

KILBOURNE *et al.* v. W. BINGHAM CO.

(Circuit Court, N. D. Ohio, E. D. July, 1891.)

## PATENTS FOR INVENTIONS—INFRINGEMENT—SINKS.

Letters patent No. 240,146, granted April 12, 1881, to James Kilbourne, for a sink which is to be manufactured by swaging or striking up from a single sheet of wrought steel or iron, are void for want of invention.

## In Equity.

Suit for infringing letters patent No. 240,146, granted April 12, 1881, to complainant James Kilbourne for a sink. Claim first, which is in issue in this case, reads as follows:

“The herein-described sink, made of a single sheet of wrought steel or iron, without joint, seam, or interior angle, substantially as set forth.”

The patentee, in his specifications, says:

“My invention consists of a sink swaged or struck up from a single sheet of wrought iron or steel, without joint, seam, or interior angle. Heretofore, so far as I am informed, sinks have been made of cast-metal. Sinks of this kind are neither strong nor durable. They break easily and frequently in shipping or in storing them, and also in placing or setting them in position for use. They are also liable to fracture or break if water should freeze in them; and, in order to give them the *modicum* of strength which they possess, a considerable amount of metal must be used in their construction, making them cumbersome and heavy, and increasing expenses of manufacture.

“I have discovered that the above-specified defects can be completely removed by making the sink of wrought iron or steel, said sink being swaged or struck up from a single sheet of such metal, as hereinbefore first specified.

“Such a sink is, of course, stronger than one of cast-metal, and is not liable to be fractured or broken by a sudden jar or blow. It is cheaper than a cast-metal sink, for the reason that much less metal is required in its construction, and it can be, by the swaging operation,—as, for instance, by being struck up in a drop-press,—made more rapidly and economically.

“And, again: The sink being, as seen in the drawings, without interior angle, has practically equal strength at all points, and has no corners where sediment or dirt can gather.”

*M. B. Leggett and Watson, Burr & Livesay*, for complainant.

*Briesen & Knouth, H. M. Turk*, and *Arthur V. Briesen*, for defendants.

Before SAGE and RICKS, JJ.

SAGE, J., (*after stating the facts as above.*) The complainant's sink differs in no respect whatever from sinks manufactured by him and others prior to his patent, and in general use, excepting that it is constructed of wrought iron or steel, swaged or struck up from a single sheet, by a process which is old and perfectly well known. The material is old; the mode of manufacture is old; and the only thing claimed in addition to what is set forth in the specification, to support the invention, is that the result is a new manufacture, having the advantage over the old that, whereas cast-iron is porous, and therefore absorbs impurities, and gives out unpleasant and unhealthful odors, the wrought iron or steel is impervious, and free from that objection.

There may be novelty in that precisely this construction for a sink is new, but there is not invention. It is true that in *Hotchkiss v. Greenwood*, 11 How. 248, where the patent was for an improvement in making door and other knobs of clay or porcelain, instead of iron, brass, wood, or glass, which was held to be nothing more than the substitution of one material for another in constructing the article, the court said that the clay or porcelain door-knobs had no properties or functions which other door-knobs, made of different materials, had not. Like expressions are to be found in other cases, as in *Hicks v. Kelsey*, 18 Wall. 670. But in each case where a patent has been sustained by reason of the use of new material it has been upon a finding, on the facts and circumstances of the case, that invention was displayed.

There is no doubt, as stated by Mr. Phillips, in his work on Patents, page 134, that "there may be cases in which the substitution of a different material may be matter of contrivance or invention, and in such case the particular mode of applying the new material would be a good subject of a patent."

In the case of *Hotchkiss v. Greenwood*, the court announced that superiority of material cannot be itself the subject of a patent, and that "the meaning of the doctrine is that the superiority must extend beyond mere comparative cheapness or durability, or adaptation to the purpose for which the old material was used, and must lead to some change in the construction or mode of operation." Many other cases might be cited, but it is not worth while. The doctrine is well known, and well understood.

In this case, not only was the material old, and its qualities, including that which it is claimed sustains the patent, perfectly well known, but it is shown by the defense that various structures, manufactured in the same way, and from the same material, without joint, seam, or interior angle, were manufactured and in public use long before the date of the complainant's alleged invention. Among these is a bidet pan, manufactured in New York as far back as 1876; a butler's tray, in common use before 1880; a flanged baking-pan, resembling in shape the complainant's sink, made of wrought iron or steel, before 1880; and there is testimony that articles like that exhibit have been stamped for eighteen or twenty years in large quantities. So, also, oval and round dish-pans, round wash-boilers, oblong bake-pans, perforated and solid wash-bowls, umbrella drips, and scoop-trays, were stamped out of sheet-metal before 1880.

Without entering upon a consideration of the patents shown in anticipation, what has already been said is more than sufficient to establish that there is no merit in the complainant's patent.

The bill will be dismissed.

## BOTTLE SEAL CO. v. DE LA VERGNE BOTTLE &amp; SEAL CO.

(Circuit Court, D. New Jersey. July 8, 1891.)

## 1. PATENTS FOR INVENTIONS—NOVELTY—BOTTLE STOPPERS.

Letters patent No. 438,709, issued October 21, 1890, to William Painter, for a device for extracting an arched bottle stopper by attaching a headed stud to the crown of the arch, and applying force thereto, so as to cause a retroversion of the arch destructive of the lateral pressure of the stopper, and so rendering its removal easy, were not anticipated by the ordinary stoppers of wash-basins and bath-tubs, or by ordinary ink-bottle corks with their attendant corkscrews.

## 2. SAME—ANTICIPATION.

Nor was said patent anticipated by the statement in letters patent No. 327,099, issued in September, 1885, to said William Painter, that "it is sometimes desirable to remove the disk stopper without the use of a tool. In such cases I form the disk with a lug or ear. I may also attach to the disk an eye of wire, like the shank of a button, or a string, cord, or other device to facilitate its removal."

## 3. SAME—EQUITY PLEADING—DEMURRER.

The validity of a patent may be attacked for lack of inventive novelty by demurrer to a bill to restrain infringement, although the bill properly alleges the novelty and usefulness of the patented device. Following *Brown v. Piper*, 91 U. S. 44.

## 4. SAME—JUDICIAL NOTICE.

Courts will not take judicial notice of patents for inventions.

In Equity.

*Webbore & Jenner*, for complainant.

*Banning, Banning & Payson*, for defendant.

GREEN, J. This matter comes before the court upon demurrer to the bill of complaint. The bill is in the usual form of bills of complaint, seeking injunction and relief upon an alleged infringement of letters patent. It sets forth that in September, 1885, one William Painter, of Baltimore, Md., being the original and first inventor of a certain new and useful improvement in bottle stoppers, which had not been known or used by others in this country, and had not been in public use for more than two years prior to the application for letters patent, was granted letters patent bearing date the said ——— day of September, 1885, and numbered 327,099. That on October 21, 1890, the said William Painter, having invented another new and useful improvement in bottle stoppers, not before known or used in this country, was granted therefor letters patent bearing the said date, and numbered 438,709. That these letters patent, by certain indentures of assignment, have been granted, assigned, and transferred to the complainant, who is now the sole and exclusive owner thereof. That the inventions and improvements described and claimed in said respective letters patent were and are capable of joint use, and were and are so conjointly used, and are intended so to be; and that the said inventions and improvements, and each of them, are designed and intended to be used together and in combination and connection with bottles or similar vessels. That said improvements and inventions are of great pecuniary value to the complainant; are of great benefit and advantage to the public; and that the public has generally acknowledged and acquiesced in the rights of the complainant under said letters patent.