

1915
 Jan. 13.

HORACE G. JOHNSON, AND HENRY S. COOPER
 AND PENMAN'S, LIMITED,

PLAINTIFFS;

AND

THE OXFORD KNITTING COMPANY, LIMITED,
 DEFENDANT.

*Patent for Invention—Proper method of Construction—Specification and Claim—
 Canadian Patent No. 130,413 for closed crotch underwear—Infringement.*

Held, that a patent for invention should be construed in the same way as any other written instrument. According to the true canons of construction the claim of the patent should not be read without reference to the specification. The whole document must be looked at to see what the claim is. Canadian Car Heating Co. v. Came, (1903) A.C. 509 followed. Edison-Bell Phonograph Corporation (Ltd.) v. Smith, (1894) 10 T.L.R. 522, specially referred to.

Canadian Patent No. 130,413 held not to be infringed by a garment using two flaps to obtain a permanently closed crotch.

STATEMENT OF CLAIM for damages for an alleged infringement of a patent for invention, and for an injunction to restrain further infringements.

The patent is described and the alleged acts of infringement stated in the reasons for judgment.

September 28th, 29th and 30th, 1914.

The case was heard at Toronto before the Honourable Mr. Justice Cassels.

A. W. Anglin, K.C., for the plaintiffs.

W. C. Languedoc, K.C., for the defendants.

CASSELS, J. now (January 13th, 1915) delivered judgment.

The statement of claim in this case was filed by Horace G. Johnson, and Henry S. Cooper and Penmans,

Limited, as plaintiffs, against the Oxford Knitting Company, Limited, defendant. The claim is based upon Letters Patent, No. 130413, bearing date the 17th January, 1911, granting to Johnson and Cooper certain rights for an invention consisting of a certain new and useful improvement in garments.

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The plaintiffs allege that the defendants have infringed their patent, and ask for an injunction restraining them from further infringing, with the usual claim for damages and costs.

The case came on for trial before me at Toronto on the 28th, 29th and 30th September last. I have been unable to dispose of the case earlier on account of pressure of work. The very able and astute argument of the counsel for the plaintiffs shook the views that I had formed at the trial, and I deemed it necessary before coming to a conclusion, to very carefully consider the evidence adduced at the trial and the various exhibits.

I may say that after the best consideration I can give to the case I am of opinion that the argument of Mr. Anglin that the plaintiff's patent should be construed broadly, as a *quasi*-pioneer patent, is not well founded. I will give some of my reasons for this view subsequently.

At the trial the plaintiffs' counsel relied upon the 4th claim of the patent, and I have not thought it necessary, as no argument was adduced before me on behalf of the defendants, to consider the effect of the first three claims of the patent as affecting its validity.

The fourth claim of the patent does not contain the words, as the previous three claims do at the end of the claim, "substantially as described." I do not think this affects the case one way or the other.

Before dealing with the merits I may cite one or two cases as to the manner in which a patent should

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be construed. An important case, is *Edison-Bell Phonograph Corporation v. Smith* (1). I do not find a report of this case in the regular reports. In this particular case the contention was raised that the claim was too broad, as the claim itself had not the words "substantially as herein described," and had to be construed in a broad way. I quote the language of the Master of the Rolls:

"The first question was, what was the proper mode of construing a patent? The rules of construction were the same as would be applied in the case of any other written instrument. It was not in accordance with the true canons of construction to read the claim alone without the specification. The whole document must be looked at to see what the claim was. In *Arnold v. Bradbury* (2) it was contended that the claim, when read alone, was too large as including something which could not be patented, and that therefore the patent was bad. Lord Hatherley, however, said that the specification must be read first to see what the inventor had described as the thing to be patented. He said:—'I do not think that the proper way of dealing with this question is to look first at the claims, and then see what the full description of the invention is; but rather first to read the description of the invention, in order that your mind may be prepared for what it is the inventor is about to claim.' Therefore, in order to construe the instrument, the description of the invention must be looked at to see whether the claim went further than the specification. That rule had been followed in subsequent cases. That was the true rule, and it was the same as was applicable to any

(1) (1894) 10 T.L.R. 522.

(2) L.R. 6 Ch. App. 706.

“other instrument. In the present case there was
 “an elaborate and detailed specification of what the
 “inventor wished to patent. It was an invention
 “of certain improvements in phonograph machines.
 “He described those improvements minutely. It
 “was not suggested that the descriptions in the
 “specification were too large. The objects and the
 “means of carrying out those objects were described.
 “Then the claims were headed with a statement that
 “the inventor, ‘having now particularly described
 “and ascertained the nature of this invention
 “and in what manner the same is to be performed,’
 “claimed, etc. Claim No. 1 was the one chiefly
 “contested. It was said that it was too wide. But
 “in the specification the inventor had pointed out
 “the exact manner in which he would carry out the
 “object stated, and any one reading the claim
 “reasonably would come to the conclusion that all
 “he meant to claim was what he had previously
 “described and shown. Therefore the claim was
 “not too large, and the patent was not bad upon
 “that ground.”

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In the case of *Badische Anilin Und Soda Fabrik v. Levinstein* (1), Lord Herschell is reported as stating that Lord Justice Fry had complained of the course pursued at the trial in not calling witnesses to prove what the invention is. He states—“I cannot think
 “that this complaint was well founded. The question
 “what the real invention is must be answered from a
 “critical examination of the specification.”

Another case that might be referred to is the case of *Consolidated Car Heating Company v. Came* (2)—the judgment of the Privy Council in which Lord Davey pronounced the judgment of the Board. In that case

(1) 12 A.C. p. 717.

(2) (1903) A.C. 509.

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the claim had to be construed in the light of the specification.

Any number of cases might be cited for the same proposition. Before referring to the specifications of the patent in question, it may be well to state that union suits, so-called, were old at the date of the alleged invention of the patentees. These union suits, so-called, were otherwise styled combination under-garments and were formed in one piece. The effort was to obtain a union under-garment with a permanently closed crotch, with a slit or opening at the back of sufficient depth to permit the wearer to perform the operations graphically described by the patentee.

Numerous prior patents have been filed, and evidence adduced before me to show the gradual advance and improvement in the art. The fourth claim sued upon reads as follows:

“A permanently closed crotch under-garment
“having a posterior opening extending below the
“crotch and a sewed in flap constituting a closure
“for said opening, said flap having one of its lateral
“margins permanently sewed to the garment from
“a point above the seat to a point in one leg below
“the crotch, the other lateral margin being free from
“a point above the seat to a point in the opposite
“leg below the crotch.”

I agree with Mr. Anglin that the crotch referred to is the crotch in the garment and not the crotch of the human body.

It is admitted that a permanently closed crotch under-garment is old. It is shown by the art that the extension of a flap extending below the crotch to the leg is also old. This is made clear by what is called the Austrian patent to Caroline Tichy of the 25th January, 1907. This patent shows the covering with

two flaps instead of a *single* flap. The exhibit produced of the Holmes Knitting Company, namely, Exhibit "D," referred to by Lacher, shows a permanently closed crotch, but with *two* flaps.

In arriving at the question of the construction of a patent of this character, and whether it is to be construed as a pioneer patent or merely a patent for a specific mode or method of construction, a considerable amount of stress has to be laid upon the nature of the article for which the invention is sought; and I think the case cited before me by Mr. Languedoc, of *Dalby v. Lyons* (1) is very apposite.

According to the evidence of the patentee, Johnson, he seems to have discovered what would have been obvious to anybody, that a longer slit or opening would have answered all his objections to the previous union garments. His difficulty apparently, which lasted for a considerable period, was to devise some kind of flap which would act as a cover for this extended slit. The idea apparently flashed upon him one Friday night of how to devise such a covering. He may or may not have known of this Austrian patent, which indicates by the drawing and specification the extension down the leg. I should judge that what he was aiming after was to break away from the prior art and obtain something which would enable him to get a construction patent, and that idea has been carried out in the description in the patent.

Bearing in mind the previous state of the art, and of the character or nature of the article in question, I turn to his specification. He says:

"This invention relates to that class of underwear known as union suits, and has for its chief object to provide an improved construction of such gar-

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(1) 64 Fed. Rep. 376.

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“ment permitting the use of a permanently closed
 “crotch and *dispensing with the use of double flaps* or
 “a single, wide drop-fall or flap, with their numerous
 “fastenings, heretofore used to cover the posterior
 “opening, while at the same time presenting a
 “posterior opening of ample dimensions for its
 “required purpose *covered by a single flap* capable
 “of being secured by a single button or other fasten-
 “ing. In *other* words, my present invention is
 “designed to supply a garment combining in its
 “construction the two most essential requisites for
 “comfort and convenience in garments of this
 “character, namely, a permanently closed crotch,
 “and a posterior opening of ample dimensions and
 “convenient location that will not gap to expose the
 “person and *closed by a single flap* requiring but a
 “single button or equivalent fastening.”

He then proceeds to describe his invention, and towards the end of the specification he states:

“From the above it will be seen that my invention
 “provides a garment having a *permanently closed*
 “*crotch* and a posterior opening extending from a
 “point near the waist-line to a point below the
 “crotch in one leg only. By carrying this opening
 “obliquely from a point substantially in the waist
 “line down to a point on the inner side of the leg
 “below the crotch, I provide a construction affording
 “an opening of ample dimensions and not requiring
 “twisting or lateral displacement of the intermediate
 “portion of the garment when in service. *This*
 “*opening is covered and fully protected by the single*
 “*stitched-in flap L*, requiring to be buttoned at but
 “a single point to effect a perfect closure.”

His claim sued upon as Number 4, is as I have stated, “a permanently closed crotch undergarment

“having a posterior opening extending below the crotch
 “and a sewed in flap constituting a closure for said
 “opening, said flap having one of its lateral margins
 “permanently sewed to the garment from a point
 “above the seat to a point in one leg below the crotch,
 “the other lateral margin being free from a point above
 “the seat to a point in the opposite leg below the
 “crotch.”

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The defendants do not use the single flap; their garment has the two flaps—and as far as I can see does not differ from that of the Holmes Knitting Company. Lacher in his evidence shows that there are *two* flaps in the Holmes' garment; that there are *two* flaps in the defendants' garment; also *two* flaps in what is called the fit-to-fit garment.

McLoughlin shows the same thing, and so does Meyer—and I think a consideration of the garments themselves indicates that these witnesses are correct in the views which they have expressed:

It was contended before me that the patentee was in reality entitled to two flaps. I do not think this contention is correct. I do not think that patent would have been granted to him had it been as large as contended for by counsel.

After the best consideration I can give to the case, and bearing in mind the specification which I have quoted, and the construction which I am forced to place upon the patent, having regard to the prior art and evidence, I am of opinion that the plaintiffs have failed to prove infringement on the part of the defendants. Having come to this conclusion, and following the precedent set before me in the case of the *Consolidated Car Heating Co. v. Came*, (1) it is unnecessary for me to enter into the question of the validity of the

(1) (1903) A.C. 509.

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plaintiffs' patent. I may say, however, that were I called upon to pass upon this point, I would find grave difficulty owing to the manner in which the case has been presented for my consideration. With the exception of what is called the Austrian patent to Tichy, I have had no assistance by evidence of experts or an examination of the patents by counsel.

I would refer to one case in the Supreme Court of the United States which is worthy of perusal, namely, *Bischoff v. Wethered* (1). The language of Lord Westbury referred to in that case, can be seen in *Frost on Patents*, 4th ed. at pages 108, 144 and 148.

Betts v. Menzies, (2) may be referred to on the same point.

Another case may be looked at, lately decided by the House of Lords, *Pugh v. Riley Cycle Company, Limited* (3). It has not much bearing upon the case before me, but is very important as showing how publication may be made by a prior specification. A drawing even without a specification may amount to publication if it could be understood by any machinist, and would be prior publication. See *Terrel on Patents*, 5th ed. p. 80; (4) and also *The Electric Construction Company v. The Imperial Tramways Co.* (5).

There is not much to be gained by an elaborate citation of authorities in these patent cases. Authorities go into the thousands, but I think the principles which govern are well understood.

As I have said my opinion is, for the reasons I have stated, that the defendants in this particular case do not infringe. I decline to pass one way or the other

(1) 9 Wall. p. 812.

(2) 10 H. of L. Cases, p. 117.

(3) 31 R.P.C. 266.

(4) 5th ed. p. 80.

(5) 17 R.P.C. p. 550.

on the validity of the patent. The action is dismissed
with costs.

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Judgment accordingly.

Solicitors for plaintiffs: *Blake, Lash, Anglin &*
Cassels.

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Solicitors for defendants: *Greenshields, Greenshields*
& Languedoc.
