

## LOWELL MANUF'G CO. v. HOGG.

(Circuit Court, D. Massachusetts. December 3, 1895.)

**1. DESIGN PATENTS—INFRINGEMENT — MARKING "PATENTED"—PLEADINGS AND PROOF.**

Where a bill for infringement of a design patent fails to allege that the articles were marked "Patented," and the answer makes no denial of the fact, it is still open to defendant to make that defense, not only in respect to the penalties prescribed by the act of February 4, 1887 (24 Stat. 387), and damages, but also in respect to an accounting of profits. *Dunlap v. Schofield*, 14 Sup. Ct. 576, 152 U. S. 244, and *Coupe v. Royer*, 15 Sup. Ct. 199, 155 U. S. 565, applied.

**2. SAME—AMENDMENTS TO BILL.**

Where infringements were not willful, were few in number, and were discontinued upon notice of complainant's claims, the court declined, after final hearing, to permit an amendment to the bill by inserting an allegation that complainant's articles were marked "Patented."

This was a bill in equity by the Lowell Manufacturing Company against William J. Hogg for alleged infringement of a design patent.

Witter & Kenyon, for complainant.

Louis W. Southgate, for defendant.

PUTNAM, Circuit Judge. This is a bill in equity based on the infringement of a patent for a design. It prays for an injunction, for the enforcement of the penalties imposed by the act of February 4, 1887 (24 Stat. 387), for profits in excess of those penalties, and for damages. The bill failed to allege that the patented articles were marked as provided by sections 4900 and 4933 of the Revised Statutes, and the answer made no denial of this fact. Apparently, under *Rubber Co. v. Goodyear*, 9 Wall. 788, 801, the point could not be taken by the defendant, so far at least as applies to an accounting for profits. But this case was explained in the later case of *Dunlap v. Schofield*, 152 U. S. 244, 249, 14 Sup. Ct. 576, and under it and *Coupe v. Royer*, 155 U. S. 565, 583, 15 Sup. Ct. 199, it is open to the defendant here, so far at least as concerns the damages and penalties claimed. The principle applies as well to an accounting for profits, which, after all, is only one form of damages. The discussion in *Rubber Co. v. Goodyear*, where only profits were involved, went on this theory, and the same with *Sessions v. Romadka*, 145 U. S. 29, 49, 12 Sup. Ct. 799.

The defendant does not deny that the complainant is entitled to an injunction, but maintains that it is not entitled to the other relief prayed for, by reason of the want of allegations and proofs with reference to sections 4900 and 4933; and, as the record stands, the case on this point is with him. The complainant, however, now moves that the record be reopened to enable it to offer proofs that it complied with section 4900. Waiving the questions whether this would be effective without also amending the bill, and whether equity can enforce the penalties sought to be recovered, we cannot grant this motion. The answer denies that the defendant infringed after he had actual knowledge of the existence of the patent, and, under the circumstances of the case, we are not satisfied that his infringements were willful. They were few in number and within a period of four

months after the patent was issued. On receiving notice of the complainant's claims, he acquiesced in them. All substantial controversy is ended. Even if equity can enforce the penalties, it would not be within its policy to permit amendments at this late stage for that purpose. Therefore we will dispose of the case as presented to us at the final hearing.

Let there be a decree for an injunction, with costs for the complainant.

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COVERT v. TRAVERS BROS. CO.

(Circuit Court, S. D. New York. December 9, 1895.)

1. PATENTS—EFFECT OF PRIOR DECISION—EX PARTE INJUNCTION.

A decision granting a preliminary injunction, where no counsel appeared for defendant, though some affidavits were submitted in his behalf, does not preclude the court, in a subsequent suit against a different defendant, from considering anew the question of the validity of the patent.

2. SAME—PLEADING—DEMURRER TO BILL.

A patent manifestly invalid upon its face may be so declared on demurrer to the bill, but this power should be exercised with the utmost caution and only in the plainest cases. All doubts should be resolved in favor of the patent. *Button-Fastener Co. v. Schlochtmeyer*, 69 Fed. 592, followed.

3. SAME—INVENTION—ROPE CLAMPS.

There is no invention in simply clamping an open ring of metal around a braided or twisted rope to prevent unbraiding or untwisting.

4. SAME.

The Covert patent, No. 208,157, for an improvement in rope clamps, is void on its face as to the second claim for want of invention. The first claim, which is for a described method of connecting two parts of a rope, or two ropes, by clamping the same with one or more open metallic rings under pressure, discloses sufficient evidence of novelty and invention to prevent the same being declared invalid upon demurrer to the bill.

This was a bill in equity by James C. Covert against Travers Bros. Company for alleged infringement of letters patent No. 208,157, granted to complainant September 17, 1878, for an improvement in rope clamps.

Charles G. Coe, for complainant.

Arthur v. Briesen, for defendant.

COXE, District Judge. The patent in suit, No. 208,157, was, in 1885, before the court on a motion for a preliminary injunction. 25 Fed. 43. As the facts are now recalled the proceedings on that motion were *ex parte* in character. No one represented the defendant at the argument although some affidavits on his behalf were submitted. That decision does not preclude the court from considering the arguments which are now presented. That a patent, manifestly invalid upon its face, may be so declared on demurrer is now settled beyond dispute. The authorities bearing upon this proposition will be found collated in the recent case of *Button-Fastener Co. v. Schlochtmeyer*, 69 Fed. 592. It is also true that this power should be exercised with the utmost caution and only in the plainest cases.