

of demurrer. But it is equally well settled that on demurrer the court will not consider any question which requires the support of evidence. The defect in the alleged invention must appear either upon the face of the letters patent under criticism, or spring from those matters of which the court must take judicial notice. Such is not this case. So far as the bill itself is concerned, it is certainly not demurrable as a pleading. So far as the letters patent in question go, there appears, upon their face, to have been an invention made by Mr. Waring which justifies their issue. It may be that, when carefully compared with some other invention, this alleged improvement may not reach the dignity of invention, but such comparison can be based only upon evidence disclosing what the anticipating or prior invention was. The mere fact that reference is made to a former invention in the letters patent, as in this case, does not bring that invention to the knowledge of the court, or spread its claims or description upon the record. As a part of the state of the art, it must be proved by legal testimony. *Fibre Industries Co. v. Grace*, 52 Fed. 124.

It was also insisted by counsel for defendant that, without reference to the former patent, there was disclosed upon the present patent a want of patentable invention. I am not willing to assent to this, although I may say that the argument addressed to the court upon this contention was exceedingly persuasive. Yet upon demurrer for want of patentability, if a doubt remains, such doubt should be resolved against the demurrant. Nice questions should not be decided until the complainant has had ample opportunity to present his case in the clearest form. The demurrer is overruled.

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PAGE v. BUCKLEY.

(Circuit Court, N. D. Illinois. January 7, 1895.)

**PATENTS—PNEUMATIC TESTERS FOR CANS—PRELIMINARY INJUNCTION REFUSED.**

Application for preliminary injunction on reissue patent No. 11,443, reissued September 25, 1894, to William B. Page, for an improvement in pneumatic testers for cans, refused on the ground that there had been no adjudication of the patent and nothing that amounted to public acquiescence.

This was an application for a preliminary injunction to restrain infringement of the reissued letters patent No. 11,443, dated September 25, 1894, to William B. Page, for an improvement in pneumatic testers for cans.

Walter H. Chamberlin, for complainant.  
Banning & Banning, for defendant.

GROSSCUP, District Judge. There has been no adjudication of the validity of complainant's patent outside of the finding of the patent office in an interference hearing, and nothing that amounts to public acquiescence. The decision of the patent office deter-

mined that the complainant's and defendant's inventions were the same, and that complainant's, in point of time, was prior; but its validity, in view of the state of the art, was not inquired into, much less determined. The issuance of a patent, in this circuit at least, is not sufficient *prima facie* evidence of the novelty of the invention as justifies an injunction.

Neither is defendant, by the fact of having presented a claim for a patent for the same invention, barred from denying novelty. The right against monopoly is a general right, in which defendant shares, until it is adjudicated in a real contest that the invention has not been anticipated and the patent is in other respects valid.

Injunction denied.

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CHRISTMAN et al. v. BERTELS et al.

(Circuit Court of Appeals, Third Circuit. April 17, 1895.)

No. 21.

**PATENTS—LIMITATION OF CLAIMS—INFRINGEMENT—BAIL EAR FOR PAILS.**

The claim of the McDonnell patent, No. 344,667, for a bail ear for pails, if valid at all, is limited, both by its language and by the prior state of the art, to an ear in which the lug and the spring are not separated entities, but constitute one integral thing, and hence is not infringed by a device in which the spring is not attached to the groove of the ball, but passes through and extends below it, and is there fastened to the body of the pail itself.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

This was a suit by Charles E. Christman and Enoch E. Christman against William B. Bertels, Charles E. Bertels, and Hayden U. Merithew, partners as W. B. Bertels, Son & Co., for the alleged infringement of a patent. The circuit court dismissed the bill, and complainants appealed.

James I. Kay, for appellants.

John H. Roney, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and WALES, District Judge.

DALLAS, Circuit Judge. This suit was brought to restrain the alleged infringement by the appellees of the third claim of patent No. 344,667, dated June 29, 1886, granted to James McDonnell for "Bail Ear for Pails." That claim is as follows:

"(3) The combination, with the pail, of the ears or lugs secured on each side thereof for the attachment of the ball or handle, each having the groove therein, and the spring secured in said groove, and having a projection or shoulder for engaging with the lid of the pail and locking it in position."

The court below pointed out that the specification describes, and the drawings exhibit, the lug and the spring of the patent, not as separate entities, but as together and unitedly constituting one integral thing; and, construing the claim with reference to