

formed, Cornish could not have maintained an action upon the note, although the time for payment stipulated therein had arrived; and the bank, taking the note with full knowledge, is in no better position. The question, therefore, as to whether the right of Cornish and his associates in the land in question has lapsed, and as to whether there may be performance hereafter of their agreement, so as to make the consideration for the note good, is immaterial. There can be no recovery upon this note until the condition upon which it was given is performed. The demurrer is overruled.

HERRICK et al. v. TRIPP GIANT LEVELLER CO.¹

(Circuit Court of Appeals, First Circuit. October 12, 1893.)

No. 60.

1. APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW.

Objections to the form of the bill, whether original or supplemental, and to the sufficiency of the allegations thereof, cannot be taken in the appellate court for the first time.

2. PATENTS—VALIDITY—BEATING-OUT MACHINES.

The Cutcheon patent, No. 384,893, for beating out the soles of boots and shoes, is valid as to claims 1 and 3. 52 Fed. 147, affirmed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

In Equity. Suit by the Tripp Giant Leveller Company against George W. Herrick, Frederick W. Herrick, and George H. Herrick, doing business as George W. Herrick & Co., for infringement of letters patent No. 384,893, issued June 19, 1888, to Cutcheon & Johnson, assignees of James C. Cutcheon. The patent, which is for a machine for beating out the soles of boots and shoes, was sustained by the court below, and infringement declared. See 52 Fed. 147, where the opinion below is reported under the title of Cutcheon et al. v. Herrick et al. Defendants appeal. Modified and affirmed.

Charles Allan Taber and Thomas W. Porter, for appellants.

Alexander P. Browne, for appellee.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PER CURIAM. The objections made by the appellants touching the form of the bill, whether supplemental or original, and those as to the sufficiency of the allegations of the bill, were not raised in the court below, and cannot be taken for the first time in this court.

The court below was right in holding that the first and third claims of the Cutcheon patent were valid, and were infringed by the machine used by the appellants; that the iron last in the appellants' machine was a mechanical equivalent for the jack of the patent; and that there was no sufficient proof that the stop mechanism of the third claim was in use by others prior to October 28, 1887,

¹Rehearing denied November 16, 1893.

the date of the application for the patent. See the opinion of the court below in *Cutcheon v. Herrick*, 52 Fed. 147.

As only the first and third claims of the patent were in controversy, the decree of the court below is to be modified so as to extend to those claims only; otherwise, the decree of the court below is affirmed, with costs.

JONATHAN MILLS MANUF'G CO. v. WHITEHURST et al.

(Circuit Court, S. D. Ohio, E. D. February 3, 1894.)

No. 631.

LACHES—PATENT SUITS—DELAY IN SETTING UP DEFENSE.

In a suit for infringement of a patent the doctrine of laches does not apply to delay short of the statutory limitation in setting up the defense that plaintiff had no right in the patent which he sues on.

In Equity. Suit by the Jonathan Mills Manufacturing Company against M. C. Whitehurst and others for infringement of letters patent No. 267,098, issued November 7, 1882, to Jonathan Mills, for an improvement in machines for bolting flour. A decree for complainant was heretofore granted. 56 Fed. 589. Heard on motion for rehearing. Granted.

Poole & Brown, for complainants.
George J. Murray, for respondents.

SAGE, District Judge (orally). This cause is before the court upon a petition for rehearing, setting forth that after the opinion was filed defendants' counsel for the first time learned that in a suit in the circuit court for the county of Wayne, state of Michigan, in chancery, it was determined that patent No. 267,098, upon which this suit is based, was the property of the George T. Smith Middlings Purifier Company, and that in fraud of its rights it had been transferred by George T. Smith, he holding the title, as its trustee, to his wife, Eliza B. Smith, and by her to Charles H. Plummer, whose executor was a defendant in said suit.

It was further determined that both said assignments were in fraud of the George T. Smith Middlings Purifier Company and its creditors, and the defendants were, by the decree in said cause, ordered to make the necessary transfers to vest the title to said patent (together with other patents, which had been by said George T. Smith fraudulently assigned) in the complainants in said suit, who were the receivers of said George T. Smith Middlings Purifier Company. It was also ordered that the decree itself should operate as an assignment, transfer, and release of all the right, title, and interest, legal or equitable, owned or claimed by said Eliza B. Smith, George T. Smith, or said Plummer, or any of them, at the time of filing the bill in said suit, to wit, August 13, 1890.

The petition for rehearing further sets forth that it appears from the assignment from Jonathan Mills to the complainant herein—that is to say, to the Jonathan Mills Manufacturing Company—