

been produced. It is also satisfactorily shown that the plaintiffs' competitors in business (save the defendant company) have respected their rights under the patents in suit.

I have very carefully examined the numerous prior patents set up by the defendants as anticipating Goldie's inventions, or as showing want of patentable novelty in what he has done. I am, however, quite clear that no such effect is to be given to them. The Goldie spike seems to be a valuable improvement, evincing meritorious invention. Nothing appears to create a doubt as to the validity of either of the patents sued on.

A specimen of the spikes manufactured by the defendants and here complained of is an exhibit in the case, and the question of the infringement of the spike patent (No. 394,113) is determinable by a mere inspection of this exhibit. The plaintiffs' spike and the defendants' spike differ in this: that, whereas the spike shown in the patent has a single point, the defendants' spike has two points, each, however, being substantially the same as the Goldie point in form, function, and result. The two points in the defendants' spike are produced by shearing away as well a central part of the metal as the sides, after the point is formed by swaging. The central shear, indeed, is crescent-shaped; but this is purely a formal difference. The substance of the invention remains. The principle of the two spikes is identical. The defendants' spike is provided with diagonal cutting edges located in the same perpendicular plane with the rear side of the point, and with oblique facets on the front sides of the cutting edges. To all intents and purposes the defendants' construction is a mere duplication of the Goldie point. The change which the defendants have made is a palpable evasion, and cannot here avail them. *Hoyt v. Horne*, 145 U. S. 302, 308, 12 Sup. Ct. 922. Infringement of this patent, I think, clearly appears.

With respect to the other two patents, the evidence of infringement is both direct and circumstantial. The defendants' spike itself bears very strong indications that it was cut by a reciprocating plunger acting upon the metal while supported upon an anvil die in a position oblique to the movement of the plunger. Plainly, its sharp cutting edges were produced by shearing the metal obliquely across and in the direction of the length of the fiber. The faces of the cut show straight and continuous lines, while the under side of the spike has visible marks which can be reasonably accounted for only upon the supposition that when cut it rested upon an anvil die. Then we have the positive statement of David Ford, an experienced witness, who examined and describes with particularity the defendants' spike-making machines. According to the specific description contained in his affidavit, those machines are the same, in construction and operation, as the machine of the Goldie patent, or substantially so. How do the defendants meet this case? In their answer the denial of infringement is couched in the most general terms. George W. Todd, the president of the defendant company, and its codefendant, in his additional opposing affidavit does not at all explain the defendants' machines or method.

Mr. Browne, the defendants' patent expert, Mr. Griffith, their employé, and Mr. George, their foreman, respectively deny the correctness of Ford's description of the spike-making machines the defendants are using, and assert that Ford's statements are "erroneous" and "wholly false and misleading"; that the defendants' machines and methods are "radically and totally different" from Ford's description, the machines operating in "an entirely distinct and different manner"; with other allegations to the like general effect. But no one of these affiants describes the machines the defendants are using, or their method of manufacture, or gives the court any specific information as to the actual construction of those machines, or their mode of operation. This reserve is significant. It is not satisfactorily explained. The plaintiffs' proofs under this head are exceedingly strong, demanding something more than bald denials and vague general statements. The defendants should have given the court facts, and not bare opinions. Moreover, the three last-named affiants state that the defendant company actually has one machine made "in substantial accordance with the Goldie machine patent," but intended and used, they say, "simply for the purpose of experiment." The proofs, then, as a whole, I think, fully warrant the interposition of the court to prevent infringement of the patents for the Goldie machine and method.

The evidence tends to the conclusion that the defendants do not conform to the Bower and Todd patents, but in material respects depart therefrom. Be that as it may, however, those patents are for inventions of a later date than Goldie's, and are subordinate to his patents.

The allegation that the plaintiffs have been guilty of such laches as should deprive them of summary relief is not well founded. In November, 1892, upon the first serious intimation of probable infringement, the plaintiffs addressed a warning letter to the defendants. Positive information of actual infringing sales did not reach the plaintiffs until May, 1893, and satisfactory proofs of infringement were not obtained until late in the year. Then the bill was promptly filed, and this motion made. There are no equitable considerations to induce the court to withhold preliminary relief. Interference with the defendants' general business is not proposed. Their manufacture of infringing spikes began recently, and has not yet attained large proportions. On the other hand, to permit the defendants to put on the market the infringing spikes at an under price, as the evidence shows they have been doing, would seriously embarrass the plaintiffs, and inflict upon them special injury which it would be very difficult, if not impossible, to compensate adequately.

A preliminary injunction in accordance with the prayer of the bill will be allowed.

GRAVER v. FAUROT.

(Circuit Court, N. D. Illinois. November 8, 1894.)

1. FEDERAL COURTS—JURISDICTION—REVIEW OF DECISION OF STATE COURT.

A federal court cannot entertain jurisdiction of a bill of review seeking a rehearing of a cause in a state court.

2. COURTS—RULE OF DECISION.

Where two cases in the court of last resort appear to be in irreconcilable conflict as to the right of a complainant to maintain his bill, the later of such cases citing the earlier and conflicting case with approval, the circuit court will sustain a demurrer to the bill, in order to obtain a determination of such right, before putting parties to the expense of marshaling evidence.

3. FRAUD—IMPEACHING DECREE.

Can a final decree be impeached by an original bill seeking to attack such decree for fraud where the only fraud alleged is false swearing and perjury in the suit in which such decree was rendered, *quære*.

This was a suit by William Graver against Benjamin C. Faurot to set aside, on the ground of fraud, a decree rendered in a court of the state of Illinois. Defendant demurred to the bill.

Monroe & McShane and R. Rae, for complainant.

Frank L. Wean and Frank O. Lowden, for defendant.

JENKINS, Circuit Judge. Preliminary to the consideration of the demurrer, an observation may be indulged with respect to this bill of complaint. It is understood to be a bill filed in the state court, either as a bill of review of a previous decree in equity in that court, or as an original bill attacking that decree for fraud. The transcript of record filed in this court upon removal of the cause from the state court exhibits what purports to be a copy of the bill so filed in the state court. That copy is either incorrect, or the bill itself is imperfect. I find therein no allegation that any bill was filed in the state court in the suit in which the decree was entered, and which is there attacked. The first six pages would seem to be a copy of that original bill in the state court, and this is followed by allegations that the defendant entered his appearance to the bill, and filed his sworn answer thereto. There are, however, no apt allegations showing the commencement of the original suit in the state court, although the decree therein is asserted and sought to be annulled. This is a matter which doubtless can be rectified, and I prefer to consider the bill as it should be perfected.

This bill is either a bill of review, seeking a rehearing of the original suit upon the ground of newly-discovered evidence, or is an original bill attacking the former decree for fraud. If it be a bill of review, this court cannot properly entertain jurisdiction. *Barrow v. Hunton*, 99 U. S. 80; *Johnson v. Waters*, 111 U. S. 640, 4 Sup. Ct. 619; *Marshall v. Holmes*, 141 U. S. 589, 12 Sup. Ct. 62. Otherwise, if it be an original bill attacking the former decree for fraud. I must therefore consider this bill as an original bill.

The decree sought to be impeached was rendered on the 8th of July, 1889, and is as follows: