

The defendant has further insisted that it has not been shown that it was connected with, or in any manner responsible for, any act of infringement which has been proved; but, upon careful consideration of all the evidence, I have reached the conclusion that it is sufficient to fix upon the defendant the sale of the infringing table made through Mr. Hogg, in New York. The proof of Mr. Hogg's agency is not as clear as might be desirable, and I have hesitated upon the question, but can only repeat that, after reflecting upon it, I am convinced that the point has been established. There is, in my opinion, nothing in the circumstances of this case, or in the facts which have been urged by way of exculpation, which would justify the refusal of an injunction. That the defendant did not intentionally violate the plaintiff's right, that he does not propose to continue to do so, or that it is not probable that the infringement will be repeated,—all which facts he, not unreasonably, asserts,—cannot avail to defeat the right of the complainant to preventive relief. *Celluloid Manuf'g Co. v. Arlington Manuf'g Co.*, 34 Fed. 324; *White v. Wallbridge*, 46 Fed. 526; *Glass Co. v. Macbeth*, 12 C. C. A. 70, 64 Fed. 118.

A decree for the complainant for injunction only will be entered.

MARTIN & HILL CASH-CARRIER CO. v. MARTIN.

(Circuit Court of Appeals, First Circuit. December 30, 1895.)

No. 97.

DECISION ON APPEAL—LEAVE TO AMEND PLEADINGS.

Where an appellate court affirms a decision dismissing a bill in a patent suit, it will not, under the circumstances of this case, grant leave to the complainant to amend his bill so as to sue upon other patents not previously in issue. *American Bell Tel. Co. v. U. S.*, 15 C. C. A. 569, 68 Fed. 542, 570, applied.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by the Martin & Hill Cash-Carrier Company against Joseph C. Martin for the infringement of patents Nos. 255,525, 276,441, and 284,456, granted to defendant, Martin, for improvements in automatic cash-carrier systems for store service, and assigned to complainant company. By amendments to the bill the latter two patents were stricken out and the suit proceeded upon the first claim of patent No. 255,525. The circuit court held that there was no infringement, and dismissed the bill. 62 Fed. 272. The complainant appealed to this court, which, on May 9, 1895, affirmed the decree, with costs. 14 C. C. A. 642, 67 Fed. 786. Afterwards leave was given to the appellant to file a petition for a rehearing and an alternative petition for leave to amend the bill so as to sue upon certain other patents owned by the complainant.

John Lowell, M. B. Phillip, and Samuel Norris, Jr., for complainant.
F. P. Fish and W. K. Richardson, for defendant.

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

PER CURIAM. In this case we ordered a rehearing of the questions of estoppel raised by the appellant. The rehearing has been had, and we have carefully considered the propositions then made to us, and find no occasion to modify our opinion passed down May 9, 1895. 14 C. C. A. 642, 67 Fed. 786. We see no equity in the application that leave may be reserved for amendments in the circuit court. The case in that court was not made up so as to test the validity and effect of the several patents which the appellant now asks to be permitted to have opportunity to introduce formally, nor have we the proofs here bearing upon them. It seems plain that the complainant framed its case deliberately,—in fact, so deliberately that it amended by striking out allegations as to several of the patents referred to, and by cutting down the bill to its present form. It now asks to make a case in substantial respects different from that deliberately made in the circuit court. Moreover, the decision there was against it. Then was its proper time to apply for leave to amend, if it desired to do so, in order to strengthen its position. If the decision below had been in its favor, and this court had reversed that decision on grounds which operated as a surprise, or if we had the facts here, and there was a mere error in pleading, the equities in favor of the application might be different. We think the distinction must be kept clearly in view between amendments allowable before an appeal and those for which a cause is to be kept along thereafter. Most of the decisions cited by the appellant relate to the former, and so are not in point; and none of them sustains this application. *Woodward v. Boston Lasting Mach. Co.*, 11 C. C. A. 353; 63 Fed. 609, was an exceptional case, the point on which it turned in this court having been made by the court itself.

This case comes within the closing remarks of our opinion in *American Bell Tel. Co. v. U. S.*, 15 C. C. A. 569, 68 Fed. 542, 570, as follows:

"We have already found that, as the record now stands, it contains no proof to sustain an allegation of this character. Therefore, an amendment of this nature would require the opening of the record below for further proofs. It is not at all a case where a complainant has proved his case, but his allegations are found by the appellate court to be inapt. To grant this motion would, under the circumstances, violate all the rules requiring diligence from parties complainant."

The decree heretofore entered having been vacated by the allowance of the petition for a rehearing, the decree of the circuit court is affirmed, with costs.

DIAMOND MATCH CO. v. SOHENCK et al.

(Circuit Court, E. D. Pennsylvania. December 30, 1895.)

No. 22.

1. PATENTS—ANTICIPATION.

Proof of the pre-existence of suggestions, as distinguished from practically available description, does not establish anticipation. It is not enough that by selecting parts from several prior patents, and making but little change therein, the contrivance of the patent in suit might be constructed.

2. SAME—PLEADING—NOTICE OF DEFENSE OF PRIOR USE.

A notice of a defense of prior use, which recites the names and residences of the alleged users, but wholly omits to describe the place of such use, is fatally defective.

3. SAME—FRICTION-MATCH DEVICE.

The Pusey patent, No. 483,166, for a friction-match device, designed to be carried in the pocket, held valid and infringed.

This was a suit in equity by the Diamond Match Company against John H. Schenck and John M. Moore, trading as Dr. J. H. Schenck & Sons, and the Binghamton Match Company, for alleged infringement of a device relating to friction matches.

Joshua Pusey, for complainant.

Wm. S. Price and Jas. Wilson Bayard, for defendants.

DALLAS, Circuit Judge. The bill in this case charges the defendants with infringement of claims 1, 2, 4, 5, and 6 of letters patent No. 483,166, dated September 27, 1892, granted to Joshua Pusey, for a friction-match device, designed to be carried in the pocket. The defenses relied upon are lack of invention and novelty. Of the several patents introduced by the defendants, two (said in their brief to be "identical in import") have been mainly discussed, namely, "Roca's Italian patent," granted January 16, 1879, and "Roca's Belgian patent," granted January 31, 1879. These patents are in foreign languages, and the usual controversy as to whether they exhibit the invention covered by the patent in suit has been complicated by contention respecting the meaning of certain of their material words and phrases. The translations supplied by the defendants may be correct, but by cross-examination of the translators, and by evidence for the complainant (exclusive of the "patent-office translation," the incompetency of which is admitted), they have been so seriously impugned as to impair, at least, confidence in their accuracy. The defendants affirm that these patents anticipated the invention of Pusey, and the burden which they assumed, to support that allegation fully, clearly, and exactly, included an obligation to adduce, as they might readily have done, translators and translations impregnable to reasonable criticism; and their failure to do this has occasioned much complexity in argument, and perplexity in consideration. But one fact, and that a determinate one, seems