

edition of the complainant's; but there are nevertheless many passages which seem to have been conveyed from the copyrighted edition. The answer to the question of fact upon which the case turns is not entirely clear. Even conceding full weight to the suggestions above set forth, some of the resemblances between the two sets of publications are strongly indicative of piracy. But a preliminary injunction, such as is prayed for, would be practically a judgment in advance of hearing, working irreparable damage to defendants; and it is thought best to relegate the question to final hearing. Cross-examination may give so clear a conviction as to the direct evidence as to enable the court to weigh the circumstantial evidence more correctly.

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DUFF MFG. CO. v. KALAMAZOO RAILROAD VELOCIPEDA & CAR CO.

(Circuit Court, W. D. Michigan, S. D. August 3, 1898.)

1. PATENTS—PRELIMINARY INJUNCTION.

Where a patent has been sustained by the circuit court of appeals in another circuit after a serious contest, the court will award a preliminary injunction, if infringement is clear, and postpone to the final hearing all questions relating to the validity of the patent, unless there is new evidence so clear and persuasive in character as to leave no fair doubt that such former decision was erroneous, and would have been different if the new matter had been before the court.

2. SAME—JACKING APPARATUS.

The Barrett patents, Nos. 455,993 and 527,102, for a jacking apparatus, construed on motion for preliminary injunction, and held valid and infringed; the former as to claims 1 and 6, and the latter as to claim 19.

This was a suit in equity by the Duff Manufacturing Company against the Kalamazoo Railroad Velocipeda & Car Company for alleged infringement of letters patent No. 455,993, granted July 11, 1891, and No. 527,102, granted October 9, 1894, both to Josiah Barrett, for a jacking apparatus. The claims involved are 1 and 6 of the earlier patent, and 19 of the later one. The cause was heard on a motion for preliminary injunction.

Kay & Totten, for complainant.

Howard, Roos & Howard, for defendant.

SEVERENS, District Judge. A motion is made in this case for a preliminary injunction to restrain the defendant from manufacturing or selling a certain kind of lifting jacks, which are alleged to be infringements of the patents of the complainant. It appears from examination that the claims in the complainant's patents here sued on have been the subject of litigation in the federal courts of the Third circuit, where their validity has been sustained by the circuit court and the circuit court of appeals upon records nearly as full as the present in respect to the defense of anticipation. *Manufacturing Co. v. Forgie*, 57 Fed. 748, 78 Fed. 626; *Id.*, 26 C. C. A. 654, 81 Fed. 865. Upon that point the question was quite elaborately considered, and evidently upon a bona fide record and strenuous controversy. The general rule of comity requires this court, in such circumstances, to

award a preliminary injunction, if there is infringement, and postpone to the final hearing the determination of the questions relating to the validity of the patent, unless there is new evidence of such clear and persuasive character as to leave no fair doubt that the former decision was erroneous in point of fact, and would have been different if the new matter had been before the court. *Electric Mfg. Co. v. Edison Electric Light Co.*, 10 C. C. A. 106, 61 Fed. 834.

The defendant here, for the purpose of obviating the consequences of this rule, submits and relies upon the Gard patents, Nos. 116,296 and 123,010, as clear anticipations of the complainant's claims. But, whatever consideration and effect may be given to those patents upon final hearing, I think it cannot be held that they constitute such clear and positive proof of anticipation as to meet the requirement of the present occasion. I think a preliminary injunction should issue as prayed.

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OVERWEIGHT COUNTERBALANCE ELEVATOR CO. v. IMPROVED ORDER OF RED MEN'S HALL ASS'N OF SAN FRANCISCO.

(Circuit Court of Appeals, Ninth Circuit. February 13, 1899.)

No. 470.

1. PATENTS—PLEADING AND EVIDENCE—ANTICIPATIONS.

There is no error in admitting in evidence a patent of which notice has not been given, under Rev. St. § 4920, where it is introduced, not as an anticipation, but merely to show the prior state of the art, as bearing solely upon the question of infringement.

2. SAME—CONSTRUCTION OF CLAIMS—COMBINATIONS.

When a specific element is not claimed as a device by itself, but all the claims are for a combination, this is, in effect, an admission that such element was old, and was not invented by the patentee.

3. SAME—INFRINGEMENT OF COMBINATION CLAIMS.

If the invention claimed be but an improvement on a known machine, by a mere change of form or combination of parts, the patentee cannot treat another as an infringer who has improved the original machine by the use of a different form or combination performing the same functions. The inventor of the first improvement cannot invoke the doctrine of equivalents to suppress all other improvements which are not mere colorable evasions of the first.

4. SAME—EXPERT EVIDENCE—JURY TRIAL.

Where, in a jury trial, the question is as to whether an element in defendant's machine is the mechanical equivalent of one of the elements in the patented machine, the mere fact that there is testimony by experts that it is such an equivalent does not necessarily require the submission of the case to the jury; for the court is not bound to accept the opinion of experts, but may draw its own conclusions from an inspection of the respective machines or models, and if, in its opinion, the evidence is insufficient to support a verdict for the plaintiff, it may instruct the jury to find for defendant.

5. SAME—ELEVATORS.

The Hinkle patent, No. 257,943, for an improvement in freight and passenger elevators, construed, and *held* not infringed.

In Error to the Circuit Court of the United States for the Northern District of California.

For opinion of circuit court, see 86 Fed. 338.