

THE BLAIR CAMERA CO. v. THE EASTMAN CO.

(Circuit Court of Appeals, First Circuit. October 31, 1894.)

No. 105.

This was a suit by The Eastman Company against The Blair Camera Company for infringement of a patent. A decree was rendered for complainant; the circuit court holding that the defendant's apparatus infringes the 3d, 26th, 29th, 30th, 31st, and 32d claims of letters patent No. 317,049, granted to Walker and Eastman, May 5, 1885. 62 Fed. 400. Defendant appeals.

John L. S. Roberts (Causten Browne, of counsel), for appellant.
M. B. Philipp and Chauncey Smith, for appellee.

Before PUTNAM, Circuit Judge, and NELSON and WEBB, District Judges.

PER CURIAM. We fully concur with the reasoning and conclusions of the judge who sat in the circuit court. We refer to the opinion in Shute v. Sewing Mach. Co., 64 Fed. 368, passed down this day, touching modifications of the decree and the order as to costs. The decree below will be modified so as to be expressly limited to the claims specifically passed on by the circuit court, and as thus modified is affirmed. Neither party will recover any costs of appeal.

EDISON ELECTRIC LIGHT CO. et al. v. CITIZENS' ELECTRIC LIGHT,
HEAT & POWER CO.

(Circuit Court, E. D. Pennsylvania. June 29, 1894.)

No. 26.

1. PATENTS—INFRINGEMENT BY USER.

The purchaser of a patented article is not liable as an infringer where he purchased it from one having a legal right to sell it. Adams v. Burke, 17 Wall. 453, and Hobbie v. Jennison, 13 Sup. Ct. 879, 149 U. S. 361, followed.

2. SAME—PRELIMINARY INJUNCTION—DECISION IN ANOTHER CIRCUIT.

A decision by another circuit court that the person from whom the present defendant purchased the alleged infringing articles had a legal right to sell them is sufficient ground for denying a motion for a preliminary injunction.

This was a bill by the Edison Electric Light Company and others against the Citizens' Electric Light, Heat & Power Company for infringement of letters patent No. 223,898.

Dyer & Seely, C. E. Mitchell, and S. B. Huey, for complainants.
J. L. Steinmetz, for defendant.

DALLAS, Circuit Judge. This is a motion for a preliminary injunction to restrain the defendant from using certain electric lamps in alleged violation of the rights of the complainants, under what is known as the "Edison Patent for Incandescent Lamps." The substantial question is as to the weight which should, upon this application, be accorded to the action of the circuit court for the Northern district of Ohio, on certain motions made in that court for, and to dissolve, preliminary injunctions in suits upon the same patent. In disposing of the motions referred to, Judge Ricks delivered three opinions, which have been discussed at length by counsel and

attentively read by me; but I do not deem it necessary or advisable to express any opinion of my own upon the subject with which they deal. It is enough to say that he has decided that the lamps now involved could be lawfully made and sold by the defendant's vendor; and under *Adams v. Burke*, 17 Wall. 453, and *Hobbie v. Jenison*, 149 U. S. 361, 13 Sup. Ct. 879, the user of a patented article is not liable as an infringer where he purchased it of a person who had a legal right to sell it. Nothing is now indicated as to the view which may be taken of this case when considered upon pleadings and proofs; but I am of opinion that, because a preliminary injunction against the maker of the lamps has been refused in the Sixth circuit, this court should not, upon interlocutory application, enjoin the use of them by a defendant who bought them from that maker. The motion for a preliminary injunction is denied.

TRAUT & HINE MANUF'G CO. et al. v. WATERBURY BUCKLE CO.
(Circuit Court, D. Connecticut. November 16, 1894.)

No. 820.

1. PATENT—INFRINGEMENT—PRELIMINARY INJUNCTION.

Defendant's device showed all the elements of the broadest claim of the patent to George E. Adams (No. 487,689), for a "cast-off" device for connecting and disconnecting the web and the front end of a pair of suspenders, but defendant's arrangement of parts was not wholly that of the patent, but the practical equivalent, the patentee's arrangement not being essential to the operation of his device. *Held*, that a preliminary injunction should be granted, and its operation suspended until the case be heard and disposed of by the circuit court of appeals.

2. SAME—ANTICIPATION.

An affidavit that certain exhibits, claimed to anticipate or limit the scope of the patent in suit, were conceived prior to the application, and manufactured prior to the issue of the patent, and that the exhibits were suggested to take the place of a certain imported device alleged to have been in use in this country prior to the date of the patent, is too indefinite to constitute a defense.

This was a bill in equity by the Traut & Hine Manufacturing Company and George E. Adams against the Waterbury Buckle Company for infringement of a patent. Heard on motion for preliminary injunction.

Mitchell, Hungerford & Bartlett, for complainants.
Terry & Bronson, for respondent.

TOWNSEND, District Judge. Motion for a preliminary injunction. The patent in suit, No. 487,689, is for an improvement in garment supporters, and was applied for by the complainant George E. Adams, August 9, 1892, and granted December 6, 1892. The complainant corporation is the exclusive licensee under said patent. The complainant and defendant corporations are each large manufacturers of suspender fittings. The invention claimed covers a novel construction of the device known as a "cast-off," whereby the web and the front ends of a pair of suspenders are readily and rapidly con-

nected and disconnected. The objects of the invention are stated to be "to produce a cast-off device, through which a portion of the attaching loop may readily slide with the constant changes in position of the wearer," and "to provide an ornamental form of cast-off device which will be durable in construction and simple and convenient in operation." The combination claimed comprises oppositely pivoted back and front plates, the lower portions of each being concave,—the back member or guard tongue in order to receive and support the suspender cord, the front member in order to fit snugly over said guard tongue,—and a catch, and lip to engage said catch. The catch is described in the specification and shown in the drawings as located "at the point of junction between the concavity and the lip," which is at the center of the concavity formed by the two opposing sides when in attachment.

The claims of said patent are as follows:

"(1) In a cast-off for garment supporters, in combination, two oppositely pivoted members, having oppositely arranged concavities to receive a cord or its equivalent, and a latch for positively locking the members together, as described. (2) In a cast-off for garment supporters, the combination, with a depending plate having a downwardly curved transverse concavity and a guard tongue curving upward from the edge thereof, of an oppositely curved locking member, adapted to fit over the guard tongue, as described. (3) The combination, with the plate, 9, having the concavity, 10, the guard tongue, 11, and a catch, 12, and pivoted to the link, 5, by the ears, 8, 8, of the locking member, 14, also pivoted to said link, and having a lower concavity, adapted to cover said guard tongue, a lip, 15, for engaging the catch, 12, and a thumb piece, 16, as and for the purpose described."

Title in complainants is proved. There has been no adjudication establishing the validity of the patent, but acquiescence is claimed, and is supported by affidavits from which the following facts appear: The first cast-offs manufactured in accordance with the claims of said patent were furnished in September, 1892, to Fisk, Clark & Flag, suspender makers in New York City, who had obtained the exclusive control of the patented article. It was not furnished to the general trade until February or March, 1894. During the whole period since the fall of 1892, covering, it is claimed, two seasons in each year, the public have acquiesced in the validity of said patent. Notwithstanding the fact that the trade in general have expressed a desire to obtain such cast-offs, and were unable to do so until recently on account of the Fisk, Clark & Flag contract, the affidavits of several of the largest manufacturers and dealers in various states show that they recognized the novelty and great utility of the device, and refrained from the infringement of the patent. The sales have been constantly increasing, and already amount to upwards of a million cast-offs. So far as appeared on the hearing, this cast-off was a meritorious article, and a decided improvement upon those shown by the prior art. The affidavits of the witnesses for defendant do not seriously question the validity of the patent. These facts support the presumption of validity raised by the grant of the patent sufficiently to warrant a temporary injunction.

The defendant denies infringement. It appears that the style of cast-off furnished to the trade in February or March, 1894, differs

from that manufactured for Fisk, Clark & Flagg, and from the device illustrated in the drawings of the patent. The cast-off manufactured by defendant is almost identical with this later model. The claim of defendant is that neither of these cast-offs is covered by the patent. Complainants' exhibit, "Waterbury Cast-Off," shows the device manufactured by the defendant. The lower portion of the back plate is curved in the shape of a letter J, the upper or front part forming a lip. The front plate is not concave. It is slightly curved, but such curve is not absolutely essential to the practical operation of the device. It has a lip to engage the catch in the back plate, but this lip and catch, when in engagement, are not located at the center of the concavity, but at the upper end of the front part of the back plate. It therefore has neither the specific oppositely arranged concavities, nor the catch at the point of junction between the concavity and the lip, of the first and third claims.

It is strenuously urged by counsel for complainants that defendant's cast-off contains the elements of complainants' invention in the combination claimed by the patentee, provided the patent is properly and fairly construed. Whether this contention is correct depends upon the construction of the second claim, which appears to be the broadest of the three claims. All of the elements of the patented device are found in defendant's cast-off. The question is whether they are constructed and combined as described in said patent. The lower end of the front plate is adapted to be used as a thumb piece. I think the curve at the lower part of defendant's back plate may fairly be considered as the practical equivalent of the concavity in the back plate of complainants' patent. Each is so constructed and arranged as to receive and hold the button-hole loop, and allow it to readily slide with the constant changes in position of the wearer. The front plate, although not concaved or snugly fitting, yet is "adapted to fit over the guard tongue." The phrase "as described" does not necessarily confine the patentee to every detail of construction stated in the specification. It must be interpreted in the light of the substance and substantial purpose of the invention. The location of the catch is not, and is not stated to be, a special feature of complainants' invention. It relates merely to the form of the device. The object was to so arrange it that it might be readily engaged and disengaged. The downward pull being entirely on the back plate, it is not essential to the practical operation of the device that said catch be located at the center of the concavity. *Lake Shore & M. S. Ry. Co. v. National Car-Brake Shoe Co.*, 110 U. S. 235, 4 Sup. Ct. 33; *Snow v. Railway Co.*, 121 U. S. 617, 7 Sup. Ct. 1343.

The affidavit of Dwight S. Smith, the general superintendent of the defendant corporation, as to certain exhibits claimed to anticipate or limit the scope of the patent in suit, is not sufficiently definite to constitute a defense. He merely states that they were conceived by him prior to the date of the application for the patent in suit, and were manufactured by the defendant corporation prior to the date of the issuing of said letters patent. There is no evidence to show the character of the conception, or whether or not it was reduced to practice. The same criticism applies to the statement in

his affidavit that these exhibits were suggested to take the place of some imported device alleged to have been in use in this country prior to the date of the patent.

I am inclined to think, though with some hesitation, that the limitations contended for by defendant should not be applied. In the recent case of Consolidated Bunting Apparatus Co. v. Metropolitan Brewing Co., 8 C. C. A. 485, 60 Fed. 93, Judge Lacombe, delivering the opinion of the court of appeals refusing to confine the claim to a certain form illustrated and described in the patent, says:

"Except for the italicized phrase quoted in the first of these descriptions, there is no reference whatever in the specification to a knife-edge bearing valve. Nowhere is there pointed out any advantage arising from the use of that particular form of mechanical fit valve. There is no suggestion that anything depends upon the bearing being of this shape; nothing to show that such a construction was regarded by the patentee as an improvement, to be covered by his patent; and the claim is not for a combination with a knife-edge bearing valve, but for one with a mechanical fit valve, which term, as has been shown, covers many other bearings besides the knife-edge; and a construction of the first claim which will confine it to knife-edge bearing valves cannot be sustained." Delemater v. Heath, 7 C. C. A. 279, 58 Fed. 414.

See, also, Woodward v. Machine Co., 8 C. C. A. 622, 60 Fed. 283.

Under all the circumstances, I think the ends of justice will best be promoted by granting the injunction asked for, but suspending its operation until the case can be heard and disposed of by the circuit court of appeals. Let a decree be entered for a preliminary injunction, and also an order suspending its operation in accordance with this opinion.

MUD SCOWS NOS. 18, 19, 21, 25, and 31.

(Circuit Court of Appeals, Second Circuit. May 29, 1893.)

No. 96.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by Frederick Stebbins, Archibald Watt, Clement Doty, Frederick Hart, and Patrick O'Keefe against Mud Scows Numbers 18, 19, 21, 25, and 31, for salvage services performed by the steam tug Archibald Watt. A decree was rendered for libelants (50 Fed. 227), from which the Morris & Cummings Dredging Company, claimant, appeals.

Albert A. Wray, for appellant.

Franklin A. Wilcox (Wilcox, Adams & Green, on the brief), for appellees.

PER CURIAM. We do not think the sum allowed as salvage in this case, viz. \$150 for each \$6,000 scow, is at all unreasonable, irrespective of any calculation as to the probability of one or more of them causing damage, while adrift, to other vessels. Therefore, in affirming the decree, we do not think it necessary to discuss the questions raised as to the propriety of taking that contingency into consideration in fixing the amount of salvage allowance. The decree of the district court is affirmed, with interest and costs.