

1933
 KERR
 v.
 KERR
 —
 Crocket J.

For this reason, though of opinion that the provisoes of sec. 34 of the Ontario *Marriage Act*, as they stood in 1930, were *ultra vires* of the Provincial Legislature, I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for the appellant: *Walsh & Evans.*

Solicitors for the respondent Mrs. Kerr: *McClemont & McClemont.*

Solicitor for the respondent The Attorney-General for Ontario: *E. Bayly.*

1933
 * June 5, 6,
 7, 8.
 * Oct. 3.

BALDWIN INTERNATIONAL RADIO
 COMPANY OF CANADA, LIMITED } APPELLANT;
 (DEFENDANT) }

AND

WESTERN ELECTRIC COMPANY,
 INCORPORATED, AND NORTHERN
 ELECTRIC COMPANY, LIMITED } RESPONDENTS.
 (PLAINTIFFS) }

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Validity—Infringement—Subject matter—Combination—Anticipation—Claims of Specification (sufficiency of)—Patent Act, R.S.C. 1927, c. 150, s. 14.

The judgment of Maclean J., President of the Exchequer Court of Canada, [1933] Ex. C.R. 13, holding that the plaintiffs' patent for a certain "improvement in acoustic devices" (of the type commonly known as loud speakers) was valid and had been infringed by defendant, was affirmed; the court holding against the defendant's contentions that there was lack of subject matter, that there was anticipation, no infringement, and (a ground not urged in the Exchequer Court) that the two claims of the specification which plaintiffs relied on were insufficient and failed to meet the requirements of s. 14 (c) of the *Patent Act* (R.S.C. 1927, c. 150) because they did not distinguish between what was already old and what the applicant for patent "regarded as new" in the invention claimed.

To decide an objection grounded upon anticipation, one must look at the description in the specification, so as to ascertain what the invention really is. The claims may add light to it, but they are not meant for that purpose, and their object is mainly to define the extent of the monopoly to which protection is granted. The description in the present patent clearly showed that the invention consisted in a

PRESENT:—Duff C.J. and Rinfret, Lamont, Smith and Hughes JJ.

certain combination, not a mere aggregation or a juxtaposition of known contrivances, but a group of co-acting parts achieving a combined result, which satisfies the definition of a combination for the purposes of the patent law. In such case, it matters not whether some or all of the elements were old and already known in the art as separate entities; the only point (on the question of anticipation) is whether the actual combination was new.

The claims relied on by plaintiffs (and attacked as aforesaid) must be read with reference to the entire specification; and it was sufficient if it appeared from the claims so read what the applicant regarded as his invention; and, so read, the claims left no doubt of the exact nature of the invention claimed as new; and there existed no difficulty in ascertaining and defining what were the exact parts of the new combination and what the monopoly covered. Where the combination itself is the only thing regarded and described as the invention, the fact that the claiming clause does not distinguish old from new is not a ground for objection (*British United Shoe Machinery Co. Ltd. v. A. Fussell & Sons Ltd.*, 25 R.P.C. 631, and other cases cited; *Patent Act*, s. 14, considered). It is only if the applicant desires to claim invention for a subordinate element *per se* that it is necessary for him to claim the element separately.

1933
BALDWIN
INTER-
NATIONAL
RADIO Co.
OF CANADA
LTD.
v.
WESTERN
ELECTRIC
Co. INC.
et al.

APPEAL by the defendant from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that, as between the parties to the action, claims 4 and 9 of the letters patent of the plaintiffs No. 287,240, dated February 12, 1929, for new and useful improvements in acoustic devices, were valid and had been infringed by the defendant. The material facts of the case are sufficiently stated in the judgment now reported. The appeal to this Court was dismissed with costs.

E. G. Gowling and *D. K. MacTavish* for the appellant.

O. M. Biggar, K.C., *R. S. Smart, K.C.*, and *M. B. Gordon* for the respondents.

The judgment of the court was delivered by

RINFRET J.—The respondents are the owners of Canadian Letters Patent No. 287240 granting them the exclusive right and privilege of making, constructing, using and vending to others a certain “improvement in acoustic devices”. They brought this action for the infringement of their rights by the appellants.

In the Exchequer Court of Canada (1), the respondents succeeded and were held entitled to the relief claimed by them, together with their costs of the action.

1933

BALDWIN
INTER-
NATIONAL
RADIO CO.
OF CANADA

LTD.

v.

WESTERN
ELECTRIC
CO. INC.
*et al.*Rinfret J.
—

The appellants now appeal and renew before this Court three of the objections which were unsuccessful in the trial court, to wit: Invalidity of Letters Patent on two grounds—absence of subject-matter, and anticipation; and denial that there was infringement on their part. A new ground not urged before the Exchequer Court is that the claims of the specification relied on by the respondents are insufficient and fail to meet the requirements of section 14 (c) of the *Patent Act*, because they do not distinguish between what was already old and what the patentee “regards as new” in the invention therein claimed by him.

We will examine each of the appellants’ several objections in the order in which they have been presented to us. Before we do so, however, it will be convenient to say a word of the device which forms the subject of the patent in suit.

The “acoustic device” covered by the patent is of the type familiarly known as a loud speaker. Its function is to reproduce sound, including musical notes and the human voice. It is known that sound, as heard by the human ear, consists of the vibration of the air. Sound waves are sequences of alternate compressions and expansions of the air in immediate contact with the ear. The object of the sound reproducer is therefore to catch the vibrations caused by the instruments or voices, translate them into electrical or mechanical impulses and transmit them back into sound waves at the other end of the receiver, or, in the case of loud speakers, bring them to the human ear in amplified form. For that purpose, both electrical and mechanical devices have been adopted. Here, we are concerned with an electrical device.

The respondent’s device is described in the patent as follows:

In accordance with a preferred embodiment of the invention, a piston diaphragm is provided to radiate into a sound chamber having a plug secured therein which decreases the area of a portion of the sound passage therethrough. The diaphragm and plug are so shaped and arranged that converging sound passages are formed thereby extending from the centre of the diaphragm and from its peripheral portion to a common sound passage. The cross sectional areas of the converging sound passages preferably increase as the common sound passage is approached and these areas are such, moreover, that the air displayed by the diaphragm flows from each of the converging sound passages into the common sound passage with substantially the same velocity. The meeting point of the converging sound passages is effectually the throat of the horn since the

volume of the sound passage beyond this point is not appreciably affected by the displacement of the diaphragm. Extending from this throat portion to the mouth of the horn, it is preferable to have the cross-sectional area of the sound passage such that the area of the wave front of the transmitted sound progressively increases exponentially with respect to the distance travelled.

This description is immediately followed in the patent by the statement that

The invention may be readily understood by referring to the accompanying drawing in conjunction with the following detailed description.

The drawing is a sectional view of a loud speaking receiver employing the feature of the present invention. An electromagnet having a hollow annular core 10, a winding 11, and annular pole pieces 12 and 13 provides a magnetic field in which the coil 14 is positioned. The top portion 15 of the magnetic core 10 is detachable to permit the assembling of the winding 11 on the core structure and is secured to the lower portion of the core by the screws 16. The diaphragm to which the coil 14 is attached comprises a stiff, dish-shaped, piston portion 17, a flexible corrugated portion 18 and a flat portion 19 which is clamped between the housing structure 20 and the upper portion 15 of the core structure. The diaphragm is separated from the portion 15 of the magnetic structure and the housing 20 by the clamping rings 21 and is held in a clamped position by screws (not shown) which pass through the flanged portion of the housing 20, washers 21 and the flat portion 19 of the diaphragm and which are threaded into the upper portion 15 of the magnetic structure. The light rigid coil 14 is connected to the stiff, piston portion 17 of the diaphragm, which is also made of light material, by means of a strip 30 of stiffened fabric material such as oiled silk coated with bakelite or shellac, or a strip of thin, lightweight metal. When assembled the coil 14 is positioned approximately equi-distantly from the pole pieces 12 and 13. The ends of the conductor of which the coil 14 is wound may be brought out in any suitable manner to the screws 31 and 32 which are electrically connected to the terminals 33 and 34 respectively. The housing structure 20 is connected to a suitable sound projector such as the exponentially tapered horn 26.

The metallic plug 23 in the form of a spherical meter is secured to the housing 20 by the projecting lugs 24 and the screws 25, thus forming converging sound passages which extend from the centre of the diaphragm and from its peripheral portion to a common annular sound passage, formed between the plug 23 and the housing 20. There are preferably three projecting lugs on the plug equally spaced about its periphery, although a greater or lesser number of lugs may be used if desired. The radius of the plug 23 is slightly smaller than that of the adjacent surface of the dish-shaped portion 17 of the diaphragm and the housing structure is likewise suitably shaped so that the cross-sectional areas of the sound passages formed between these surfaces progressively increase from the centre of the diaphragm and from its peripheral portion toward the common sound passage. The cross sectional areas of these sound passages, moreover, are such that the air displaced from each of the converging passages flows into the common sound passage at substantially the same velocity. The meeting point between the converging sound passages and the common sound passage is effectively the throat portion of the sound projector since the volume of the sound passage beyond this point is not affected appreciably by the displacement of the diaphragm.

1933

BALDWIN
INTER-
NATIONAL
RADIO Co.
OF CANADA
LTD.v.
WESTERN
ELECTRIC
Co. INC.
et al.

Rinfret J.

1933

BALDWIN
INTER-
NATIONAL
RADIO CO.
OF CANADA
LTD.
v.
WESTERN
ELECTRIC
CO. INC.
et al.

Rinfret J.

We have in the above the material part of the "detailed description".

Every sound, as shown by the record, has two basic elements: pitch, which is due to the number or frequency of the vibrations per second in the air; loudness or intensity, which is due to the amplitude of the vibrations. But, of course, each sound has a different tone quality which is determined by the presence of what are called "over-tones" or "harmonics". The fundamental waves produce the pure notes. The overtones are the number of additional sound waves superimposed on the fundamental wave and which give the characteristic note of a given instrument, or the characteristic sound of the human voice. The frequency range, including fundamentals and overtones, is said to be from 25 for the lowest note to 20,000 vibrations per second for the highest note; but the useful range of pitch audibility is stated to extend from about 50 to about 9,000 per second.

The problem faced by the inventor, with the development of the talking moving picture, was the design of an instrument capable of reproducing sound covering the high range of pitch audibility so as to transmit to the human ear the exact characteristic of each instrument, or of each individual voice, and with sufficient loudness or intensity that it could be heard in all parts of the largest auditoriums. Such are the difficulties which the patent in suit claims to have solved satisfactorily.

The invention, so it was stated, was to receive or transmit sound with high and substantially uniform efficiency over a wide frequency range * * * to improve the transmission characteristics of loud speaking receivers at the upper portion of the sound frequency range * * * By inserting the plug into the sound chamber the frequency response characteristic of the loud speaker (was) improved to such an extent that the point of low radiation is moved up to a frequency of about 14,000 cycles per second and the efficiency of the loud speaker is practically uniform up to a frequency above 5,000 cycles.

This leads us to a consideration of the appellants' objections, first, that the patent lacks subject matter or, which is the same thing, that there was no invention in the respondents' device; and, second, that the device was anticipated in the prior art.

Whether there is invention in a new thing (art, process, machine, manufacture or composition of matter) is a question of fact "for the judgment of whatever tribunal

has the duty of deciding". (Ref. Lord Moulton's dictum quoted by Terrell on Patents, 7th ed., p. 71). The evidence shows that, generally speaking, at the time of the invention, there were at least two main difficulties to overcome: a large range of frequencies could not be reproduced at all and, within their limited range, the several apparatus were unequal in their reproduction of the intensity of sound. The receivers on the market were entirely deficient in the higher frequencies, under which most of the important overtones lay, and there was lack of naturalness in the sound produced, so that the individual characteristics of the voice or of the instrument could not be satisfactorily identified, all the components of the sound failing to pass in their proper intensity. Moreover, the sound output in certain frequencies often became unduly enhanced, with resulting abnormal loudness or distortion of the sound commonly known in the art as "blasting". As a consequence, the fidelity of the reproduction was imperfect and inadequate.

Bearing in mind the enormous extension of the moving picture business, it is easy to understand how important it was to increase the capacity of the apparatus in translating the range frequency and the amplitude of the sound waves and to improve the tone quality so as to make the reproduction satisfactory from the viewpoint of the practical purposes for which it was intended. We would gather from the evidence that many a skilled craftsman was at work endeavouring to overcome the difficulties and some hundreds of patents were taken out with regard to all sorts of diaphragms, driving mechanisms and sound boxes with the object of solving the problem.

Wente, the inventor of the respondents' device, produced an ingenious article, of which the utility is conceded, and which brought a markedly superior result. It increased the frequency range capable of reproduction; its transmission was louder and more even; it improved the accuracy of the tone quality and did away with distortion or "blasting". It met with ready adoption and quickly went into wide commercial use.

We agree with the learned President that there is no lack of subject-matter in the patent in suit. We also agree with him with regard to the objection founded on the

1933

BALDWIN
INTER-
NATIONAL
RADIO CO.
OF CANADA
LTD.

v.
WESTERN
ELECTRIC
CO. INC.
et al.

Rinfret J.
—

1933

BALDWIN
INTER-
NATIONAL
RADIO CO.
OF CANADA
LTD.
v.

WESTERN
ELECTRIC
CO. INC.
et al.

Rinfret J.
—

prior art. It is not possible to base anticipation on the evidence adduced by the appellants.

In order to decide an objection grounded upon anticipation, one must look at the description in the specification, so as to ascertain what the invention really is. The claims may add light to it, but they are not meant for that purpose, and their object is mainly to define the extent of the monopoly to which protection is granted. It may be that a patentee has discovered and described a new thing for which he made no claim, in which case he will have no "exclusive property and privilege", but obviously his patent may not be displaced upon the ground of prior knowledge or use by others.

The description in this patent is set out in an earlier part of the judgment. It clearly shows that the invention consists in a combination. It is a combination of four elements: a diaphragm, a sound chamber, a plug and means for driving or actuating the diaphragm. The diaphragm is described as comprising "a stiff, dish-shaped, piston portion, a flexible corrugated portion and a flat portion which is clamped between the housing structure and the upper portion of the core structure". The sound chamber has the plug secured therein so as to decrease the cross-sectional areas of the sound passages therethrough. The plug is so shaped as to conform with the concavity of the dish-shaped diaphragm, the radius of the plug being slightly smaller and so arranged as to form with the diaphragm converging sound passages extending from the centre of the diaphragm and from its peripheral portion to a common sound passage, which is effectually the throat of the horn. (N.B. It is common ground that the horn, although an obvious adjunct of the apparatus and although referred to in the specification, is not an element of the patented combination). The driving or actuating means, throughout the "detailed description", are referred to as a coil and they are shown as such on the drawing. The specification states that "the light rigid coil" is attached or connected to the stiff piston portion of the diaphragm and that, when assembled, it is positioned approximately at equal distance from the pole pieces of the electromagnet.

The invention lies in the particular combination so described: the combination of a diaphragm of a particular

defined *form* actuated from the periphery of its rigid portion by a defined type of driving mechanism (the dynamic type) and used with a special type of sound chamber having in it a plug of a particular description. This is not, as was urged by counsel for the appellants, a mere aggregation or a juxtaposition of known contrivances. We have here a group of co-acting parts achieving a combined result or, as was said in *British United Shoe Machinery Company Ltd. v. A. Fussell & Sons Ltd.* (1), "a collocation of intercommunicating parts so as to arrive at (what may be called) a simple and not a complex result". That satisfies the definition of a combination for the purposes of the patent law.

Having read the specification as describing a combination, it matters not whether, as contended by counsel for the appellants, the plug or the diaphragm or the coil driver or the sound chamber are old and were already known in the art as separate entities. On this branch of the case, viz.: anticipation, the only point is whether the actual combination is new. In the light of the evidence given at the trial, it appears that the particular diaphragm, the particular air chamber with the plug were never before used together in the way described; and it may be stated with certainty that not a single patent was referred to which anticipated the combination of elements constituting Wenté's invention. It is idle to repeat that anticipation is not established by what the learned President so justly qualified the "imaginary assemblage" of separate elements gathered from glosses selected here and there in several and distinct anterior specifications. None of the prior patents relied on conveyed the same knowledge or gave information equal, in practical utility, to that given by the respondents' patent. The result is that the objection based on anticipation was rightly dismissed by the Exchequer Court.

The designer of the appellants' device, in the course of his testimony, made some reference to a demonstration in Dr. Lee de Forest's studio, in New York City, in February or March, 1926. On that occasion, he was shown an apparatus in the nature of a dynamic cone speaker and, as he thought, reproducing sounds in a very satisfactory way.

(1) (1908) 25 R.P.C. 631, at 657.

1933

BALDWIN
INTER-
NATIONAL
RADIO Co.
OF CANADA
LTD.

v.

WESTERN
ELECTRIC
Co. INC.
et al.

Rinfret J.

1933

BALDWIN
INTER-
NATIONAL
RADIO CO.
OF CANADA
LTD.

v.

WESTERN
ELECTRIC
CO. INC.
et al.

Rinfret J.

In the same testimony a mere mention is made of another apparatus, the Panetrope R.C.A. 104, a performance of which was witnessed by him in a large auditorium in Salt Lake City in the year 1925. These were introduced in the evidence apparently to show that, at the time of Wenté's invention, there were other types of loud speakers on the market suitable for talking moving picture equipment. The evidence was addressed neither to the issue of subject-matter, nor to that of anticipation. It may be that it might have been developed. As it stands in the record, it is entirely inconclusive. It gives no information whatever on the structure or on the operation of the apparatus and it is quite impossible to ask the court to make a finding on that kind of evidence.

We have so far reached the conclusion that the patent in suit, read as a patent for a combination, has subject-matter and utility and that it had not been anticipated. Before proceeding to consider the issue of infringement, it will be more convenient to examine the new point urged in this court by the appellants to the effect that the claims are insufficient and that the specification does not fulfill the requirements of section 14 of the *Patent Act* (c. 150 of R.S.C. 1927).

At the outset of the trial in the Exchequer Court, counsel for the respondents declared that they would rely only on claims 4 and 9 of the patent. Counsel for the appellants accepted this situation, so that the trial proceeded on the basis of the respondents' declaration, and it was limited to the question of the merits or demerits of the two claims in question. No evidence, no argument was addressed to the other claims; and the validity of the patent as a whole, upon the ground of insufficiency of the claims, was not put in issue. We think, therefore, the discussion must be restricted to claims 4 and 9. Here is the full wording of the two claims in dispute:

Claim 4:

An acoustic device comprising a piston diaphragm having a flexible peripheral portion and a substantially dish-shaped central portion, means for driving said diaphragm at the periphery of its central portion, a horn, a sound chamber between said diaphragm and said horn, a plug in said sound chamber for decreasing the cross-sectional area of a portion of the sound passage therethrough.

Claim 9:

An acoustic device comprising a diaphragm having a dish-shaped portion and a flexible portion, a coil attached to said dish-shaped portion for driving said diaphragm, and means juxtaposed to one face of said diaphragm for directing sound waves from the centre of the diaphragm outwardly and from the outer edge of said diaphragm inwardly to an annular passage, the face of said means conforming substantially to the face of the diaphragm juxtaposed thereto.

The objection made by the appellants is that these claims do not distinguish what is new from what was known or used before. There is no doubt it was at one time the rule in Great Britain that the claiming clause must clearly distinguish that which was old from that which was new; although it may yet be a question whether the rule applied to patents other than process patents or patents for improvements of a known article and whether it was ever meant to apply to a patent covering a combination as such. The old rule, however, has been considerably modified and the new doctrine found expression, amongst others, in Halsbury, "Laws of England", *vis.* Patents & Inventions, sec. 340, at p. 162. In that section, we find the following:

It may be expedient or even necessary to mention in the claiming clause of the specification something which, though not the invention itself nor *per se* proper subject-matter of letters patent, helps to explain the invention. If the claiming clause is drafted so as to claim this thing *per se*, the patent is clearly bad, for it claims something which is not the invention. * * * (But) upon the authorities it is now established that if the claiming clause does in fact claim the invention and does not claim anything that is old *per se*, the patent is not avoided because in the claiming clause that which is old is not distinguished from that which is new.

It will be sufficient for our purpose in that connection to refer to the judgment of the Court of Appeal, in England, in the case of *British United Shoe Machinery Company Ltd. v. A. Fussell & Sons Ltd.* (1). In that case, the inventor had applied for a new combination described in the specification and which claimed the whole combination as new. The objection was made that the claiming clause did not distinguish the old from the new. The earlier cases were considered and distinguished, and *Harrison v. Anderton Foundry Co.* (2) was followed. Moulton L.J. said that it was not a good objection to a claim for a combination that the patentee had not distinguished old from new; that, apart from the duty of a patentee to delimit his invention,

1933

BALDWIN
INTER-
NATIONAL
RADIO CO.
OF CANADA
LTD.
v.
WESTERN
ELECTRIC
CO. INC.
et al.

Rinfret J.
—

(1) (1908) 25 R.P.C. 631.

(2) (1876) 1 App. Cas. 574.

1932
BALDWIN
INTER-
NATIONAL
RADIO CO.
OF CANADA
LTD.
v.
WESTERN
ELECTRIC
CO. INC.
et al.
Rinfret J.

there is now no such duty on his part. He referred to a passage in *Harrison v. Anderston Foundry Co.* (1). The passage is illuminative on the point we are now discussing:

The first is an objection said to be founded upon the case of *Foxwell v. Bostock* (2), decided by the late Lord Westbury when Lord Chancellor. It is said to have been determined in that case that where there is a patent for a combination there must be a discovery, or explanation of the novelty, and the specification must show what is the novelty, and what the merit of the invention. I cannot think that, as applied to a patent for a combination, this is, or was meant to be, the effect of the decision in *Foxwell v. Bostock* (2). If there is a patent for a combination, the combination itself is, *ex necessitate*, the novelty; and the combination is also the merit, if it be a merit, which remains to be proved by evidence. So also with regard to the discrimination between what is new and what is old. If it is clear that the claim is for a combination, and nothing but a combination, there is no infringement unless the whole combination is used, and it is in that way immaterial whether any or which of the parts are new. If, indeed, it were left open on the specification to the patentee to claim, not merely the combination of all the parts as a whole, but also certain subordinate or subsidiary parts of the combination, on the ground that such subordinate and subsidiary parts are new and material, as it was held a patentee might do in *Lister v. Leather* (3), then it might be necessary to see that the patentee had carefully distinguished those subordinate or subsidiary parts, and had not left it *in dubio* what claim to parts, in addition to the claim for combination, he meant to assert. The second objection to the first claim in the present case was founded on the doctrine of *Lister v. Leather* (3). In the present case, however, no question of this kind appears to me to arise. The patentees claim, as I have said, for a combination under their first claim, calling it "the construction and arrangements of the parts of mechanism herein distinguished generally".

And, after having made the quotation, Lord Fletcher Moulton adds (4):

Therefore what Lord Cairns said was,—If what you have claimed, and the monopoly which you have obtained, is for a combination, that combination is the novelty, and you have no obligation beyond accurately defining it. In my opinion that is the law as it now stands.

Lord Justice Buckley expressed the same view, and his judgment was that where a patentee claims what is substantially a new combination, he need not discriminate and identify that part of his combination which is new. He said (5):

The combination is the novelty, and to sufficiently describe the combination is sufficient to describe the novelty; but if the combination is not new, which is the case first put by Lord Selborne in *Moore v.*

(1) (1876) 1 App. Cas. 574, at 577-578.

(4) 25 R.P.C. at 656.

(2) (1864) 4 DeG. J. & S. 298.

(3) (1858) 8 El. & Bl. 1004.

(5) 25 R.P.C. at 657.

Bennett (1), so that there cannot be a valid patent for a combination, then even though the patentee misdescribes it as a new combination, which by hypothesis it is not, the novelty must be in the subordinate integer. *Foxwell v. Bostock* (2) then applies. To describe it as a new combination is, in such a case, to misdescribe it. The invention in such a case is the improvement upon a particular part of an old combination, and the part must be identified by the patentee.

We do not think that section 14 of the *Patent Act* prescribes any different rule. The section requires that:

The specification shall

- (a) correctly and fully describe the invention and its operation or use as contemplated by the inventor;
- (b) set forth clearly the various steps in a process, or the method of constructing, making or compounding, a machine, manufacture, or composition of matter;
- (c) end with a claim or claims stating distinctly the things or combinations which the applicant regards as new and in which he claims an exclusive property and privilege.

What is required, therefore, under our law, is that the applicant should give a full and correct description of the invention and its operation or use. If the invention is a new process, he should set forth clearly the various steps in the process; if a machine, manufacture, or composition of matter, the specification should explain the method of constructing, making or compounding the same. Then, in every patent, the claim or claims must state distinctly what the applicant regards as new and in which he claims an exclusive property and privilege. If the invention be a new thing, or the improvement of a thing, he must so state; but where the invention consists merely in the new combination of old elements or devices, such combination is sufficiently described if the elements or devices of which it is composed are all named and their mode of operation given and the new and useful result to be accomplished pointed out (Compare: *Bates v. Coe* (3)). It is only if the applicant desires to claim invention for a subordinate element *per se* that it is necessary for him to claim the element separately, if he wishes to secure in it an exclusive property and privilege.

In the present case, we have already indicated the reasons why we thought the patent ought to be construed as a patent for a combination, and nothing more. We are dealing with a meritorious invention; and the respondents are

1933
BALDWIN
INTER-
NATIONAL
RADIO CO.
OF CANADA
LTD.
v.
WESTERN
ELECTRIC
CO. INC.
et al.

Rinfret J.

(1) (1884) 1 R.P.C. 129.

(2) (1864) 4 DeG. J. & S. 298.

(3) (1878) 98 U.S. 31.

1933

BALDWIN
INTER-
NATIONAL
RADIO CO.
OF CANADA

LTD.

v.

WESTERN
ELECTRIC
CO. INC.
et al.

Rinfret J.

entitled to have their claims interpreted "by a mind willing to understand, not by a mind desirous of misunderstanding" (*Lister v. Norton* (1)). Claims 4 and 9 must be read with reference to the entire specification; and it is sufficient if it appears from the claims so read what the patentee regards as his invention. See Fletcher Moulton on Patents, 1913 ed., p. 87; Terrell on Patents, 7th ed., p. 121. Here, the combination itself is the only thing which Wentle regarded as his invention. He correctly and fully described it in the description part of the specification. He indicated the method of constructing and making the new combination in the detailed description and in the accompanying drawing which forms an essential part of the patent; and, upon a fair construction of claims 4 and 9 construed with reference to the entire specification, there can be no doubt, in our view, of the exact nature of the invention which he claimed as new; and there exists no difficulty in ascertaining and defining what are the exact parts of his new combination and what his monopoly covers. It should be added that, had we come to the conclusion that the specification and drawing contain more or less than was necessary for obtaining the end for which they purported to be made, there was not the slightest suggestion that such omission or addition had been wilfully made for the purpose of misleading (*Patent Act*, s. 31).

The attack made by the appellants upon the patent of the respondents having failed, the only remaining point is that of infringement; and, in regard to it, we find no difficulty in following the finding made by the Exchequer Court. The appellants' device is substantially the same as the respondents' device. The diaphragm in one is dished in the opposite direction to the way it is dished in the other; but obviously the appellants cannot escape infringement upon such a flimsy pretence. There is a hole in the middle of the plug designed for the appellants' apparatus; but this slight difference is more apparent than real. In effect, as the evidence shows, the difference has no bearing on the nature of the device or in the method of its operation. The trial judge found, and the evidence establishes, we think, that the

response curves of the defendants' device, taken according to standard practice, indicate that the sound intensity for the different frequencies are practically the same with the hole free, or with the hole plugged. The hole does not seem to have any practical effect in so far as results are concerned.

All the characteristics of Wenté's patent are incorporated in the appellants' device and we are unable to agree with the appellants that the central aperture in the plug saves them from infringement of Wenté's invention. The scientific fact is that both plugs (aperture or no aperture) were put there substantially for the same function and their performance is practically identical. We have therefore two devices based upon the same principles, composed of the same elements, and producing no results materially different. In those circumstances, we must come to the conclusion that one is a mere imitation of the other and that therefore the respondents' patent has been infringed (*Collette v. Lasnier* (1)).

For the above reasons, the appeal will be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Henderson, Herridge & Gowing*.

Solicitors for the respondents: *Smart & Biggar*.

1933

BALDWIN
INTER-
NATIONAL
RADIO CO.
OF CANADA
LTD.

v.
WESTERN
ELECTRIC
CO. INC.
et al.

Rinfret J.