

said that the method consisted "in introducing into the water, simultaneously with its passage to or into the filter, a substance which will sufficiently coagulate or separate the impurities to facilitate their arrest and removal by the filter-bed." It is true that in the specification the water pipe and the pipe containing the coagulating agent met near the filter-bed, and that the contents of the two pipes passed into the filter together, but the novelty of the process did not consist in the formation of the hydrate at or after the exact instant of time when the solution enters the filter-bed, and accordingly the court of appeals, in defining the patented method, said that the coagulant was to be "applied to or mixed with the water to be filtered substantially at its introduction into the filtering apparatus, and while it is flowing continuously to the filter-bed. By this method the coagulants perform their principal work within the filter-bed," and settling-tanks are dispensed with. To urge that the defendant does not infringe because it mingles the inflowing current of water and the solution of alum while the water is flowing continuously to the filter-bed, but a few minutes before it reaches it, savors of technicality. The defendant has adopted the Hyatt method of clarifying water from suspended impurities by an uninterrupted process of filtration, which is accomplished by introducing into the water while it is continuously flowing to the filter-bed a sufficient quantity of a coagulant.

It is next said that new issues have been presented in the defendant's affidavits and in patents not in the Schwarzwald record, which affect the validity and scope of the patent. The patent of most apparent importance which is referred to was issued by the United States to Franz Pichler and Karl Sedlack—No. 278,178, dated May 22, 1883—for an apparatus for purifying and softening water. It was evidently particularly designed for the softening of water, and consists of an inlet pipe, preferably of two branches, one for the influx of water, the other for the re-agent. The fluid then flows into a series of purifying chambers and of sediment chambers, the latter being of larger cross section than the other chambers, so that the movement of the liquid shall be considerably slower and the deposit of the impurities shall be secured before the water finally reaches the filter. The specification presents the deposit of sediment in the sediment chambers of gradually increasing capacity as the chief feature of the invention, and the entire description contained in the paper patent shows that the alleged invention has no patentable relation to Hyatt's process. Affidavits were also presented in regard to the use of settling basins between the point where the water receives the re-agent and the filter-bed, which were used in two sugar refineries in New Orleans before the date of the Hyatt invention. The Planters' Refinery plant is described with the greater particularity. The water went into a settling tub, where it received its re-agent. It then passed through 3 other settling tubs, and thence to 10 filters, each 3 feet in diameter and 25 feet high. The dimensions of the tubs are not given. The plant delivered about 100,000 gallons per day. If the drawing which the affiant annexed to his affidavit shows the size of the tubs as compared with that of the filters, the settling-tanks had a value for sedimentation, and were

in fact used for that purpose. Certainly they were far more important than the basins of the defendant. Inasmuch as the main inquiry before the circuit court was whether the defendant's tanks are settling tanks in name only, the fact that other people had used tanks of a size and character which made them efficient throws but little light upon the issues involved in the present appeal.

The affidavits of three gentlemen that the beneficial character of salts of iron as a re-agent was suggested by one or more of them to Mr. Hyatt during his experiments in New Orleans prior to his application for a patent are inconsequential.

Three instances of the construction of filters of the Hyatt type, in a more or less perfect form, prior to the date of his invention, are next stated in affidavits. These instances are by Raynor, in New York, in 1878; by Peterson, in St. Louis, in 1882; and the alleged manufacture and use by B. T. Loomis, in Baltimore, in December, 1882. It must be recollected that the Schwarzwald Case was contested with earnestness, and at great expense. The pre-existing patents were produced in abundance, and an earnest effort was made to show the history of the art of filtration in all the forms in which it had been practiced. After the decision of the court of appeals, a motion for a preliminary injunction was brought, in accordance with the declared wishes of the defendant. Under such circumstances, where a new defense is interposed, the evidence to support it must be so cogent and persuasive as to impress the court with the conviction that, if it had been presented and considered in the former case, it would probably have availed to a contrary conclusion. *Electric Manuf'g Co. v. Edison Electric Light Co.*, 10 C. C. A. 106, 61 Fed. 834; *Bresnahan v. Tripp Giant Leveller Co.*, 19 C. C. A. 237, 72 Fed. 921. The account of the Raynor and the Peterson anticipations in 1878 and in 1882, in view of all the presumptions in the case, makes no impression upon the mind. The Loomis Case is stated with more detail. He was a manufacturer of filters in Baltimore, and in 1879 or 1880 made an experiment for the purification of foul water flowing from a factory and dye works in Wilmington, which was abandoned because the filters became clogged with the impurities in the waste water. In December, 1882, Mr. Loomis says that he applied his alum-feeding device to a filter in his shop, and successfully used it, in connection with the filter, for several months. He subsequently attached his feeding device to some of the filters, which were delivered in response to orders for filters from purchasers outside of Baltimore; but their names or residences, or the dates of the sales, or what the purchasers actually did with the alum-feeding devices, are not stated. Whether they were sold before or after the date of the Hyatt invention is not known. None were ever sold in Baltimore, which was his principal market. His prior use was, therefore, the use in his own shop, and whether this was experimental, for purposes of an advertisement, which was never responded to by his customers in Baltimore, can only be ascertained by investigation. As Mr. Loomis presents his case in his affidavit, this defense is not cogent or persuasive enough to impress us with the conviction that it would have availed in the Schwarzwald Case.

It is believed that after an exhaustive litigation upon a patent which is of known importance, and has been widely advertised, and after its careful re-examination and a favorable adjudication upon its validity by the appellate court, this class of paper affidavits in regard to priority by individuals ought not to be permitted to delay the owner of the patent from receiving the advantages which accrue from his successful struggle with infringers.

The next point is that the defendant is a public servant, is engaged in supplying the city of Niagara with pure water, and therefore ought not to be enjoined. The defendant was eager that a bill for an injunction should be promptly brought, and stated its desire that the suit should be accompanied by a motion for a preliminary injunction, so that a speedy decision could be had. Under these circumstances, its point that the order for an injunction is inequitable is deprived of force.

The order for an injunction pendente lite is affirmed, with costs.

WALLACE, Circuit Judge (dissenting). I am unable to concur in the opinion of the court. In my opinion, the patent to Pichler & Sedlack, of May 22, 1883, negatives the novelty of the patent in suit, and discloses apparatus in all essentials like the alleged infringing apparatus of the defendant. In the Schwarzwaldner Case, in which the patent in suit was considered by this court (13 C. C. A. 380, 66 Fed. 152), the Hyatt patent was sustained, not because the use of the coagulants therein described was new for the purification of water, but because the method of using the coagulants while the water was flowing continuously to the filter-bed was supposed to be new, "the coagulant being applied to or mixed with the water to be filtered substantially at its introduction into the filtering apparatus, and while it is flowing continuously to the filter-bed." The patent to Pichler & Sedlack describes this method, although the continuous flow of the water is somewhat retarded on the way to the filter-bed by partitions which form sediment chambers, and catch some part of the suspended impurities.

RUBIN et al. v. STURTEVANT et al.

(Circuit Court of Appeals, Second Circuit. May 26, 1897.)

1. RESCISSION OF SALES—BREACH OF WARRANTIES—EXECUTORY CONTRACTS.

When there is an express warranty upon an executory contract of sale, and the articles which are the subject thereof do not correspond to the warranty, the vendee may return them, as not being what he has agreed to buy, and rescind the contract; and if several distinct articles at different prices are embraced in the contract, though covered by the same warranty, a right of rescission exists as to each.

2. SAME—RESALE BY VENDEE.

When the vendee in an executory contract of sale rescinds the contract and returns the goods, because they do not correspond to a warranty, but the vendor refuses to receive them, it is proper, if not obligatory, for the vendee to take such measures as are expedient to save unnecessary loss to

the vendor, and if he sells them, exercising reasonable diligence, he is responsible only for the proceeds.

8. SAME—ACTION FOR PRICE—EVIDENCE.

When the vendee in an executory contract of sale has rejected and returned the goods, but the vendor has refused to receive them, in an action by the vendor for the price, evidence of attempts to induce the vendor to arbitrate is competent on behalf of the vendee to explain a delay in selling the goods to save loss.

In Error to the Circuit Court of the United States for the Southern District of New York.

Manheim & Manheim, for plaintiffs in error.

Stern & Rushmore, for defendants in error.

Before WALLACE and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the plaintiffs in the court below to review a judgment entered upon the verdict of a jury.

The action was brought to recover the agreed price for goods sold and delivered by the plaintiffs to the defendants. The defense was a recoupment of damages for breach of warranty by the plaintiffs of the quality of the goods. The plaintiffs admitted the warranty, but denied the breach. The jury found upon this issue for the defendants, rendering a verdict for the plaintiffs for the sum of \$1,106.25, being the purchase price of part of the goods and the sum realized by the defendants from a sale of the balance at auction.

It appeared upon the trial that in June, 1895, the defendants, merchants in business at Zanesville, Ohio, ordered of the plaintiffs, manufacturers of fur garments at New York City, 173 fur capes, at separate specified prices, which were to be perfect and like certain samples. Pursuant to the order the capes were made and shipped by the plaintiffs in July, and received by the defendants about the 1st of August. The defendants retained some of the goods as acceptable, but, insisting that the rest did not correspond to the warranty, and were unmerchantable, reshipped them to the plaintiffs at New York City, notifying them accordingly. The plaintiffs declined to accept the goods, and in the following December the defendants caused them to be sold at auction. It appeared that there had been a steady decline in the market prices of fur goods since August, and that in December prices were 50 per cent. lower than in August. The evidence for the plaintiffs tended to show that the goods were in all respects perfect and according to the sample, and that they were at the time of the shipment equal in value to the agreed price. Evidence on the part of the defendants was given showing the amount which the goods brought at the auction sale, and also tending to show that the goods, in their imperfect condition, were not worth more than 25 or 30 per cent. of the market value of perfect goods. The defendants were permitted to show, against the objection and exception of the plaintiffs, that the expenses of the auction sale were \$67.

The trial judge instructed the jury that the plaintiffs were entitled to recover the price of the goods which were accepted by the defendants, and, as to the rest of the goods, that, if they did not correspond