

1934
 * Feb. 26, 27.
 * April 24.

ELECTROLIER MANUFACTURING COMPANY LTD. (DEFENDANT).....	}	APPELLANT;
AND		
DOMINION MANUFACTURERS LIM- ITED (PLAINTIFF)	}	RESPONDENT.

ON APPEAL FROM THE EXCHEQUER COURT OF CANADA

Patent—Validity—Sufficiency of advance upon prior art and of inventive ingenuity—Infringement.

The judgment of Maclean J., President of the Exchequer Court of Canada, [1933] Ex. C.R. 141, holding that plaintiff's patent (relating to improvements in coffin handles) was valid and had been infringed by defendant, was affirmed.

It was *held* that the construction invented, whereby a certain method of locking was made possible, was novel and ingenious; that the advance upon the prior art, and the inventive ingenuity in the discovery, were sufficient to make it good subject matter of a patent. As to infringement, it was *held* (distinguishing *P. & M. Company v. Canada Machinery Corporation Ltd.*, [1926] Can. S.C.R. 105, and *Gillette Safety Razor Co. of Canada Ltd. v. Pal Blade Corporation*

* PRESENT:—Rinfret, Lamont, Cannon, Crocket and Hughes JJ.

(1) [1921] 2 W.W.R. 416; 60 Can. S.C.R. 662.

Ltd., [1933] Can. S.C.R. 142) that, even assuming that the pivoting means used by defendant were not precisely and exactly covered by the claims of the patent, the article placed on the market by defendant embodied the principle itself of the invention in question; defendant had taken that which constituted the patentable article in the inventor's disclosure; at best, defendant had borrowed the essence of the patented structure with a small variation in its unimportant features or its non-essential elements.

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APPEAL by the defendant from the judgment of Maclean J., President of the Exchequer Court of Canada (1), holding that the plaintiff's patent in question (relating to improvements in coffin handles) was valid and had been infringed by the defendant. The material facts of the case are sufficiently stated in the judgment now reported. The appeal was dismissed with costs.

O. M. Biggar K.C. and *R. S. Smart K.C.* for the appellant.

W. L. Scott K.C. for the respondent.

The judgment of the court was delivered by

RINFRET J.—This is an action for the infringement of a patent relating to improvements in coffin handles which was granted on November 25, 1919 (No. 194,209) to one Gustav C. Pahlow and assigned on March 7, 1924, to the plaintiff. The action was tried before the President of the Exchequer Court who, on April 8, 1933, held the patent valid and infringed. The judgment granted the usual relief by way of injunction and damages. From it the defendant appeals, contending that the patent is not valid and that, even if it were, there was no infringement of it.

Although before the Exchequer Court, the invalidity of the patent was urged on several particulars of objection, the appellant in this Court limited its defence on that branch of the case to one contention only, viz., that the patent in suit was void because, having regard to the state of the art, the advance, if any, therein disclosed was not sufficient to be regarded as an invention in the legal sense or, in other words, that the patent ought to be set aside for want of subject-matter.

It is essential, therefore, to appreciate clearly what the respondent claims to be his invention. And that is to be gathered from the specification.

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The invention is said to relate to new and useful improvements in handles adaptable for use on caskets and other receptacles. The handle described in the patent consists of two members: the plate or base, which is attached to the side of the receptacle by means of screws, and the "grip", which is the portion of the handle grasped by the hand in lifting the receptacle.

The device forming the subject-matter of the specification

aims to provide novel means whereby, when the grip portion of the handle is raised, a part of the grip will be distorted or bent, so as to form a permanent pivotal connection between the grip and the base member of the handle.

The specification then proceeds to describe the device, "the combination and arrangement of parts" and "the details of (its) construction" by way of reference to "the accompanying drawings".

The base member is preferably made out of metal. It has a semi-circular opening across which a pivot bar extends. The grip

may be variously constructed, without jeopardizing the utility of the invention. As shown, but not necessarily, the grip is trough-shaped in cross section, and is provided at its lower end with a tongue having a reverse bent. Ears project inwardly from the side portions of the grip, and engage the bent of the tongue to hold the tongue about a side bar.

In the side walls of the grip, at the upper end thereof, slots are formed, the slots defining bendable tongues having depending lugs. On its top, and near to its upper end, the grip may be supplied with a transverse rib.

Having thus described the construction of the handle, the specification indicates how it operates. The upper end of the grip is inserted into the opening of the base member, the pivot bar being received in the slots; and when the grip is raised and "fulcrums" on the pivot bar, the bendable tongues at the upper end of the grip, being inside the base or plate, engage the latter at the lower edge of the opening and they are bent upwardly at their free ends, thereby diminishing the width of the slots, at the inner ends thereof, or, in effect, closing them so that, although the grip may still be swung upwardly and downwardly as occasion may demand, it cannot be retracted out of the plate's opening or be removed from the pivot bar. It is permanently assembled with the pivot bar and, therefore, with the base member.

In practical operation, the upper end of the grip (having the bendable tongues) simply is inserted into the opening

of the plate. The lower end of the grip is raised, whereupon the grip will be "securely but pivotally assembled" with the plate.

If the transverse rib has been supplied on the top and near to the upper end of the grip, as alternately suggested, it will, when the grip is raised and in use, bear against the base member above the opening and, co-operating with the pivot bar, receive a portion of the weight of the receptacle. If the bendable tongues have "depending lugs", the latter will engage the plate at the lower edge of the opening and further help in bending the tongues. One other point only need be mentioned. The specification states it should be

understood that, within the scope of what is claimed, changes in the precise embodiment of the invention shown can be made without departing from the spirit of the invention.

And now, here are the claims:

1. A handle comprising a base member having an opening and provided with a pivot bar extended across the opening and a grip insertible into the opening and having a slot receiving the pivot bar, the slot defining a bendable finger in the grip, the finger co-operating with the base member at the lower edge of the opening, when the grip is raised, to secure a bending of the finger, a partial closing of the slot, and a permanent pivotal mounting of the grip on the pivot bar.

2. A handle comprising a base member having an opening and provided with a pivot bar extended across the opening and a grip insertible into the opening and having a slot receiving the pivot bar, the slot defining a bendable finger in the grip, the finger having a lug adapted to engage the base member at the lower edge of the opening, the finger and the lug co-operating with the base member, when the grip is raised, to secure a bending of the finger, a partial closing of the slot, and a permanent pivotal mounting of the grip on the bar.

The only difference between the two claims is the lug adapted to the bendable finger, which is mentioned in the second claim and is not mentioned in the first one.

It will therefore appear that the thing or combination which the inventor regarded as new, and for which he claimed "an exclusive property and privilege" (*Patent Act*, s. 14), is a handle comprising a base member and a grip member. The base member must have an opening into which the grip is insertible. The base member is provided with a pivot bar extended across the opening. The grip has a slot receiving the pivot bar; and that slot defines a bendable finger.

Such is what we would call the constructional part of the specification, and it must have been evident to persons having the technical skill and knowledge, to whom, after

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all, claims of this nature are primarily addressed (*Osram Lamp Works Ltd. v. Pope's Electric Lamp Co. Ltd* (1))—it must have been evident that, having regard to the state of the art as disclosed in the evidence, there was no novelty in the integers of the combination so far enumerated.

But the claims proceed to say that the bendable finger co-operates

with the base member at the lower edge of the opening, *when the grip is raised*, to secure a bending of the finger, a partial closing of the slot, and a *permanent* pivotal mounting of the grip on the pivot bar; and there lies the gist of the invention. The article thus described is a construction which will permit the permanent assembly of the two parts of the handle by merely "raising" the grip. The principle disclosed in the claims is the arrangement of the bendable finger in such a way that, in the words of the inventor at the trial, it will "hook-up automatically" by the mere upward lift of the grip. That is an interpretation of the claims to which, in our view, the respondent is entitled upon a fair reading of the whole of the specification (*Lister v. Norton* (2)). In the light of that specification, the words "the finger co-operating" in the claims may reasonably be construed as meaning: "capable of co-operating". In that sense and contrary to what was urged by the appellant, the invention does not consist solely in a mode of attachment or in a method of locking the parts, to which, when the finger is once bent or when the closing of the slot is once permanently secured, the claims no longer apply. The invention is not precisely the method of locking. It is rather the particular construction whereby that method is made possible, the arrangement whereby the bendable finger will close by the mere raising of the grip and will procure "a permanent pivotal mounting of the grip" on the base member. No other two such parts had ever been constructed before. It was a combination which appeared to the learned President of the Exchequer Court "quite novel and ingenious indeed"; and we agree with his decision.

There was nothing similar in the prior art. Fletcher (U.S. patent no. 438,349) disclosed a handle built up of a knuckle and slot made to receive a pintle and drilled transversely for the insertion of a fastening pin. It was

(1) (1917) 34 R.P.C. 369, at 391.

(2) (1886) 3 R.P.C. 199, at 203.

the clear intention of that inventor that the two parts of the handle should be held together by the pin and that the insertion of this pin should constitute a separate operation. No way was provided in this patent whereby the tongues defining the slot could be bent. In fact, no thought of bending the tongues was in the mind of the inventor.

Raymond (U.S. patent 1027067) suggested a stamped or pressed metal handle whereof the prongs were bendable; but he provided for bending them by tool or by machine; and, assuming the device he disclosed could be made to work automatically—an assumption not warranted by the evidence—it is abundantly clear that no such idea ever entered his mind. His device was conceived and based on an entirely different principle. As was said by Parker J. (afterward Lord Parmoor) in *Flour Oxydizing Co. Ltd. v. Carr & Co. Ltd.* (1):

It is not enough to prove that the apparatus described in an earlier specification could have been used to produce this or that result. It must also be shown that the specification contains clear and unmistakable directions so to use it.

We are not mentioning these anterior publications for the purpose of negating anticipation. Counsel for the appellant expressly declared he was not relying on anticipation. We are referring to these former patents (the only ones produced at the trial), in order to show the state of the art and the extent of the advance made by Pahlow, the inventor of the respondent's device. He eliminated the use of the fastening pin or of the tool operation or of the machine operation. Indeed, he did away with the method of manually connecting the parts of the handle. He devised an article which is useful, practical, of manifest ingenuity (*Pneumatic Tyre Company v. Casswell* (2)) and producing a beneficial result. Though simple, his device cannot be said to have been obvious. Raymond applied his mind to the same subject, and he never thought of the use to which the pliable material could be put as it was by Pahlow. Raymond's patent issued seven years before Pahlow's and yet Pahlow's idea never occurred to the skilled craftsmen working on these or similar handles, although the bendable tongue or finger had been suggested by Raymond.

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(1) (1908) 25 R.P.C. 428, at 457.

(2) (1896) 13 R.P.C. 375, at 380.

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The merit of Pahlow's patent is not so much in the means of carrying out the idea as in conceiving the idea itself (*Fawcett v. Homan* (1)). He produced an improved thing as the result of the ingenious application of a known elastic material (*Gadd and Mason v. Mayor, etc., of Manchester* (2)); and, to our mind, there was just as much inventive ingenuity in his discovery as there was in the adoption of tubular wire braids in making bristles, held by the House of Lords to have been good subject-matter of a patent (*Thomson v. American Braided Wire Company* (3)), the result attained being a complete article, effective and capable of being assembled cheaply and expeditiously. The advance may have been slight—although, as pointed out by Fletcher Moulton on Patents (p. 22), "the general tendency of the mind is to minimize the difficulty of a discovery after it has been made"—but there was a real inventive step upon "what went before"; and the new result which obtained was of sufficient importance to make it a genuine invention. It follows that the patent should be held good and valid.

We also agree with the learned President that infringement has been established.

Infringement is a matter depending on the construction of the claims, for there it is that the inventor is required to state "the things or combinations * * * in which he claims an exclusive property and privilege" (*Patent Act*, s. 14 (1) (c)). The appellant's formation is the same as that disclosed in the patent in suit, with the exception that the pivoting means in the appellant's structure do not make use of the continuous bar extending across the semi-circular opening in the plate or base member as described in the specification. Instead of the pivot bar running right across the opening, there are two holes "about which the tongues in the sides of the grip rotate, when they are closed by raising the handle to bend the tongues."

It so happened that, in 1925, the patentee abandoned the pivot bar, in the manufacture of the base member, and replaced it by two holes in the lower wall for pivoting the grip. And the appellant copied exactly the device described in the patent including the modification brought about by the patentee in 1925. The appellant has made,

(1) (1896) 13 R.P.C. 398, at 410. (2) (1892) 9 R.P.C. 516, at 524.

(3) (1889) 6 R.P.C. 518.

constructed, used and vended the identical article turned out by the respondent since that date.

We would feel disposed to hold, as suggested by one of the expert witnesses, that the pivoting means now adopted by the patentee, and notwithstanding the modification, conform, strictly speaking, with the description of the specification. We hardly believe that, in the premises, even in respect of "the pivot bar extended across the opening", the slight change that was made may really be called a departure from the fair construction of the claims within the meaning of the patent law. But having indicated, as we have in the first part of this judgment, how we think Pahlow's claims ought to be construed, to wit: as disclosing an invention, not of a method of pivoting or locking, but of a novel construction or arrangement capable of being assembled automatically and of securing a permanent pivotal mounting by the mere raising of the grip,—the consequence follows that the particular pivot bar is not of the essence of the patented combination. Indeed, it was an old element of the prior art.

What the appellant did—and in that his infringement truly consists—was to take the idea which formed the real subject-matter of the invention. It does not matter whether he also adopted the substitution of the two holes for the bar in the pivoting means. The precise form of these means was immaterial. In the language of the patent, they could be changed "without departing from the spirit of the invention."

That is the essential distinction which must be made between this case and those of *The P. & M. Company v. Canada Machinery Corporation Limited* (1) and of *Gillette Safety Razor Company of Canada, Limited v. Pal Blade Corporation, Limited* (2) relied on by the appellant. In the *P. & M.* case (1), the appellant's invention was one of mechanical detail. It was held that the use of a different method not embodying the specified mechanical contrivance did not fall within the ambit of the claims. In the *Gillette* case (2), the patentee had claimed the blade as a subordinate invention in addition to the main or principal invention consisting in the complete safety razor. The subject-matter, if any, of the subordinate invention was found to consist in the particular form and position

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of the holes in the blade; and it was held no infringement to have punched in a razor blade holes of a different form and in a different position. In such cases, so it was decided, the patentee must make plain the metes and bounds of his invention, and he will be held strictly to the thing in which he has claimed an exclusive property and privilege. In both cases, it was found there was no infringement because the alleged infringing article was not the precise mechanism claimed for by the patentee. In this case, the situation is entirely different. Assuming, but not admitting, that the pivoting means used by the appellant are not precisely and exactly covered by the claims of the patent, the article placed on the market by the appellant embodies the principle itself of Pahlow's invention. The appellant has taken that which constitutes the patentable article in Pahlow's disclosure. Both handles are in all material respects the same.

The appellant's counsel was able to point to only three differences:

(a) the substitution of the holes for the pivot bar, and that has already been discussed.

(b) the dependent lug on the bendable finger; and that is not mentioned in claim 1, so that, at all events, it would not affect the question of infringement.

(c) the shoulder or transverse rib on the top and near the upper end of the grip; and that is given only as optional in the specification. It is an immaterial part of the mechanism.

At best, the appellant has borrowed the essence of the patented structure with a small variation in its unimportant features or its non-essential elements; and we would say, as Lord Davey, in *Consolidated Car Heating Company v. Came* (1), that, according to any fair interpretation of the language of the specification, he has taken, in substance, the pith and marrow of the invention, with all its essential and characteristic features, except in details which could be varied without detriment to the successful working of it. There is no difference in the main elements of the two structures. There is no difference in the operation. Both perform the same function in the same way. Above all, "the spirit of the invention" was infringed.

(1) ([1903] A.C. 509, at 515, 517, 518.

It does not matter, of course, that, by chance, the appellant failed to appreciate the full value of the invention and, in assembling the two parts of the infringing handle, he bent the finger by mechanical operation, instead of accomplishing the same object by the simple method of raising the grip. We are no more impressed than the trial judge by the contention that the mechanical operation, in this case, would make for more uniformity. It was the appellant's misfortune to have produced the identical article without having taken advantage of all the benefits of the patent.

If, however,—which we do not suppose—the appellant resorted to the more complicated or more cumbersome method of assembling and locking the handle for the purpose of escaping the possible consequences, we concur in the view of the learned President that the course followed by the appellant was “not sufficient to avoid infringement”.

We are of opinion that the appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the appellant: *Smart & Biggar.*

Solicitors for the respondent: *Ivey, Elliott & Gillanders.*

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