1888 PIERRE DANSEREAU (PLAINTIFF).....APPELLANT;
*Oct. 16.

AND

1889 FERDINAND BELLEMARE (DEFENDANT)..... } RESPONDENT.
*Jan. 15.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA (APPEAL SIDE).

Patent—Carriage tops—Combination of elements—Novelty.

P. D. obtained a patent for an improvement in the construction of carriages by the combination of a folding sectional roof joined to the carriage posts, in such a way and by such an arrangement of sections of the roof and of the carriage posts that the whole carriage top could be made entirely in sections of wood or other rigid material with glass sashes all round, and the carriage be opened in the centre into two principal parts and at once converted into an open uncovered carriage. In an action for infringment of this patent,

Held, reversing the judgment of the Court of Queen's Bench for Lower Canada (appeal side), and restoring the judgment of the Superior Court, Ritchie C. J. and Gwynne J. dissenting, that the combination was not previously in use and was a patentable invention.

APPEAL from a judgment of the Court of Queen's Bench for Lower Canada (appeal side) in an action brought against respondent, a carriage manufacturer, of the city of Montreal, for damages for the infringement of a patent of invention, issued to appellant on the 6th May, 1881, for an improvement in the construction of carriages, called "Dansereau's carriage tops."

The letters patent give the following definition of the invention claimed by appellant:

"It consists in the combination of a top made in

*PRESENT.—Sir W. J. Ritchie C. J. and Strong, Fournier, Taschereau and Gwynne JJ.

folding sections as described, with the posts D, O & P arranged to turn down substantially as set forth."

The paper called specification which is annexed to the letters patent contains a more explicit description of the pretended discovery and is as follows :—

"This invention has reference more particularly to the construction and arrangement of the top of carriages, to obviate the difficulty that when tops are made so that they "let down" and are formed of flexible material and in a short time show all the ribs of the bows, and thereby become shabby looking and ill shaped, and this defect cannot be remedied without removing the covering of the top, or replacing it with a new one; by my invention a rigid top is provided, arranged in sections so that when it is desired to "turn down" the top, it may be folded up and then turn down. Also, as constructed, whenever the top that I have invented becomes shabby it is only necessary to coat it with paint to make it look as good as new. My invention also enables glass pannels to be used all round the carriage, a thing that is very much desired by the public at this time."

Six months after the registering of this patent, the plaintiff caused an additional one to be registered with the following description :

"It consists first in the combination of a top divided into rigid parts and hinged together as described, one of the said parts secured in posts C and the whole of the parts turning back, with the said posts; 2nd, in the combination of a top divided into rigid parts as described and arranged to turn completely back as described, with back turn down posts C and front turn down posts H."

The defendant pleaded :

1st. The carriage tops manufactured by the defend-

1888

DANSEREAU v. BELLEMARE.

ant were neither an imitation of those built by the plaintiff nor an infringement on his patent.

2nd. The pretended invention of plaintiff was not one in reality and his patent was null and void. At the date when said patent was registered carriage tops made of rigid material and folding by sections were well known to the public, and had been in use for a considerable time; the plaintiff was not the inventor of the carriage tops described in his letters patent; plaintiff's patent had been obtained by fraud and false representations and could not form a basis of a suit at law.

These two pleas were followed by a general denial.

After evidence on both sides was concluded the court, of its own motion, appointed experts to examine and compare the carriage tops of four carriages made by respondent and alleged by appellant to be infringements on his patent; and also to examine the carriage top of one carriage, in the possession of C. A. Dumaine, alleged by respondent to be made on the same principle as appellant's invention, and to have been in use long before the appellant obtained his patent; and to ascertain and report on the 17th September, 1883, whether they were constructed on the principle covered by the appellant's patents, exhibits Nos. 1 and 2, and to state the differences, if any existed.

The court on the said 17th September, on motion of appellant extended the delay for the experts to report, until the 20th of September, 1883, the report was then filed, and was favorable to plaintiff's contentions.

The court rendered judgment in favor of the plaintiff, which judgment was subsequently reversed by the Court of Queen's Bench.

Geoffrion Q. C. for appellant.

Saint Pierre for respondent.

1888

DANSEREAU v. BELLEMARE.

Sir W. J. RITCHIE C.J.—I cannot discover that the invention is novel, that it developes any new principle, or exhibits the application of known principles to a new use. The principle claimed by the plaintiff on the folding of carriage-tops appears to have been applied and used by Dumaine in reference to the front part of carriages for some time before the plaintiff obtained his patent, and plaintiff's patent would seem to be only the application of the same principle to the rear part, and Mr. Larivière, one of the experts, says: "the principle of the front part of Dumaine's carriage could be applied to the rear part as well, and the fact that the post is solidly attached to the top, or connected with it, by means of hinges does not constitute any difference."

The principle in Dumaine's carriage seems to be precisely the same as the invention covered by the letters patent 1 and 2. In both the top is solid in front, both open by sections, and the principle is, therefore, exactly the same in both cases; therefore, as I can discover no new invention by plaintiff in this case, I am not disposed to interfere with the judgment of the Queen's Bench—that plaintiff's patent disclosed no new patentable invention or discovery.

STRONG J.—I am in favor of allowing the appeal for the reasons which will be given by my brother, Mr. Justice Taschereau.

FOURNIER J.—I agree with the view of the case taken by Mr. Justice Taschereau and also with the reasons given by Mr. Justice Loranger, in the Superior Court, for upholding the appellant's patent.

TASCHEREAU J.—This is an appeal by the plantiff from a judgment in an action brought against respondent, a carriage manufacturer, of the city of Montreal,

1889

DANSEREAU v. BELLEMARE.

Taschereau J.

for damages for the infringement of a patent of invention, issued to appellant in May, 1881, for an improvement in the construction of carriages, called "Dansereau's carriage tops," which was extended by a subsequent patent issued on 7th November, 1881.

The Superior Court had maintained the plaintiff's action but the Court of Appeal reversed the judgment, and dismissed the action on the ground that the said patent discloses no new patentable invention or discovery.

It appears by the first patent and specifications, and drawings annexed thereto, that the invention of the appellant is an improvement in the construction of carriages, by the combination of a folding sectional roof joined to the carriage posts, in such a way and by such an arrangement of sections of the roof folding in themselves, and of the carriage posts on hinges, that the whole carriage top can be made (like stationary tops) entirely in sections of wood or other rigid material, with glass sashes all round, and the carriage be opened in the centre into two principal parts, and at once converted into an open uncovered carriage.

The arrangement of all the parts being (as shown by the specifications and drawings) combined in such a way that the sections of the roof opened and folded in themselves, the lining is protected from the weather and the sashes also protected by a special device. One of the most important devices used in the combination, to convert the carriage from a covered to an uncovered carriage, is that some of the sections of the roof, are rigidly attached to the door posts, so that when the carriage is to be converted from a closed into an open carriage, two of the door posts are thrown back on hinges with the rigid sections attached, and two are thrown forward with the other rigid sections of the roof attached; or in summer, the top may be

left up as a protection from the sun, with the sides, back, and front, all open, the sashes being let down.

The respondent pleaded first, that he had not copied plaintiff's invention, and secondly, that the patent covered no new or patentable invention.

As to the first of these pleas, there is no question. That the respondent did manufacture carriage tops similar in principle to the one described in this patent is clearly proved, and in fact was hardly denied by the respondent at the hearing. The two experts found against the respondent on this point.

On the second of the respondent's pleas, by which he alleged that the plaintiff's patent disclosed no new or patentable invention, there is more difficulty.

I have however come to the conclusion that this plea is also unfounded, and that the judgment of the Superior Court was right.

The respondent, to sustain this, examined seven witnesses, Dumaine, Racette, Roussel and Giroux, carters: Maccabe, a blacksmith, and Houle and Papineau, carriage makers; the two latter only may be classed as mechanics skilled in the subject matter of the invention, but do not appear to have had any long experience in the business.

The first witness, Dumaine, who is described as a cooper and a carter, says, that on a visit to New York, in 1878, he got the plan of a carriage top, which he brought to Montreal, and that the front part folded like the model B, and that he had a carriage of his own, remodelled on the same plan by a carriage maker, but he could not tell, without having the carriage before him, whether it closed like the model or not. Racette, a carter, in the employ of Dumaine, says he saw a few months previous to 1881, a carriage, the front of which was like appellant's model, but it appears the carriage he saw belonged to Mr. Dumaine.

1889

DANSEREAU v. BELLEMARE.

Taschereau J.

Houle, a carriage maker says, he saw the carriage of Mr. Dumaine, and that it folds up like appellant's. That he had seen carriages like appellant's for five, six, or seven years, perhaps longer; but he afterwards says, he never saw carriages like Mr. Dumaine's until he saw his. He does not say where he had seen any other carriages like the model, whether in Canada or the United States, and he describes no other carriages than Mr. Dumaine's.

Papineau testifies that he made in 1880, a carriage with folded top like that of model, that it was a round carriage, repaired for Mr. Hoofsteter. He had made one for Mr. F. X. Roy like the model, but Mr. Roy had been prosecuted by appellant, and he had been told that Mr. Roy had promised to make no more carriages like that, and that the suit had been settled.

Maccabe, a blacksmith, says that he examined the carriage of Mr. Dumaine and that the front part closes in the same way as appellant's model B; he then states and describes differences in the constructions, and adds, *que ca revient toujours à peu près à la même affaire.* But he never made any carriage like the model B.

Giroux, a carter, says he has seen carriage tops folding like the model B for a long time—Mr. Marlo had one for nine years. Mr. Hoofsteter had one for three or four years. Mr. Marlo's was made by F. X. Roy—as to the carriage of Mr. Marlo, he cannot say positively *qu'elle ferme les deux draps ensemble.*

These were the witnesses produced by respondent in support of this plea.

On examining Papineau's testimony it appears that Roy had been prosecuted for manufacturing carriages on appellant's model, and that the action had been settled by Roy promising not to manufacture any more. This statement rebuts the assertion that the carriage made for Marlo by Roy, had been made prior

1889

DANSEREAU v. BELLEMARE.

Taschereau J.

to the appellant's patent, for, if such had been the case, there would have been no reason for Roy's settling appellant's action and stopping the manufacture. It may be observed here that the appellant's invention was found by expert and skilled carriage makers to be so new and useful that they consented to pay $10 and $20 as royalty for each top manufactured on the model patented. Giroux, being a carter and not a carriage maker, and therefore not skilled in the construction of carriages, the general appearance of the folding of the top might have seemed to him so like the model, that he could see no difference in principle. It does not appear that he examined Marlo's carriage with any care, for on cross-examination, he is unable to say how it closed; consequently he could make no comparison. Giroux also says, that Mr Hoofsteter had one folding like the model for three or four years, but he says that it was a coupé; he says also that this was the same carriage that the witness Papineau says he altered from a round top, for Mr. Hoofsteter, by cutting the front.

As the points of resemblance of Marlo's carriage and Hoofsteter's carriage to the appellant's are not shown, the only carriage known prior to appellant's patents, about which there can be any question of resemblance, in the principle of construction, is that of Dumaine. As to the respondent's plea, that appellant's alleged invention was used by others long before appellant obtained his patent, the respondent seeks to show this, by attempting to prove that the carriage of Dumaine constructed by him, before appellant obtained his patent, was on the same principle as appellant's.

The respondent attempted to sustain this part of his plea by the same witnesses above referred to, but in my opinion, completely failed in his attempt.

The appellant brought in as witnesses men of large experience in the carriage trade, in Montreal, who all

1889

DANSEREAU v. BELLEMARE.

Taschereau J.

swear that they never saw any tops folding on the same principle as the one patented, and the evidence on this part of the case strongly preponderates in favor of the plaintiff. The material part of the contestation, as already remarked, was as to one of Dumaine's carriages, which the respondent alleged was similar and anterior to that of the plaintiff. But the report of the expert Simpson against this contention seems to me so clear and able, that I am not surprised that the Superior Court did not hesitate to adopt it.

I would allow the appeal with costs *distraits.*

GWYNNE J.—I am of opinion that this appeal should be dismissed upon the grounds taken in the Court of Queen's Bench for Lower Canada, appeal side, that the appellant's patent disclosed no novelty.

Appeal allowed with costs.

Solicitors for appellant: *Geoffrion, Dorion, Lafleur & Rinfret.*

Solicitors for respondent: *Saint Pierre, Globensky & Poirier.*