

rate patent. We think the case on these two patents much nearer *Miller v. Manufacturing Co.* than the case on the two patents already considered, but we are unwilling upon an appeal from a preliminary injunction heard upon affidavits, and without a full review of the art, and without a fuller argument and closer consideration of the claims and specifications, to decide the question mooted. The questions are whether, in determining the separability of the inventions, we may consult evidence dehors the record, and whether, in considering the gist of the second patent, we may supply such variations in the form of the combination shown in the drawings and specifications suggested by mere mechanical skill as would make it one not covered by the first patent, but a simpler and more generic form, and whether the claims of the second patent are limited to the devices actually shown by the words "substantially as described." The main invention is confessedly a meritorious one, and we shall be loath to declare it void because of a mistake in the patent office proceedings, if we can, by any reasonable construction of the patents, do otherwise. The second patent was sustained as valid after a full hearing on the merits, before so good and experienced a patent judge as Judge Townsend, of Connecticut. *Thomson-Houston Electric Co. v. Winchester Ave. Ry. Co.*, 71 Fed. 192. This certainly justified the court below in assuming the validity of the patent on a motion for preliminary injunction. It is well settled that, on appeals like this, this court will ordinarily look into the case merely to see whether the discretion of the court below in issuing or withholding the order of preliminary injunction has been abused; and that only in exceptional cases, in which a controlling question of law may be as fully and fairly considered as upon final hearing, and the court has no doubt upon it, will it finally dispose of the injunction and the case on a hearing like this. *Duplex Printing-Press Co. v. Campbell Printing-Press & Manuf'g Co.*, 16 C. C. A. 220, 69 Fed. 250; *Mayor, etc., v. Africa*, 23 C. C. A. 252, 77 Fed. 501. Questions on appeals of this character are ordinarily to be treated in this court from the standpoint from which they were viewed by the circuit court, and the decision on the merits by a circuit court of another circuit sustaining the patent is therefore usually of controlling weight here, as it should be in the court below.

In an appeal from a preliminary injunction on this same patent, the circuit court of appeals of the Second circuit affirmed the order without examining or deciding the validity of the patent, justifying its course in this regard by the statement that in another cause, heard upon a voluminous record by Judge Townsend, the patent had been sustained. *Thomson-Houston Electric Co. v. Kelsey Electric Railway Specialty Co.*, 22 C. C. A. 1, 75 Fed. 1005. The orders of preliminary injunctions appealed from in both cases are accordingly affirmed, at the costs of the appellant, the defendant below.

JANOWITZ v. LEVISON.

(Circuit Court, S. D. New York. April 9, 1897.)

PATENTS—INVENTION AND ANTICIPATION—DRESS STAYS.

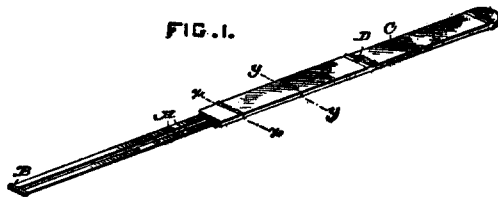
The Janowitz patent, No. 512,113, for a dress stay composed of twin wires covered with a hard, resilient, waterproof coating, such as vulcanized rubber, which also fills in the space between the wires, firmly uniting their inner edges, and having perforations or grooves along the middle for sewing through, discloses a patentable improvement over prior constructions, though the difference seems but slight.

Louis C. Raegener, for plaintiff.

Edwin H. Brown, for defendant.

WHEELER, District Judge. This suit is brought upon patent No. 512,113, dated January 2, 1894, and granted to the plaintiff for a dress stay. In the specification he says:

"This invention relates to that class of stays which are covered with rubber or other suitable compound, and is designed to provide an improvement thereon to prevent their breaking when in use, or rusting after washing or from perspiration of the wearer. Heretofore it has been proposed to cover single steel stays with rubber, and an example of this is shown in my patent, No. 496,313, but such stays cannot be sewed through, as is required in making dresses of the better class, unless the steels are perforated, and if so perforated they are so weakened at the point of perforation as to be almost sure to break under the strain to which they are subjected. To remedy this it has been proposed to use double or 'twin' stays, and cover them with textile material sewed on to the stays. This, however, is also objectionable, as the steels rust under perspiration and after washing, and this destroys the stitching, so that they not only iron mold the clothing of the wearer, but they become loose and annoying beside. To overcome these difficulties is the object of my invention, which I do by imbedding duplex or twin steels in a suitable composition, such as rubber or similar compounds.



"Referring now to the details of the drawings: A represents two steel wires of any approved cross section, but preferably either flat or corrugated. These are united at the ends by metal tips clamping the ends at top and bottom, and the whole is covered with a suitable compound, such as rubber, or other suitable material, which, when it has been vulcanized or hardened, not only forms a hard, elastic coating, but also fills in, or partially so, the space between the two wires, and firmly unites them along their entire length, so as to make them practically one piece. The rubber is preferably perforated at several places along the center between the steels, or the material between the steels may be solid; but, owing to the absence of steel in the middle, it can be sewed through with a needle in the same manner as whalebone or horn, and to facilitate this there is a slight channel in the covering between the steels."

The claims are for:

"(1) A twin wire stay having a hard, resilient, waterproof coating, covering the two members of the stay on all sides, and forming a filling connecting the two contiguous edges of said members, substantially as described. (2) A twin wire stay, covered with vulcanized rubber, having a filling of the same between the wires, firmly uniting their inner edges, substantially as and for the purpose specified. (3) A twin wire stay covered with vulcanized rubber, having a channeled filling of the same between the wires, firmly uniting their inner edges, substantially as and for the purpose specified."

The defense shows abundantly such stays of single pieces covered with rubber, and of two pieces covered with cloth and with paper, but none of twin stays covered with rubber, and perforated or grooved between them for sewing through. The nearest anticipation, and that most relied upon, seems to be the British patent, No. 1,765, granted December 6, 1890, to Henry Manning Knight. The most apt expressions in it towards describing the plaintiff's stay are:

"In the manufacture of artificial or imitation whalebone according to my invention, I use a material known as compounded rubber, vulcanite, ebonite, or such kindred material, and I insert a core in same composed of a strip or strips, piece or pieces of wire alone or combined with some textile fabric. These strengthening pieces should be of or about the length of the 'bones' of imitation whalebone to be manufactured."

"In the manufacture of such artificial whalebone as the above we find the following method of manufacture to answer the purpose well: We run out a thin sheet of suitably compounded rubber, and on it lay at apportioned distances the strips of metal as aforesaid. * * * These again are covered with another thin sheet of rubber, and the whole is then vulcanized under pressure, and in a high degree of heat. The sheet thus made * * * is afterwards cut up into strips of the desired widths, and polished on a revolving buff, when they are fit for market."

When cut into strips of the desired width, some might include two wires, and constitute such a twin stay as they so would make; but this is not shown to have ever been done, and, if done, it would not show such a stay perforated or grooved along the middle for sewing through it there. These differences are slight, but slight differences here are important; and, however slight important differences may be, they are, when newly discovered or invented, by law patentable. *Krementz v. S. Cottle Co.*, 148 U. S. 556, 13 Sup. Ct. 719. The differences between the many patents upon these things are all small, but the practical difference between the plaintiff's stay and any prior ones well appears by the conduct of the infringers in taking it, about which there is no question, and otherwise. Decree for plaintiff.

ZAN et al. v. MACKENZIE.

(Circuit Court of Appeals, Ninth Circuit. February 8, 1897.)

No. 324.

PATENTS—CONSTRUCTION AND INFRINGEMENT—IMPROVEMENTS IN BROOMS.

The Bradshaw & Richardson patent, No. 248,252, and the Bradshaw patent, No. 249,884, both for improvements in brooms, are limited to the precise form and combinations shown, and are not infringed by a broom the ferule of which has neither the serrations of the former patent nor the lugs of the latter.

Appeal from the Circuit Court of the United States for the Northern District of California.

This was a suit in equity by Zan Bros. & Co. and others against George E. Mackenzie for alleged infringement of two patents for improvements in brooms. The circuit court dismissed the bill, and the complainants appealed.

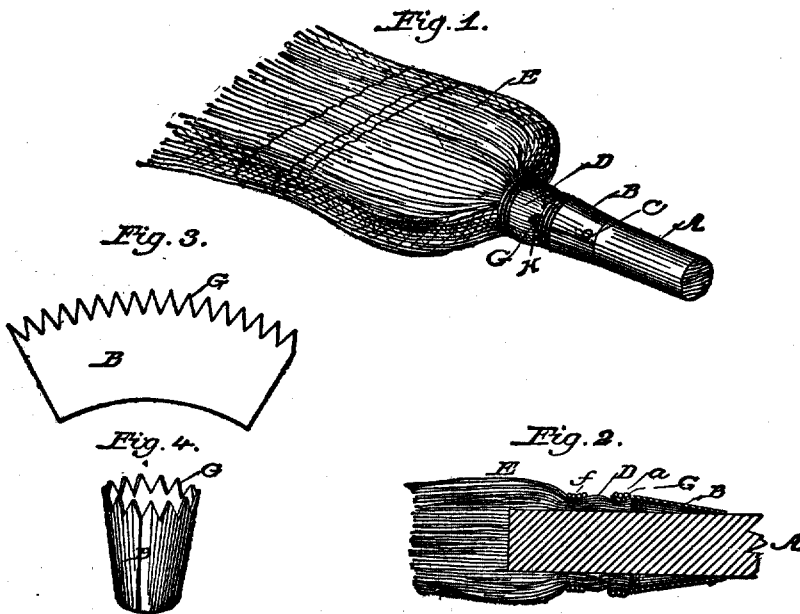
John L. Boone, for appellants.

John Henry Miller, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

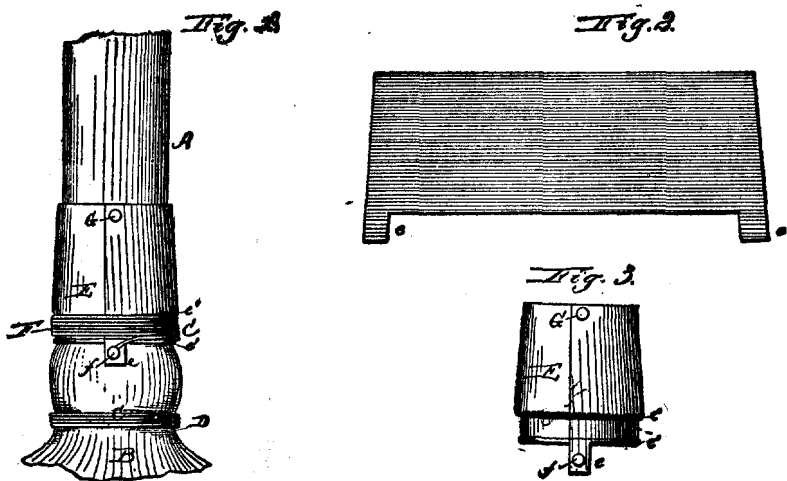
GILBERT, Circuit Judge. The appellants were the complainants in a suit against the appellee, charging him with infringing two certain letters patent for improvements in brooms, to wit, letters patent No. 248,252, issued October 11, 1881, to J. W. Bradshaw and Louis C. Richardson, and letters patent No. 249,884, issued November 22, 1881, to J. W. Bradshaw, both of which were alleged to have been assigned to the complainants. The defense was noninfringement, and a denial of the assignments to the complainants. The first patent has but one claim, which reads as follows:

"In combination with a broom, the slit or open ferrule, B, adapted to contract as the wire is wound round it, and provided with serrations, G, G, all substantially as and for the purpose set forth."



The second patent is for a device which differs from the first only in that the serrations or teeth are cut away, and in their place two lugs are left, one at each end of the metal collar or ferrule which goes around the broom straws. In this patent there are three claims as follows:

"(1) The combination of the open ferrule, E, having lips or extensions, e, e, with wire, C, and tack, f, all substantially as and for the purpose set forth. (2) The broom ferrule, E, formed with the lips, e, e, and with the beads or shoulders, é, substantially as described. (3) The combination with the broom body and its handle of the ferrule, E, formed with the beads or shoulders and with the lips, e, and the wire wrapped around the body below the ferrule, then passed up through the body, and wrapped around the ferrule between the beads, and finally secured by a tack or rivet passing through said lips, substantially as specified."



It was proven that the appellee had used metal collars or ferrules, which differed from those described in the complainants' patents in the fact that they had neither the serrations, G, G, of the first patent, nor the lips or extensions, e, e, of the second patent, nor any equivalent or substitute therefor. On the contrary, it appeared that they were plain pieces of tin or metal, which were placed around the broom, and wrapped thereon with wire. In neither of the complainants' patents is the claim made for an open ferrule. It is doubtful whether, in the state of the art, such a claim could have been made. The claims were for the open ferrule with teeth in the one patent, and with extensions or lugs in the other; the purposes of which are in both patents clearly defined. The patentees were thereby limited to the precise form and combination claimed. *Knapp v. Morss*, 150 U. S. 221, 14 Sup. Ct. 81; *Wright v. Yuengling*, 155 U. S. 47, 15 Sup. Ct. 1. The ap-