

HOGG v. GIMBEL et al.

(Circuit Court, E. D. Pennsylvania. May 26, 1896.)

DESIGN PATENTS—NOTICE OF PATENT—MARKING ARTICLES.

Under Rev. St. § 4900, if the patented articles sold by complainant are properly marked "Patented," either on the articles themselves or the inclosing package, this is general notice to the public, so that one who makes or sells such articles is liable for infringement, though he may in fact have been ignorant of the patent.

This was a suit in equity by William James Hogg against Gimbel Bros. for alleged infringement of a patent for a design for carpets.

Southgate & Southgate, for complainant.

John G. Johnson, for defendants.

McPHERSON, District Judge. This case was heard upon bill and answer. The complainant, who is a manufacturer of carpets, is the owner of design patent No. 25,907, and has made and sold large quantities of carpeting embodying such design. The patent embraces two claims,—one for a carpet body, and the other for a carpet border; and, as the answer admits, both claims have been infringed by the defendants. They made sales of a body and a border that were exact copies of the complainant's design, but they seek to avoid liability by denying actual knowledge of the patent at the time the sales were made. This denial of knowledge in fact must be accepted as true,—no testimony having been taken,—and the question for decision, therefore, is whether other facts averred in the bill, and not denied by the answer, are sufficient to visit the defendants with the consequences of constructive knowledge. These facts are, as averred in paragraph 4 of the bill, that the complainant gave "sufficient notice to the public that the [design] is patented by affixing thereon the word 'Patented,' together with the date and year the patent was granted, or by affixing to it, or the package wherein said carpeting was inclosed, a label containing a like notice, and has complied in all respects with the statute in such case made and provided."

Upon these facts, I think that the complainant has fulfilled the obligation imposed upon him by section 4900 of the Revised Statutes. The point was decided in *Dunlap v. Schofield*, 152 U. S. 248, 14 Sup. Ct. 577, in which the supreme court declare that this section makes it the duty of every patentee or his assignee, and of all persons vending any patented article for or under them, to give the public sufficient notice that it is patented, by putting the word "Patented" upon it, or upon the package inclosing it, and then go on to say:

"The clear meaning of this section is that the patentee or his assignee, if he makes or sells the article patented, cannot recover damages against the infringers of the patent, unless he has given notice of his right, either to the whole public by marking his article 'Patented,' or to the particular defendants by informing them of his patent and of their infringement of it. One of these two things—marking the articles, or notice to the infringers—is made by the statute a prerequisite to the patentee's right to recover damages against them. Each is an affirmative fact, and is something to be done by him."

The same section was considered in this circuit in *Matthews & Willard Mfg. Co. v. National Brass & Iron Works*, 71 Fed. 518.

In the present case the undisputed fact is that the complainant gave notice to the whole public, thus including the defendants, by marking properly the manufactured articles or the inclosing package. This being so, it is not material that the defendants did not have actual notice or knowledge of the patent. It is also undisputed that the defendants have infringed both claims of the complainant's patent, and I am therefore of opinion that a decree must be entered imposing the statutory penalty of \$250, under the act of February 4, 1887 (24 Stat. 387; 1 Supp. Rev. St. p. 533), for each of the two acts of infringement.

A decree may be drawn containing the preliminary injunction and making it perpetual, and directing the defendants to pay the sum of \$500, with costs.

OWATONNA MFG. CO. v. F. B. FARGO & CO.

(Circuit Court, D. Minnesota. February 1, 1899.)

1. PATENTS—SUIT FOR INFRINGEMENT—PARTIES.

While the owner of the title to a patent is for technical reasons a necessary party to any suit for its infringement, where the complainant in such a suit in equity is the owner of the exclusive right to manufacture and sell the patented article in the United States he has all the substantial right to the relief and to the recovery, the owner of the title being only a formally necessary party, who may be brought in by amendment, and the complainant may be permitted to show, by supplemental bill, that he acquired the technical title to the patent immediately after the commencement of the suit, and in such case the fact that the prior owner was not made a party will not defeat the suit.

2. SAME—INFRINGEMENT—COMBINED CHURN AND BUTTER WORKER.

The machine described in the Disbrow patent, No. 490,105, for a combined rotary churn and butter worker, while not the first to embody the idea of combining the two functions, was the first to perform the double function in such satisfactory manner as to bring it into extended and general use, and the patent is entitled to the liberal construction in respect to equivalents accorded to pioneer inventions. It is infringed by a machine different from that described therein only in respect to the gearings, which are either merely changed in form, without any substantial change in device, or in which obvious mechanical equivalents are substituted for some of the parts in the patented machine.

This was a suit in equity by the Owatonna Manufacturing Company against F. B. Fargo & Co. for alleged infringement of a patent.

Paul & Hawley, for complainants.

Benedict & Morsell, for defendants.

LOCHREN, District Judge. The complainant, a Minnesota corporation doing business at Owatonna, in that state, brings this suit to restrain the defendant, a Wisconsin corporation, from infringing patent No. 490,105, issued January 17, 1893, to Reuben B. Disbrow and Darius W. Payne for combined churn and butter worker, and to recover damages for past infringement. The defendant, be-