SMITH & DAVIS MANUF'G CO. v. MELLON.

(Circuit Court of Appeals, Eighth Circuit. October 30, 1893.)

No. 186.

1. APPEAL—OBJECTIONS NOT RAISED BELOW.
The objection that the defense, to a suit for infringement of a patent, of prior public use, was not well pleaded, in that the answer failed to allege that such use was "in this country," as the statute provides, (Rev. St. § 4920, cl. 5,) cannot be raised for the first time on appeal.

2. PATENTS—ABANDONMENT—PRIOR PUBLIC USE.
The advertising and sale by a manufacturer of an invention, to test the market, and to see how it would sell, is a trader's and not an inventor's experiment, and such use will not carve an exception out of the statute making prior public use a defense to a suit for infringement. (Rev. St. § 4920, cl. 5.)

3. SAME.
Where the only difference between an invention of a spring bed consisting of a bank of wire springs fastened together at top and bottom by a series of lateral and crosswise tie rods and hooks, as manufactured and sold by the inventor more than two years prior to his application for letters patent, and that as claimed in his specifications, was in "a more desirable means of locking the tie loops," to which means he did "not desire to be confined," prior public use is a good defense to a suit for infringement. 52 Fed. 149, affirmed.

Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

In Equity. Bill by the Smith & Davis Manufacturing Company against Peter H. Mellon for infringement of letters patent. Bill dismissed. 52 Fed. 149. Complainant appeals. Affirmed.

William M. Eccles, for appellant.

George H. Knight, for appellee.

Before BREWER, Circuit Justice, and SANBORN, Circuit Judge.

BREWER, Circuit Justice. This case is before us on an appeal from a decree of the circuit court of the United States for the eastern district of Missouri, dismissing the plaintiff's bill. The suit was one for the infringement of a patent, that patent being No. 269,242, dated December 19, 1882, issued to John G. Smith, and by him assigned to complainant, and was for an improvement in spring beds. The ground on which the circuit court dismissed the bill was that the invention covered by the patent had been in public use and on sale for more than two years prior to the date of the application, and that for this reason the patent was void. 52 Fed. 149. Counsel for the appellant insists that this defense was not properly presented by the pleadings, and, therefore, that all testimony tending to support it should be ignored; further, that the only use disclosed by the testimony was an experimental one, and therefore not such as to avoid the patent; and, finally, that the precise invention for which the patent was obtained was not in use or on sale prior to the application for the patent.

With reference to the first of these propositions but a word is necessary. The statute (Rev. St. § 4920, cl. 5) provides for, among

other special defenses to a suit for infringement, this: that the invention has "been in use or on sale in this country for more than two years before his application for a patent." The answer set up "that the alleged invention was in public and common use, and on sale, with and by the knowledge and consent of the patentee, for more than two years before the application." It did not in terms allege that such public use was "in this country," as the statute provides. While this defense may not have been pleaded with technical accuracy, yet the testimony tending to establish it was received on the final hearing without any objection. The first time the question has been raised, as appears from the record, is on the argument of the appeal in this court; and here it is too late. Roemer v. Simon, 95 U. S. 214, 220; Loom Co. v. Higgins, 105 U. S. 580, 595.

That the invention covered by the patent, or at least something very similar to it, had been in use and on sale for more than two years prior to the date of the application, does not admit of doubt; and that such use was not an experimental one seems to be clear from the testimony. The application for a patent was on October 14, 1882. In the spring of 1880, J. G. Smith & Co., the predecessors of appellant, were engaged in the manufacture and sale of bed bottoms. In the catalogue issued by them in March, 1880, there is described and advertised what is called "No. 27;" and the testimony of the patentee, a member of the firm, is that during the years 1880 and 1881 they sold quite a number of them,—probably 200 or 300, and possibly 500,—50 or more having been sold before the 14th of October, 1880. In that catalogue, beneath the cut of No. 27, were these words:

"In offering our No. 27 to the trade, we recognize the growing demand for an all-wire spring bed. After a long series of experiments, we have been able to produce a bed which is unequaled for cheapness, lightness, durability, and comfort. Mattress manufacturers will find this an excellent bed to upholster."

The patentee testified, in answer to a question as to whether the sales made in 1880 and 1881 were as an experiment or for gain, that "the sales were made as an experiment, as we do with everything else we get up; to put it on the market to see how the trade will take it; to see how it will take with the trade,"—and in response to a further question, as to what arrangement or understanding was had with the purchasers about the beds giving satisfaction, made this reply: "I had the understanding that, if any of them did not give satisfaction, they could return them, and I would replace them with the latest improvement of that or other beds; so they were satisfied." It is scarcely necessary to refer to the testimony offered by the defendant, tending to show that some at least of these sales were made in the ordinary course of business, and without any conditions named or suggested, and that a market was sought for the goods precisely as for other manufactured articles; for, upon the testimony of the patentee himself, it is obvious that what was done in the spring and summer of 1880 was not for the mere purpose of "experiment," as that term is used in patent law. The invention was one which the inventor could have tested in his own home, and