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Feb. 29.

LARKIN-WARREN REFRIGERATING CORPORATION ..... } PLAINTIFF;

AND

FRIGIDAIRE CORPORATION ..... DEFENDANT.

Patent of invention—Conflict action—Rule 32 of Practice—Statement of date of invention—Motion for Chambers Order to amend statement after disclosure made.

As required by Rule 32, the parties after issues joined filed a sealed statement in writing of the respective dates on which the inventors claim to have made the invention mentioned in their applications. The sealed envelopes were opened on the 4th of January, 1932, by consent and in presence of solicitors of both parties. More than a month afterwards a motion in chambers was made by the plaintiff corporation for leave to amend the written statement of the date of the invention relied on by it, by substituting January 15, 1925, for July 25, 1927.

Held, that after disclosure made between the parties in conformity with Rule 32, an order in chambers should not be made allowing one of the parties to amend its statement of the date of the invention relied on in the action.

MOTION by plaintiff to amend its sealed statement of date of its alleged invention required under Rule 32, after such sealed statements had been opened and date disclosed.

The motion was argued before Charles Morse, K.C., Registrar of the Court, in Chambers.

Mr. Gowling for plaintiff.

Mr. Gordon for defendant.

The material facts are stated in a memorandum handed down by the Registrar, which is printed below.

THE REGISTRAR (February 29, 1932), delivered the following decision.

This was an application by way of notice of motion for an interlocutory order in a case of conflicting applications for a patent of invention. Lester U. Larkin is alleged to have been the inventor for the plaintiff, and Jesse G. King, the inventor for the defendant.

Mr. Gowling appeared for the plaintiff in support of the motion, and Mr. Gordon for the defendant, opposed it.

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Under the provisions of Rule 32 of the practice of the Court each of the parties to the action had filed a sealed statement in writing of the respective dates on which the inventors severally made the invention mentioned in their applications for a patent. Furthermore, both the sealed statements so filed as aforesaid were opened by the Deputy Registrar in the presence of solicitors for both parties, as required by the said Rule, on the 4th January, 1932. Thus each party has had disclosure of the date relied on by his opponent in the action. More than a month after such disclosure the plaintiff applies to amend the written statement of the date of the invention by substituting the 15th day of January, 1925, for the 25th day of July, 1927. If this application were allowed, the plaintiff would stand of record as having anticipated the date relied on by the defendant by more than two years. As the record now stands the defendant's invention antedates that of the plaintiff by nearly five months.

The application for the amendment is grounded upon an alleged mistake as to the date of the invention made by Larkin's solicitor who prepared the statement. Larkin the plaintiff's assignor, avers in his affidavit filed in support of the plaintiff's application for amendment that his solicitor was in possession of all the records relating to the invention which disclosed the true date, and that the plaintiff read the prepared statement hurriedly and did not notice the error. But this does not remit Larkin from responsibility for the date assigned—*qui facit per alium, facit per se.* Moreover, the statement purports to be signed by Larkin personally.

Under such circumstances, even if I felt that I had jurisdiction in Chambers to order the amendment to be made, I would hesitate to disturb the probative value of so solemn a juristic act as the disclosure of the date of the invention made in compliance with Rule 32. I should be inclined to leave it to the trial Judge to find the power to dispense the plaintiff from any possible burden of estoppel attaching to a statement of fact of such vital importance in a conflict action. But I can find no power of amendment conferred upon me in such a case by the Rules of Practice. Obviously the statement in question is no part of the pleadings in the action. Rule 32 directs that "each applicant shall,

within ten days *after the issues are joined upon the pleadings,* make disclosure of the date of his invention by statement in writing, and, further, that "each party making disclosure, as aforesaid, *shall be bound by the date of his alleged invention so established.*" As I read the Rule its intendment is analogous to the rule concerning Preliminary Acts in collision actions in Admiralty, the object of which has been declared to be to prevent either party varying his version of fact so as to meet the allegations of his opponent. (See *The Vortigern,* (1859) 1. Swa. 518; *The Inflexible,* (1856) 1. Swa. 33). *In Williams & Bruce's Ad. Prac.* 3rd Ed., at p. 369 it is said:

> The Court will never allow a party to contradict his own preliminary act at the hearing, and an application on behalf of a party to amend a mistake in his preliminary act will not, if opposed, be entertained by the Court.

(See also *The Dorothy* (1906) 10 Ex. C.R. 163, at p. 170). Preliminary acts, according to the view of Fletcher Moulton, L.J., in *The Seacombe* (1912) P. at p. 59) "are not mere pleading allegations. They are statements of fact made under such circumstances that they rank as formal admissions of fact binding the party making them perhaps as strongly as any admissions of fact can do."

I must dismiss the plaintiff's application to amend the date of the invention as disclosed, with costs; and there will be an order accordingly.

Judgment accordingly.