

1941
 May 16.
 May 17.

BETWEEN:

DANIEL WANDSCHEER, GERRIT
 WANDSCHEER, JACOB WAND-
 SCHEER, BEN WANDSCHEER,
 WALTER E. KLAUER, CHARLES
 L. OSTRANDER AND KLAUER
 MANUFACTURING COMPANY

PLAINTIFFS;

AND

SICARD LIMITED DEFENDANT.

Practice — Patents — Exchequer Court Rule 22A—Changing date of invention.

Held: That a party wishing to rely on a date anterior to the date determined by the records of the Patent Office is limited to the date on which the invention was actually made.

2. That a party having set forth a date under Rule 22A and wishing to change it must proceed by notice of motion duly supported by affidavit.

MOTION by plaintiffs for leave to change the date of invention relied upon under Rule 22A of the General Rules and Orders of the Exchequer Court.

The motion was heard before the Honourable Mr. Justice Angers at Ottawa.

E. G. Gowling for the motion.

H. Gerin-Lajoie K.C. contra.

ANGERS J., now (May 17, 1941) delivered the following judgment:

The defendant having made a motion to amend its particulars of objection by *inter alia* adding thereto further cases of anticipation, which motion was this day granted, counsel for plaintiffs moved the Court orally for leave to change the date of invention relied upon by his clients in respect of patent No. 309,848 from December to September, 1927, under rule 22A of the General Rules and Orders of this Court.

Rule 22A reads as follows:

The plaintiff in an action for impeachment of a patent for invention other than the action referred to in rule 12A, or the defendant in an action for the infringement of a patent, when said defendant contests the validity of the patent sued on, may serve on the patentee, defendant or plaintiff as the case may be, at any time within one month after the

statement of defence has been filed, a demand that the said patentee state whether or not he proposes to rely on a date of invention earlier than the date as of which he is entitled to priority according to the records of the Patent Office, and if the patentee proposes to rely upon any such earlier date, he shall furnish to the opposite party, within thirty days after service upon him of such demand, particulars of the date which he proposes to assert and the nature of the acts upon which he intends to rely for the purpose of establishing the same.

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It was submitted on behalf of plaintiffs that rule 22A enables a party to choose any date earlier than the date as of which he would be entitled to priority according to the records of the Patent Office. I must say that I cannot share this view. In my opinion, the party who wishes to rely on a date anterior to the date determined by the records of the Patent Office is limited to the date on which the invention was actually made.

If a party has in good faith but by mistake set forth a date under rule 22A and wishes to change it, he must proceed by notice of motion duly supported by affidavit. The plaintiffs' verbal application to change the date set forth in their statement under rule 22A is accordingly dismissed, save the right of the plaintiffs to renew their application by notice of motion duly served and upon proper material, if they deem fit.

Order accordingly.