting.

Let an interlocutory decree for complainants be entered as to the claims and patents hereinbefore indicated, as being valid and having been infringed, and the case referred to the standing master in chancery to ascertain and report profits, damages, etc., and if the parties desire it, with reference to an appeal, it may be provided that the master ascertain and report separately the proportion or amount of the profits and damages due to the infringement of claim 7.

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COLLING v. JACKSON *et al.*

(Circuit Court, N. D. California. January 12, 1891.)

**PATENTS FOR INVENTIONS.—INFRINGEMENT.—WEIGHT OF EVIDENCE.**

In an action for infringing a patent for electric belts, defendants answered, under oath, denying that they had ever used the invention or infringed the patent. It was admitted, however, that one of them made a belt, but he testified that he destroyed it without ever using or attempting to sell it. Complainant testified that one of defendants showed him a belt like his own, and offered it for sale. A witness said that defendants showed him a like belt, and offered it for sale.

Another witness said that the wife of one of defendants showed and offered to sell him such a belt. In answer to a letter notifying him that he was infringing the patent, one of defendants answered, through his attorney, that complainant had copied the belt from him, and must disclaim, or be prosecuted for perjury, and damages. There was other similar evidence. *Held* sufficient to show an infringement.

### In Equity.

HAWLEY, J., (*orally.*) This is a bill in equity, alleging an infringement, by defendants, of complainant's patent on electric belts. When complainant applied for a patent in the patent-office, the defendant Jackson interfered to prevent the issuance of the patent. The day set for filing preliminary statements having passed without any action being taken by Jackson, judgment of priority of invention was rendered in favor of complainant, and as no appeal was taken that judgment is final. Defendants, after denying that complainant was the inventor, deny that they, or either of them, have unlawfully used said invention, or infringed upon said letters patent, or intend to do so. The answer is under oath. The case turns upon the question whether there is sufficient testimony to authorize this court to find that defendants have made, used, and sold electric belts that were an infringement of complainant's patent prior to the filing of his bill. To overthrow the averments in an answer under oath, denying the material averments of the bill, it requires the evidence of two witnesses, or at least one witness, and other circumstances equivalent to a second. *Slessinger v. Buckingham*, 8 Sawy. 469, 17 Fed. Rep. 454. Is the testimony governed by these rules sufficient to authorize a recovery in this case? In the consideration of this question it must be borne in mind that electric belts can be made in secret, and when sold are worn upon the person, and not exposed to public view; that if the party making and selling the same uses precaution, he can prevent publicity in regard thereto. The discovery of the making, using, or selling could be ascertained in many cases by mere chance or accident.

It is admitted in this case that the defendant Jackson made a belt prior to the issuance of the patent to complainant. Jackson, however, denies that he ever used it, or attempted to sell it, and testifies that he destroyed it. He claims that he has never made, used, or offered for sale any belt that is an infringement upon the patent of complainant. The defendant Arnold makes the same denial. Complainant testifies that the defendant Arnold showed him a belt that was exactly like his own, and offered it for sale. The witness Coughlin went to the defendant Arnold's office in company with the defendant Jackson, and testifies that Jackson showed him a belt identical with complainant's, and that it was offered for sale. Complainant was unknown to defendant Arnold at the time of his first visit. He afterwards notified Arnold who he was, and that he was an inventor, and had invented the belt previously shown to him. The defendant Arnold, after being thus notified, told the complainant that he considered him unworthy of belief; that he was an old sailor, and a fraud, and that the belt was invented by defendant

Jackson, who was a mechanic, and said to complainant that he would make and sell all he could. Jackson, through his attorney, in answer to a letter notifying him that he was infringing complainant's patent, said that complainant had copied the invention from him, (Jackson,) and that Colling must disclaim or be prosecuted for perjury, and damages. The witness Sherwood testified that he called at Jackson's house, and asked for electric belts; that Mrs. Jackson showed him a belt, a similar one to Exhibit C, offered in evidence. She offered to sell the belt to him, but said she would rather the witness would call when Mr. Jackson was in, because he had the day before given her a great scolding for exhibiting belts, for fear it might get him into trouble. The testimony of the defendant is in many respects secretive, evasive, and unsatisfactory. Especially is this true of the testimony of Jackson. Upon the whole case, after a careful consideration of all the testimony, I am of opinion that complainant is entitled to recover. Complainant's counsel will prepare and submit the usual decree in cases of this character, that there has been an infringement by defendants; with an order referring the case to the master in chancery to ascertain the damages.

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UNITED STATES v. THE FRANK SILVIA.

(Circuit Court, N. D. California. February 23, 1891.)

SHIPPING—PASSENGER REGULATIONS.

Under Rev. St. U. S. § 4499, providing that vessels violating the law relating to the carrying of passengers "may be seized and proceeded against by way of libel," in the district court, such court has no jurisdiction until there has been a seizure of the vessel. Reversing 37 Fed. Rep. 155.

In Admiralty. Appeal from district court.

*John T. Carey*, for libellant.

*Milton Andros*, for claimants.

Before SAWYER, Circuit Judge.

SAWYER, J. Since the order of proceeding required seems purely technical, I regret to say, that I shall be compelled to sustain the point as to the jurisdiction. The libel of information in the case is promoted to recover a fine of \$500 under title 52, c. 2, Rev. St. U. S. §§ 4499 and 4500, for carrying passengers without complying with the terms of the title.

The point is made, that the district court does not appear to have acquired jurisdiction, before filing the libel, by a seizure of the vessel by the collector, or other executive officer of the government. There is no allegation that any seizure was made, and, I understand, none was, in fact, made. A seizure of the vessel before filing the libel is necessary to give jurisdiction. This has been settled by numerous cases. The first appeal in