

keeping mechanism is the essential part of a watch. Case manufacturers have not usually put marks of origin on their peculiar product; at least no such marks as would mislead touching the maker of the movement. There was and is but one establishment at Elgin in which watch movements are made, namely, that of complainant. Defendants place upon some of their watch cases the words "Elgin Tiger," upon others the words "Elgin Commander," and upon others "Elgin Giant." They procured the registration of the words "Elgin Tiger" in the patent office at Washington in December, 1893, and the words "Elgin Giant" in April, 1894. A watch case is intended to inclose a watch movement. The customer buys the cased movement as a watch. I think the evidence shows very clearly that the intent of the defendants, and the effect of what they did, was to use the reputation of the complainant for the purpose of enabling inferior movements, not made by the Elgin National Watch Company, but inclosed in cases made by the defendants, to be sold as Elgin watches. That is to say, the idea was that people familiar with, or having knowledge of, the article manufactured by complainant, might be induced to buy as an Elgin watch an inferior or different movement if placed in one of the cases made by defendants, and marked with the word "Elgin" in one of the combinations "Elgin Tiger," "Elgin Giant," or "Elgin Commander." The bill alleges that the watch movement made by the complainant is intended for and is the subject-matter of commerce in foreign countries, but it does not contain the averment that the defendants' product is also sold in foreign countries, or intended for foreign commerce. It is a fair inference, not only from matters put in evidence by the complainant, but also from the sworn statement made by defendants in procuring the registrations mentioned above, which statements were put in evidence by defendants, that their product is also intended to be, and is in fact, the subject of foreign or international commerce. I think, upon this showing, complainant may be permitted to amend its bill in the respect here referred to, and that a decree for an injunction may go.

DOIG v. MORGAN MACH. CO.

(Circuit Court, N. D. New York. October 17, 1898.)

1. PATENTS—SUITS FOR INFRINGEMENT—FORMER JUDGMENT.

Collusion in the obtaining of a former judgment establishing the validity of a patent cannot be predicated on the defendant's failure to appeal.

2. SAME—PRELIMINARY INJUNCTION—IMPEACHING FORMER DECREE.

To justify a court in refusing a preliminary injunction against an infringer of a patent which has been sustained in a previous litigation, the defendant must prove either that the former decree was fraudulent, or that new proof so materially changes the aspect of the case that a different decree might have resulted, had it been presented in the original suit.

Suit in equity for the infringement of a patent. On motion for a preliminary injunction.

Wilson W. Hoover, for complainant.

Church & Church and Frederick F. Church, for defendant.

COXE, District Judge. The patent in suit, No. 342,268, has received careful judicial construction in *Doig v. Sutherland*, 87 Fed. 991, where the claims in issue, Nos. 5 and 6, were sustained by the circuit court. The defendant resists the motion for an injunction upon two principal grounds: First, that the former suit was not a bona fide one; and, second, that the state of the art as now presented establishes the invalidity of the patent for lack of invention.

The first proposition fails for want of proof. The controversy in the *Sutherland* suit seems to have been genuine and to have been conducted with ability and persistency on both sides. A few facts, which possibly permitted a suspicious inference, have been explained by the complainant's affidavits. The suggestion that the court was misled cannot be accepted. The character of counsel renders it most improbable that such an attempt was made, and the ability of the judge precludes the idea that, if made, it could have been successful. Collusion is also predicated of the failure to appeal. The failure to do this does not show common deceit; it does show common sense. If the defendant's counsel in the *Sutherland* suit supposed, as they well might, that an appeal would not succeed, it was their duty so to advise their client. In this age, when legislative and, oftentimes, judicial encouragement is given to appeals for every trivial and inconsequential mistake, the fact that an appeal is not taken is, at least, presumptive proof that the judgment is too firmly entrenched to be overthrown. The withdrawal from a cause by a defendant has never been regarded as proof of the strength of his defense. The facts surrounding the settlement of the former suit have been laid before the court. The settlement shows prudence and good judgment; it shows nothing more.

The attention of the court is now called to a number of patents which were not in the former record. The court is not at all satisfied that had they been in the *Sutherland* Case the result would have been different. Nothing now presented approximates the patent so closely as the *Swan* patent, which was held to be wholly insufficient as an anticipation. None of the new patents shows the combination of the fifth claim, and it is by no means certain that all combined would convey to a mechanic the ingenious idea embodied in that combination. It is not thought necessary or wise to discuss this branch of the motion further, as the question may present a different aspect should the cause reach a final hearing.

Infringement is clear under the construction given the claims in the former suit. The defendant is not an innocent infringer. It began making the infringing machine after the former litigation was begun and notice given to the trade. The complainant has a patent which has been sustained after a long and expensive litigation. The defendant infringes. Why should he not be enjoined? If the complainant's decree is fraudulent the burden rests heavily upon the defendant to prove it. This has not been done. Suspicion, even though well founded, is not enough. The same is true of the new evidence. It must appear that the new proof so changes the aspect of the case that a different decree might have resulted had it been present in the original suit. Of course the two suits present points of difference.

No two cases are exactly similar on the facts; but the court should not be overzealous in the search for distinctions to enable an infringer to evade a patent once sustained. Pending the trial of this action one of these parties must suffer loss. This is inevitable. No system yet devised by man can mete out absolute justice. As this case now stands the defendant is in the wrong. It must prove itself in the right before it can use the patented device. This court has so recently expressed its views upon similar situations that further elaboration is unnecessary. *New York Filter Mfg. Co. v. Niagara Falls Waterworks Co.*, 77 Fed. 900, 906; *Same v. Elmira Waterworks Co.*, 83 Fed. 1013; *Beach v. Inman*, 75 Fed. 840, 842. The motion is granted, the complainant to give a bond in the sum of \$2,000.

CHUSE et al. v. IDE et al.

(Circuit Court of Appeals, Seventh Circuit. October 3, 1893.)

No. 487.

1. PATENTS—CONSTRUCTION—INVENTION.

The lubricating art being one which embraces all machinery, a patent cannot, by including in the claim for a means of lubrication the parts of a peculiarly constructed engine or machine, cut off inquiry into the state of the art as applied to other machinery.

2. SAME—IMPROVEMENTS IN LUBRICATING DEVICES.

The Ide patents, Nos. 321,726 and 400,682, for improvements in lubricating devices, are void for want of invention.

3. SAME—IMPROVEMENTS IN ENGINE FRAMES.

The Ide patent, No. 396,209, for improvements in engine frames, is void for want of invention.

Appeal from the Circuit Court of the United States for the Southern District of Illinois.

This appeal is from a decree for an accounting and for an injunction against infringement of claims 1 and 4 of letters patent No. 321,726, claim 3 of letters patent No. 396,209, and claims 2 and 3 of letters patent No. 400,682, all granted to Albert L. Ide, who died pending the suit. The suit was revived and prosecuted to a decree by his executors, the appellees. Patent No. 321,726 was issued on July 7, 1885, and, according to the specification, is for "improvements in steam engine crosshead lubricators." The claims thereof in issue read as follows: "(1) The combination, with the crosshead guides and connecting rod of an engine, and means for feeding a lubricant to the upper guide, of a crosshead provided with a passage adapted to convey the lubricant from the upper guide to the bearing surfaces of the pivotal joint between the said crosshead and rod, substantially as described." "(4) The combination, with the crosshead guides and connecting rod of an engine, and means for feeding a lubricant to the upper guide, of a hollow crosshead adapted to receive the end of the connecting rod, and provided with a passage, h', for conveying lubricant from the upper guide to the interior of the crosshead, said connecting rod being provided with a funnel communicating with the bearing surfaces of the pivotal joint between the rod and crosshead, substantially as and for the purpose set forth." The elements of claim 1, according to the experts on either side, are: (a) The crosshead guides of an engine; (b) the connecting rod journaled to the crosshead; (c) means for feeding a lubricant to the upper guide; (d) a crosshead provided with a passage adapted to convey the lubricant from the upper guide to the bearing surfaces of the pivotal joint between the crosshead and connecting rod. Claim 4 specifies the same elements, the crosshead being described as hollow, "adapted to receive the end of the connecting rod, and provided with