1924
May 23.

DOMINION BEDSTEAD COMPANY ET AL ..... } PLAINTIFFS;

AND

JOSEPH GERTLER ET AL..... DEFENDANTS.

Patents—Infringement—Narrow Patent—Prior Art—Strict Construction.

Held, that the question of infringement of a patent must be determined by the limitations placed upon the patent by the state of the prior art when it was issued; and in case of a subsequent narrow patent, as distinguished from a pioneer patent, it should receive strict construction.

2. That it is always open to a subsequent inventor to accomplish the same results as a former inventor by substantially different means.

ACTION to have plaintiffs' patent declared valid and infringed by defendants.

April 23rd, 24th and 25th, 1924.

Action now heard before the Honourable Mr. Justice Audette at Montreal.

John W. Cook K.C. and *A. A. Magee for plaintiffs.*

R. S. Smart and *M. B. Rose* for defendants.

The facts are stated in the reasons for judgment.

AUDETTE J., now (this 23rd May, 1924), delivered judgment (1).

This is an action for an alleged infringement by the defendants of the Canadian Patent No. 209,206, bearing date the 8th March, 1921.

The grant covered by the patent is

for an alleged new and useful improvement in Bed Frames,

(1) An appeal has been taken to the Supreme Court of Canada.

as substantially set out in the two claims of the patent, as follows, viz:—

What I claim is:—

1. In a bed frame having head and foot frames and side bars, bracket bases secured to the posts of said head and foot portions and forming mountings for cross bars, brackets of angular form set on said bases and having a pin and notch fastening parts and plates secured to and distanced from said side bars and having corresponding pins and notches.

2. A bed frame comprising a head frame having posts, rails, and an angular cross bar, a foot frame having posts, rails, and an angular cross bar, bracket bases having inset faces and vertically grooved backs fitting said posts, angle brackets vertically set on said inset faces and having notches and pins in the projecting leaves, screws securing said brackets, bracket bases, cross bars and posts together, side bars of angular formation having one section fitting between the ends of said cross bars and the projecting leaves of said brackets, and plates having offsets secured to said side bars and distanced therefrom to form recesses for said projecting leaves and having notches and pins for fastening purposes.

The plaintiffs produced at trial exhibits 5a and 5b as the product of their patent and claim that exhibits 8 and 9, manufactured and sold by the defendants, constitute an infringement on 5a and 5b, and confine and narrow down their complaint as to whether or not there has been an infringement of their patent in manufacturing and selling bed frame corner devices similar to exhibits 8 and 9.

There may exist a couple of minor differences between 5a and 5b and the plaintiffs' patent, which are taken to be immaterial for the determination of the present issues.

The plaintiffs' patent is in itself very narrow, considering the state of the prior art, and the question of infringement or non-infringement must be determined by the limitations placed upon the patent by the state of the art when it was issued. *Grisworld* v. *Harker* (1); *McCormick* v. *Talcot* (2).

Moreover the patent's claims, being narrow, should receive and be upheld to a strict construction, and under such construction and limitation the controversy submitted for determination is whether the defendants are infringers. *Moodie* v. *Canadian Westinghouse* (3); *Johnson* v. *The Oxford Knitting Co.* (4); *Barnett-McQueen Co.* v. *Canadian Stewart Co.* (5).

(1) [1894] 62 Fed. 389, 10 C.C.A. 435.
(2) [1857] 61 U.S. (20 How.) 402.
(3) [1916] 16 Ex. C.R. 133 at 145.
(4) [1915] 15 Ex. C.R. 340 at 349.
(5) [1910] 13 Ex. C.R. 186.

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The question which first and readily suggests itself for consideration, after analysing the facts of the case, is whether there is more difference between the plaintiffs' patent and the prior art, than between the patent and the defendants' devices Exhibits 8 and 9. They all seem to embody the same fundamental devices, differing in structural details and perhaps mechanical equivalents, but performing the same function under the very same principle.

Let us now examine and compare exhibits 5a and 5b with exhibits 8 and 9, and their respective compound parts, being 6a, 6b and 6c as compared to 10a, 10b and 10c.

Exhibits 5a and 8 have both a base bracket. Prior art had it; 5a has an angle bracket, 8 has two angle brackets. Prior art had angle brackets. That angle bracket in 5a has one notch and one pin. Exhibit 8 has no notch, but has two pins performing the dual function of locking pins combined with the space or offset within which the locking plate runs, thereby procuring a locking space on 8 which is absent in 5a. The locking in 5a is exclusively made with pin and notch on one side.

5b is composed of the longitudinal bar to which is attached a curved or bent plate procuring one offset or spacing. Exhibit 9 has a longitudinal bar to which is attached a flat plate with two bolts, and is intersected and spaced by two washers which procure another offset or spacing.

Exhibit 6a is the plaintiffs' base plate manufactured somewhat differently from the specification. There is a recess for the support of the cross bar. It has two recesses called inset faces performing two different functions. The deeper inset is used for mounting the cross bar and the shallow one is used to engage the angle bracket. Exhibit 10a the defendants' base plate is clearly different from the plaintiffs'—it is flat with no recesses or inset faces, but has shoulders at top and bottom—and thereby performing different functions. In 6a the inset serves as a support to the cross bar. In 10a there is no recess and the support of the cross bar is found on the double bracket in 8.

Base plates existed in prior art, as shewn by exhibits E1 to E7.

Exhibit 6b is the angle plate, already referred to, with one pin and one notch. Exhibit 10b is also the double angle

plates, already referred to, with the inner plate cut so as to be used as a support for the cross plate instead of the support on the base plate as in exhibit 5a.

Exhibit 6c is the plaintiffs' cross bar cut in a particular fitting shape at the end. Exhibit 10c is the defendants' cross bar, plain all through, without any cut at the end.

The locking of 5a with 5b is done in one downward movement. The locking of exhibits 8 and 9 is made in two movements; first one horizontal move then a downward one, obviously required by the conformation of the notch in its plate through this cam-notch. From observation and comparison of the plates on 5b and on 9 it must be found that this cam-notch on 9 combined with the double channels, is an improvement on 5b, and this new combination results in a better locking and gripping. Can the defendants' device be held to be an infringement if it presents a new combination of elements that are found in the plaintiffs' patent or substitute for one or more of the same—some new ingredients, such as the cam, the double channels which perform a new function? *Singer Mfg. Co.* v. *Brill* (1). The parts are not interchangeable between plaintiffs' and defendants' devices. They are put together differently and removed differently. It is always open to a subsequent inventor to accomplish the same results, if he can, by substantially different means.

Coming now to the question of the prior art, as shewn by the several patents put in by the defence, it appears that the following elements were not new when the plaintiffs' patent was granted as appears in these several patents as common to all, namely:—bracket base, angle bracket, fastening device with pins, notches or slots, cross bar supported on the base. They are all of the same general type and under the prior art no claim *per se* could be made to any of these devices.

Having already stated that the plaintiffs' patent, which is not a pioneer patent, but a very narrow one indeed, in view of the state of the prior art, which has therefore to be strictly construed, and adverting to the consideration of the facts above set forth,—I have necessarily come to the conclusion that there is no infringement and that there should

(1) [1892] 54 Fed. 380.

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be no restraint imposed on the commercial freedom to the defendants in the use of their device.

Having done so it becomes unnecessary to decide the question of the validity of the plaintiffs' patent raised by the statement in defence. *Moodie* v. *The Canadian Westinghouse Co.* (1); *Johnston et al* v. *The Oxford Knitting Co.* (2); *Hocking* v. *Hocking* (3).

The question of estoppel raised at trial as resulting from the assignment of the patent becomes also unnecessary to decide, even with the special qualifications and circumstances under which it was raised, namely as to whether there was a covenant as to its validity, *Gillard* v. *Watson* (4); Nicolas on Patent Law 91, and also as to whether it could be attacked by the assignee's partners, *Heugh* v. *Chamberlain* (5); and as to whether the assignee could be allowed to show that on a fair construction of the patent he had not infringed. *The Indiana Mfg. Co.* v. *Smith* (6); *Consolidated Car Heating Co.* v. *Came* (7); *Clark* v. *Adie* (8).

The defence has filed Hyman Gertler's new patent granted on the 11th March, 1924; but it must be held that a subsequent patent is no defence to the infringement of a prior patent. *Treo Co.* v. *Dominion Corset Co.* (9); *Grip Printing and Publishing Co.* v. *Butterfield* (10).

The action is dismissed with costs.

Judgment accordingly.

(1) [1916] 16 Ex. C.R. 133 at 145.
(2) [1915] 15 Ex. C.R. 340 at 349.
(3) [1889] 6 R.P.C. 69 at p. 77.
(4) [1924] 26 Ont. W.N. 77.
(5) [1877] 25 W.R. 742.
(6) [1904] 9 Ex. C.R. 154.
(7) [1903] 20 R.P.C. 745.
(8) [1877] 2 A.C. 315.
(9) [1918] 18 Ex. C.R. 115 at 131.
(10) [1885] 11 S.C.R. 291.