

WILLIAM ARTHUR KEMP PLAINTIFF ;

1902

Jan. 31.

AND

W. W. CHOWN & COMPANY AND }
 THE W. W. CHOWN COMPANY, } DEFENDANTS.
 LIMITED.....

Patent of invention — Infringement — Lantern — Want of element of inventiveness.

This was an action for infringement of Letters-patent No. 69,088 for an improvement in lanterns, the globes of which could be lifted vertically for the purpose of lighting the lanterns. One question in issue was as to whether or not in the idea or conception that if the bail of the lantern was made of the right length to drop under the guard or plate of the globe, the bail would hold up the globe while the lantern was being lighted, or in the working out of this idea or conception, there was invention to sustain a patent.

Held, that there was no invention.

AN action to restrain the infringement of the Canadian Letters-Patent No. 69,088 for improvements in lanterns, and for damages.

The facts of the case are stated in the reasons for judgment.

December 12th and 13th, 1902.

The case was heard at Toronto.

C. A. Masten, for the plaintiff, contended that the element of "invention" was present in the plaintiff's patented device. The plaintiff had taken an old part of an industrial article and applied it to a new use. The invention consisted in endowing the bail of a lantern with a new quality or function, namely, making it do duty as a lever to lift the globe of the lantern vertically for the purpose of lighting the lamp. He

cited the following cases: *Vickers v. Siddell* (1); *Longbottom v. Shaw* (2); *Gadd v. Manchester* (3); *Edison Bell Telephone Corp. v. Smith* (4); *Fawcett v. Homan* (5); *Rickmann v. Thierry* (6); *Barbed Wire Patent* (7); *Lein v. Myers* (8); *Fowell v. Chown* (9); *Smith v. Goldie* (10); *Brickill v. New York* (11).

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C. A. Duclos followed for the plaintiff, citing: *Neilson v. Harford* (12).

W. B. Raymond, for the defendants, argued that there was no "invention" involved in employing the bail for the purpose described. He cited the following cases: *Clarke v. Adie* (13); *Wisner v. Coulthard* (14); *Crompton v. Belknap Mills* (15); *Carter v. Hamilton* (16); *Harrison v. Anderston Foundry Co.* (17); *Deeley v. Perkes* (18).

B. Oster followed for the defendants, citing *The Patent Act*, secs. 7, 16 and 47.

C. A. Masten replied.

THE JUDGE OF THE EXCHEQUER COURT now (January 31st, 1902), delivered judgment.

The case has to do with one feature only of lanterns, the globes of which may be lifted vertically for the purpose of lighting them, and it presents two questions of fact and one of law:

1. Whether in the idea or conception that if you make the bail of the lantern of the right length to drop under the guard or plate of the globe, the bail will hold up the globe while the lantern is being lit,

(1) 7 Outl. R. P. C. 292.

(2) 8 Ibid. 333.

(3) 9 Ibid. at p. 525.

(4) 11 Ibid. at p. 389.

(5) 13 Ibid. at p. 398.

(6) 14 Ibid. at p. 109.

(7) 143 U. S. at p. 283.

(8) 97 Fed. Rep. 607.

(9) 25 Ont. R. 71.

(10) 9 S. C. R. 46.

(11) 5 B. & Ard. 544.

(12) 1 Web. P. C. 295, 342.

(13) L. R. 10 Ch. 667; 2 App. Cas. 315.

(14) 22 S. C. R. 178.

(15) 3 Fish. P. C. 536.

(16) 3 Ex. C. R. 351 · 23 S. C. R. 172.

(17) 1 App. Cas. 574.

(18) [1896] A. C. 496.

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or in the working out of that idea or conception there is invention to sustain a patent?

2. Whether such a device was, at the time of the plaintiff's alleged invention, new; and

3. Whether the defendants are in any case entitled to make use of the alleged invention, having, before the issue of the patent therefor and apart altogether from the plaintiff, acquired and enjoyed the right to manufacture lanterns with bails adapted to hold up the globes in a manner similar to that adopted by the plaintiff?

To sustain the action it is necessary to answer the first question and the second in the affirmative, and the third in the negative.

I think the first question should be answered in the negative. Possibly the same answer should be given to the second question, but it is not necessary, in view of the answer given to the first, to determine that, or to express any opinion on the question of law that has been raised.

There will be judgment for the defendants.

*Judgment accordingly.*

Solicitors for plaintiff: *Masten, Warren, Starr & Spence.*

Solicitors for defendants: *McCarthy, Osler, Hoskin & Creelman.*

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