

ulation of models, the reading and re-reading of technical evidence, the elaborate comparison of documents couched in language which certainly is not that of common speech, the close, hard thinking, sometimes prolonged for weeks, which, in the case of a complicated patent, has to be gone through with, before a judge, however long his experience with such causes, is able to reach a conclusion on the issues of fact, which, even if erroneous, presents at least the appearance of a logical train of reasoning in its support, it seems safe to say, a priori, that the decision of such questions by an ordinary jury, imprisoned for a few hours, with nought but their vague recollections of the evidence, would be a lottery. Their verdict might sometimes be correct, but it would rarely be intelligent. For these reasons this court is averse to rendering a decision which would introduce such a practice into this circuit, until constrained so to do by controlling authority. The points raised by the defendant were decided adversely to their proponent in this circuit in *Wirt v. Hicks*, 46 Fed. 71, and that decision will be followed here. See, also, *Campbell Printing-Press & Mfg. Co. v. Manhattan Ry. Co.*, 49 Fed. 930, and *Mill Co. v. Coombs*, 39 Fed. 803.

4. As to infringement, the averment of the bill is:

"Said defendant * * * did, as your orator is informed and believes, without the license," etc., "* * * in infringement of the aforesaid letters patent, * * * make * * * and vend the said invention and patented improvements."

It is suggested that there is lacking here any positive charge that defendant does infringe. The bill is open to this criticism. The correct form of averment is that set forth in *Story, Eq. Pl. (8th Ed.)* p. 249, viz. "that plaintiff has been informed and believes, and therefore avers." The objection is rather hypercritical, but appears to be sound. The demurrer is therefore sustained, with leave to complainant to amend, but without costs.

KELLER v. STRAUSS et al.

(Circuit Court, S. D. New York. July 11, 1898.)

PATENT SUITS—INTERROGATORIES.

Interrogatories requiring defendant to state how many of the alleged infringing articles he has manufactured since a given date, and how many he now has on hand for sale, are too broad. They should be confined to the inquiry whether he manufactured, used, or sold any of such articles, and whether he had any now on hand for sale. For complainant has no right to ask for the details of defendant's business until he has established the validity of his patent, and shown a right to an accounting.

This was a suit in equity by Arthur H. Keller against Jacob Strauss and Carl Strauss for alleged infringement of a patent. The cause was heard on exceptions to the answer for insufficiency, for that defendants have not answered interrogatories numbered 1 and 2.

Briesen & Knauth, for complainant.
Murphy & Metcalf, for defendants.

LACOMBE, Circuit Judge. The suit is for infringement of a patent. The interrogatories are as follows:

"(1) How many toys of the construction of the toy hereto annexed and herewith filed, and marked 'Exhibit A,' did you manufacture, use, or sell, within the United States of America, since the 8th day of October, 1895, and before the commencement of this action? (2) How many such toys have you now on hand for sale?"

The toy, Exhibit A, is the patented article, and the date of the patent is October 8, 1895.

The complainant relies upon *Coop v. Development Inst.*, 47 Fed. 899, *Same v. Same*, 48 Fed. 239, and especially *National Hollow Brake Beam Co. v. Interchangeable Brake Beam Co.*, 83 Fed. 26. The practice sustained in these decisions is one to be encouraged, and there would be no objection to complainant's motion, if he had so confined his interrogatories as to propound the questions material to be decided upon the issues presented by the bill and answer, viz. whether defendants had infringed, and whether future infringements by them may be anticipated. Had he asked whether defendants had manufactured, used, or sold any toys of the kind claimed to be an infringement, and had any of such toys now on hand for sale, the answers called for would have been material, and, if answered in the affirmative, would have been sufficient to establish infringement and threatened infringement. But complainant has so expanded his interrogatories as to ask for details of defendants' business with which he has no concern until he shall succeed, at final hearing, in establishing the validity of his patent, and showing his right to an accounting. It is wholly immaterial to the issues raised by the pleadings how many infringing articles defendants may have made, used, and sold. The distinction here suggested apparently was not called to the attention of Judge Adams in the case in 83 Fed., but objection was made to the interrogatory as a whole, without any concession that the first half of it was entirely proper and material on the question of infringement. Complainant refers to a recent memorandum of Judge Wallace in *Regina Music Box Co. v. Paillard*. It contains nothing to indicate that proof of a single bona fide sale, under circumstances fairly warranting the inference that, unless restrained by injunction, defendant may be expected to continue infringement, is not sufficient to warrant the relief prayed for. Proof of a single sale was held sufficient in this circuit in *De Florez v. Reynolds*, 14 Blatchf. 505, Fed. Cas. No. 3,742. That case has been repeatedly followed, and never overruled. Certainly the memorandum in *Regina Music Box Co. v. Paillard* does not lay down any different rule. Probably, if the evidence in that case were examined, it would be found that there were some other defects in complainant's proof of infringement. The exceptions are overruled.

SCHWARTZ v. HOUSMAN.

(Circuit Court, E. D. New York. July 8, 1898.)

1. PROCESS PATENTS—INFRINGEMENT.

Infringement of a patent for a process of manufacture must be shown by satisfactory proof that defendant uses the process. Similarity or even identity of appearance in the product will not suffice.

2. SAME—INFRINGEMENT—METHOD OF EMBOSSING PAPER.

The Schwartz patent, No. 332,444, for an improvement in embossing plastic material, is confined to cards on which the whole surface sheet has been applied before the process of embossing begins, and does not cover any process for cutting letters or figures out of sheets of paper, and therefore affixing them to the surface of the card.

3. SAME.

The Schwartz patent, No. 389,589, for an improvement in the art of "ornamenting cardboard with letters or designs, or both, for forming show, gift, or sign cards," in which the only novel feature claimed by the patentee is in so arranging the various operations that the same movement of the die cuts the letter out, and presses it upon the surface where it is to be affixed, is void for want of invention.

This is a suit in equity by Charles Schwartz against Moses Housman for infringement of two patents relating to the forming and embossing of cards, etc. Final hearing upon pleadings and proofs.

H. A. West, for complainant.

Wilton D. Donn, for defendant.

LACOMBE, Circuit Judge. This suit is brought upon two patents, both issued to complainant. The first (No. 332,444), dated December 15, 1885, is for an improvement in embossing plastic material. The specification sets forth that the invention—

"Relates more especially to a new method of embossing paper, and it has for its object to prevent the surface of the raised portions of the paper from cracking, as with the ordinary method, which gives the work a ragged and unfinished appearance. The invention consists in incising the upper surface of the sheet or card to be embossed with the outline of the letters or figures to be raised; the incisions being made relatively to the dies, and of sufficient depth only to pass through the upper layer or surface of the sheet, so that, when the sheet or card is submitted to pressure between the dies, the stretching of the fibers will not break or tear the surfaces encompassed by the incisions. * * * The sheet to be embossed has a thin facing sheet, usually of ornamental paper. Before submitting the sheet of cardboard to pressure between the embossing dies, I outline with a sharp instrument on the facing sheet the figures or letters to be raised in embossing the sheet. By the use of the sharp instrument the facing sheet is cut through, so as to sever from the remainder of the sheet the portion of the sheet which will be raised in embossing. In this manner the stretching of the fibers at [the edge of the raised portions] when the sheet is embossed does not break or tear the [raised] portions of the sheet, as by the old method, but leaves them flat and continuous, so that they form a perfectly smooth and continuous surface or finish for the raised faces of the letters or figures."

The claim is:

"The method herein described of embossing paper and other plastic substances, which consists in incising the upper surface of the sheet to be embossed in outline of the figure to be raised; and then subjecting the sheet to pressure in embossing dies, and raising the material along the lines of incision, substantially as and for the purposes set forth."