SCULLY SIGNAL COMPANY .....PLAINTIFF;

AND

YORK MACHINE COMPANY LIMITED DEFENDANT.

1953
May 26, 27, 28
1954
Jan. 25

Patent—Infringement—Disclosure—Mechanical equivalents doctrine, application of—The Patent Act, 1935, S. of C. 1935, c. 32, s. 35.

Plaintiff sued for infringement of its patent for a device whose purpose was to provide an audible signal for a fuel tank or the like continuously operable until the liquid level in the tank reached a predetermined point. The specification made reference to a dependent tube which projected downward into the tank. A whistle connected to the upper end of the tube provided the audible signal. Claiming clause 9 referred to "means providing a second vent passage of smaller capacity and an audible signal arranged to be sounded by gaseous fluid escaping through the said smaller vent passage. . . ."

The defendant, whose device made use of a whistle controlled by a float and plunger, but not of a dependent tube, pleaded non-infringement, insufficiency as to claiming clause 9, and anticipation.

As to the plea of insufficiency, the plaintiff relied solely on claiming clause 9 and submitted the claim was broadly drawn, the phrases in question referred not to the tube but to openings in the whistle and

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that, in any event, the tube was not an essential part of its invention. It also claimed that use of the float and plunger achieved the same result as the tube and was therefore a mechanical equivalent.

Held: That the subject matter of the plaintiff's invention as disclosed in the whole specification related only to a device in which the dependent tube was an essential part. The doctrine of mechanical equivalents had therefore no application and, in any event, the defendant's device was not the mechanical equivalent of the plaintiff's dependent tube. *Marconi v. British Radio Telegraph and Telephone Co. Ltd.*, 28 R.P.C. 181 at 217; *R.C.A. Photophone Ld. v. Gaumont-British Picture Corpn. Ld.*, 53 R.P.C. 167 at 197; *J. K. Smit & Sons Inc. v. McClintock*, [1940] S.C.R. 279 at 285.

2. That the phrases "means providing for a second vent passage of smaller capacity" and "an audible signal arranged to be sounded by a gaseous fluid escaping through the smaller vent passage", mean the dependent tube and not the openings in the whistle.

ACTION for infringement of patent.

The action was tried before the Honourable Mr. Justice Cameron at Toronto.

Christopher Robinson, Q.C. and *Roy Saffrey* for plaintiff.

Gareth E. Maybee, Q.C. and *J. A. Legris* for defendant.

CAMERON J.:—This is an action brought by one company against another for the infringement of a Canadian patent No. 378571 (issued on December 27, 1938) which it will be convenient to refer to hereinafter as Mathey's Patent—Alcide E. Mathey, the inventor, having assigned his rights therein to the plaintiff. The plaintiff—an incorporated company having its head office at Cambridge, Massachusetts—claims a declaration that as between the parties the patent is valid and has been infringed by the defendant, an injunction, damages, and the usual claim for delivery up or destruction of articles in the possession of the defendant made in infringement of the said patent.

The defendant is a company having its head office in Ontario. It admits that the title to the Letters Patent is in the plaintiff. A large number of defences were raised in the Statement of Defence and in the Particulars of Objections, but at the trial counsel narrowed his case to three specific matters: (1) non-infringement; (2) that the claiming clause 9 on which the plaintiff relies is ambiguous and bad on the ground of insufficiency; and (3) that the claim is not new but was anticipated by prior inventions.

Mathey's patent is a signal device known as a Liquid Level Indicator and is more particularly designed for indicating the liquid level in a fuel tank or the like, normally closed except for the provision of filling and vent openings. The purpose of the invention is to provide an audible signal for such a tank which shall be continuously operable until the liquid level in the tank has reached a predetermined point and which thereafter will cease to function. The device is called a "Ventalarm."

One of the uses to which the device has been applied—and there are many others—is in connection with the filling of fuel oil tanks in residences and buildings. Before turning to a precise description of the device itself, it will be helpful, I think, to describe briefly the use to which it is put when used on such tanks. The pipes which are used to fuel and vent the fuel oil tank are, of course, outside the building. The tank itself, being in the basement, is not readily observable by the tank wagon operator and in the absence of a suitable warning device, the operator or an assistant would be required to enter the building to measure the amount of oil remaining in the tank, ascertain how much could be safely added, and give warning when the tank was filled so as to prevent spillage if the tank were filled beyond its capacity. As stated in the specification, "it is desirable to provide simple and efficient means, inasmuch as the tank is not readily observable, by virtue of which the admission of a predetermined level in the tank may be determined by the operator from the outside. In the plaintiff's device this is accomplished through the provision of an audible signal device—a whistle—which commences to operate as soon as fuel enters the tank and is continually operable as the level rises, until the latter reaches a point predetermined by the extension of a pipe or tube into the tank. Thereafter, the audible signal is stilled by trapping of the lower end of the tube through the rising liquid level. The increased pressure due to continued filling of the tank is conveniently vented by a relief valve operable upon pressure exceeding predetermined levels."

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In describing the device itself and the precise manner in which it operates, I shall use the language of the specification itself.

In the illustrated embodiment of the invention, the usual vent pipe is disconnected from the vent opening, and a casing is threaded thereinto at its lower end and connected with the vent pipe. This casing has a vent opening of ample size for the requirements of the tank, and may be provided with a seat which is normally engaged by a generally spherical valve member. This spherical valve member is connected to a dependent tube which projects downwardly into the tank a predetermined distance, the valve supporting the tube in predetermined position during normal operation. The upper end of the tube is connected with a whistle, which, as shown, is located within the valve. If desired, the space between the whistle and valve may be filled with solder to impart greater weight to the assembly and aid in the retention of the valve on its seat.

In the ordinary operation of the device, as liquid is caused to enter the tank through the filler pipe the gas and/or vapor under pressure is driven out through the tube and thence through the whistle, creating a constant audible alarm. This continues until the liquid level has risen to a point where the lower end of the tube is trapped. Thereafter further escape of vapors from the upper portion of the tank through the tube is prevented and the whistle ceases.

During the preliminary filling up to the given level the valve normally rests upon the seat and causes substantially all of the vapor to pass through the whistle or signal device. If the pressure due to rapid filling, however, exceeds a predetermined amount, the entire tube assembly will be elevated from its seat and permit some of the vapors to be bypassed about the signal device. If after trapping of the lower end of the tube the filling is also continued the upper portion of the tank may be also vented in this same manner by elevation of the assembly from its seat. It will thus be seen that the relief valve serves the dual function of venting against excessive pressure until the predetermined level is reached, and thereafter relieving pressure if continued filling of the upper part of the tank is carried on. It will be also observed that as this type of tank is more frequently than not round or oval in cross-section, the location of the vent is not always such that the pendant tube will hang vertically, and the employment of the generally spherical valve permits the tube to assume a natural position without the necessity of guides or other means, and insures the operation of the signal device and the operation of the relief vent without danger of the valve binding or otherwise becoming constricted or failing to properly seat.

The defendant's device which allegedly infringes the plaintiff's patent is called the York Vent Signal. Like the plaintiff's device it is also a liquid level indicator designed for indicating the liquid level in a fuel tank, or the like, which is normally closed except for the provision of fill and vent openings. Likewise, its purpose is to provide an audible signal for such a tank which shall be continuously

operable until the liquid level in the tank has reached a predetermined point and which thereafter will cease to function.

Ex. No. 3 is a sample of the defendant's device. It also comprises a casing which is threaded into the top of the tank, the vent pipe being connected with its upper portion; and when installed the major portion of the casing is below the top of the tank. The casing is hollow and of ample size for the requirements of the tank. It is provided with a seat which is normally engaged by a generally spherical member and centrally located therein is a whistle of much the same type as in the plaintiff's device. The whistle is of the conventional type used for that purpose and centrally located therein are the two usual small openings. As liquid enters the tank through the filler pipe, the gas or vapour under pressure is driven upward through the openings in the whistle, creating a constant audible alarm. During the preliminary filling up to the given level, the valve and its whistle rest upon the seat of the casing due to their weight and to the weight of the rod and float attached thereto, and thereby substantially all of the gas or vapour is caused to pass through the whistle or signal device. It is obvious, I think, that if the pressure due to rapid filling exceeds a predetermined amount, the entire valve assembly with its whistle, and the dependent rod and cork, will be elevated from the valve seat and permit some of the vapours to be by-passed about the signal device. It will be noted particularly that in the defendant's device the vented gas goes from the tank directly to the openings in the whistle and is not led thereto by a dependent tube.

In the defendant's device, means are also provided for causing the whistle to cease when the liquid in the tank has risen to a predetermined level. This is accomplished by means of a cork suspended below the level of the casing by a rod or plunger. When the liquid in the tank rises to the level of the cork, the latter floats, and as more liquid is added the cork rises, carrying upwards with it the rod on which it is suspended. The rod moves upwards through the apertures in the lower part of the casing and through the aperture in the lower part of the valve (the valve in the meantime remaining in the seat of the casing) until

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its upper portion completely covers the lower opening in the whistle, whereupon the whistle ceases. If thereafter filling is continued, the cork and rod will continue to rise, carrying with them the valve assembly, and in this manner the upper portion of the tank is also vented by elevation of the valve assembly from its seat.

It will be seen, therefore, that the devices of both plaintiff and defendant are combined signal and relief valves, that they comprise a casing, a vent designed to relieve the normal pressure in the tank when being filled, which normal venting is so designed as to provide a continuously audible whistle while the tank is being filled, means by which the whistle ceases when the tank has reached its predetermined level, and also a vent designed to provide for the venting of gas or vapour when the pressure in the tank is excessive due to rapid filling, and also from the top of the tank after the predetermined level of the liquid has been reached if filling continues thereafter.

The essential differences between the two devices are that in the plaintiff's the normal venting is carried to the whistle through the dependent tube and the audible signal ceases when the opening in the lower end of the tube is trapped by the rising liquid; while in the defendant's device there is no dependent tube, the normal venting is carried directly to the openings in the whistle and the audible signal ceases when the upper end of the rod supporting the cork is raised so as to close the vent opening in the whistle.

It will be convenient to consider first the defence of non-infringement.

Now the plaintiff relies solely on claiming clause 9 of the Letters Patent, which is as follows:

> In combination with a closed tank for the reception of fluid, a supply conduit leading into the tank, and a combined signal and vent device comprising a casing fixed in an opening in the upper portion of the tank, said casing having therethrough a vent passage of large capacity open at one end into the interior of the tank and open at its other end externally of the tank, a valve normally closing said passage, said valve being constructed and arranged automatically to open and vent the tank in response to abnormal pressure within the tank, *means providing a second vent passage of smaller capacity, and an audible signal arranged to be sounded by gaseous fluid escaping through said smaller vent passage, the smaller vent passage and whistle being of such capacity as to vent the tank under normal filling conditions without unduly increasing the pressure in the tank.*

Now what does that claim mean? I find it necessary to consider only the latter part of the claim which I have italicized, there being no dispute or uncertainty as to the meaning of the former part. Counsel for the plaintiff says that the claim is broadly drawn. He contends that the phrases "second vent passage of smaller capacity" and "the smaller vent passage" refer not to the "dependent tube" which I have mentioned above, but to the two small openings in the whistle; he says also that Claim 9 does not include any reference to a dependent tube. The effect of the interpretation so put forward on behalf of the plaintiff (if accepted) is to advance a claim to a monopoly for a device which does not include a dependent tube. If the plaintiff is entitled to a monopoly for such a claim, then, if one disregards for the moment any consideration as to the defendant's method of stopping the whistle by the use of a float, the devices of the plaintiff and defendant in principle would be almost identical and would achieve the same results.

Counsel for the defendant submits on the other hand that neither the claim itself nor the specification read as a whole permit of that interpretation, but that when the claim is properly read it includes the dependent tube and that such tube is an essential integer of the combination which Mathey invented and disclosed. I agree with that submission.

The duties of disclosure required of an inventor in consideration for the grant of a valid monopoly in respect of his invention are found in s. 35 of *The Patent Act*, 1935, the relevant portions of which are as follows:

35. (1) The applicant shall in the specification correctly and fully describe the invention and its operation or use as contemplated by the inventor, and set forth clearly the various steps in a process, or the method of constructing, making, compounding or using a machine, manufacture or composition of matter, in such full, clear, concise and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most closely connected, to make, construct, compound or use it. In the case of a machine he shall explain the principle thereof and the best mode in which he has contemplated the application of that principle. In the case of a process he shall explain the necessary sequence, if any, of the various steps, so as to distinguish the invention from other inventions. He shall particularly indicate and distinctly claim the part, improvement or combination which he claims as his invention.

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(2) The specification shall end with a claim or claims stating distinctly and in explicit terms the things or combinations which the applicant regards as new and in which he claims an exclusive property or privilege ...

In the case of *Minerals Separation North American Corp. v. Noranda Mines Ltd.* (1), Thorson P. in referring to such duties said: "The description of the invention must also be full; this means that its ambit must be defined, *for nothing that has not been described may be validly claimed.*"

I have recited above the essential parts of the disclosure and it is not necessary to repeat them in full. It is sufficient to say that in my opinion the only invention disclosed by the specification is one in which the dependent tube is an essential part. The specification says this: "According to the present invention, this (i.e., the manner in which the attainment of a predetermined level in the tank may be determined by the operator from the outside) is accomplished through the provision of an audible signal device which is continuously operable as level rises until the latter reaches a point predetermined *by the extension of a pipe or tube into the tank.* Thereafter, the audible signal is stilled *by trapping of the lower end of the tube through the rising liquid level.*" Later it recites: "This (i.e., the audible alarm) continues until the liquid level indicated at 40 has risen to a point *where the lower end of the tube 30 is trapped.* Thereafter, further escape of vapours from the upper portion of the tank *through the tube 30* is prevented and the whistle ceases."

There is no suggestion in the disclosure that the dependent tube may be dispensed with, that any other equivalent may be substituted for it, or that the cessation of the whistle may be accomplished by the oil entering the passages in the whistle itself. The specification, however, does say that there is a pipe or tube and that it extends into the tank. In the drawings attached to the specification, Fig. 1 represents a section in elevation of a conventional tank equipped with the plaintiff's device—a ventalarm which has actually been put into use; and Fig. 2 illustrates a modified form of the same type of device. Both include the dependent tube. In Fig. 2 the whistle is at the bottom

(1) [1947] Ex. C.R. 306 at 316.

of the tube which projects downward into the tank and the vent thereon, which is designed to relieve unusual pressure, is situated on the tube above the whistle but of necessity within the tank itself.

Nor am I able to find that Claim 9, whether read by itself or with the disclosure, is a claim for the device without the dependent tube. I agree with the submission of counsel for the defendant that the phrases "means providing for a second vent passage of smaller capacity" and "an audible signal arranged to be sounded by a gaseous fluid escaping through said smaller vent passage," mean the dependent tube and not the openings in the whistle itself. I find further support for that opinion in the fact that in the next phrase in the claim, "the smaller vent passage and whistle being of such capacity as to vent the tube", reference is made to two things, namely, "the smaller vent passage" *and* to the "whistle."

Counsel for the plaintiff submits, however, that the dependent tube is not an essential part of the invention, but merely an addition thereto. He points to the fact that its dimensions are not given, that its length is purely a matter of choice under given circumstances and that it may be reduced or extended in length as may be decided, according to whether it is desired to completely fill the tank or stop the filling at a lower level—and that is so. Some evidence was introduced which suggested that the device might operate successfully without any tube, but no one with a complete knowledge of the facts could say that he had ever seen it operated successfully. It is a significant fact that while the plaintiff company made tests of its device without a dependent tube, all those manufactured and sold—about 3,500,000 in all, including about 300,000 in Canada—were equipped with the dependent tube.

Mr. W. K. Phillips, Manager of the Customers' Service Department of the Oil Heating Division of Sherwood Brothers, Inc., of Baltimore, Maryland, gave evidence as to the very extensive use by his firm of the plaintiff's "Ventalarm" and its many advantages over other devices. He stated that the elimination of the dependent tube would in his opinion make no difference in the operation of the

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signal and that if given his choice he would prefer the whistle without the tube. In cross-examination, however, it became apparent that while he was present at a test made by his company at which he was informed that the dependent tube had been eliminated entirely (he seems to have reached the conclusion that it functioned satisfactorily), he had not in fact seen the actual "Ventalarm" which was then used and had no personal knowledge as to whether there was, in fact, a dependent tube of some length. He did not even know the purpose of the experiment. It was apparent that he was not very familiar with the manner in which the "Ventalarm" is normally installed. He said that his company had issued instructions that the dependent tube—or "stub" as he calls it—should be cut to a length of $2\frac{1}{2}$ inches for flat tanks, and $3\frac{1}{2}$ inches for upright tanks, but he could not say whether the lower end of the tube when so cut would be the specified distance below the casing, below the valve or below the whistle. His opinion, therefore, that the signal would operate as successfully without any dependent tube as with a tube, is of no value and it is significant that all the signals installed by his company are equipped with a dependent tube.

Mr. Scully, President of the plaintiff company, said that his company advised users of the "Ventalarm" to use a dependent tube of such length as would ensure that when its lower end was trapped by the oil, there would still be space in the tank for about 15 gallons. He said that some users might cut it off at the bottom of the casing, but that "they would not go up in there", meaning within the casing itself; and by that I think he could mean only one thing, namely, that the tube could not be completely eliminated from the device if satisfactory results were to be obtained.

Indeed, it is obvious on the evidence that the "Ventalarm" would not be successful without a dependent tube of some length. From an examination of Ex. 4 and from the evidence, it is apparent that the whistle is within the casing and entirely above the top of the tank. That being so, the whistle itself would not be trapped by the oil until the tank had been filled to capacity. If the whistle ceased only then, the oil remaining in the fuel line would be forced

into the vent pipe even if the operator at the tank wagon were able to shut off the supply immediately, which in all likelihood he could not do. Moreover, the evidence points strongly to the undesirability of filling the tank to the point where the valve member (which includes the whistle) would be submerged in oil and to the desirability of causing the whistle to cease at some distance below the tank level so as to avoid spillage and possibly make provision for some expansion.

My conclusion on this point, therefore, is that Claim 9 is a claim for a device which includes the dependent tube referred to in the disclosure and as shown in the drawings forming part thereof.

For the reasons stated, I also find that the dependent tube forms an essential part of the combination which Mathey invented. I state that conclusion because of the effect it may have on the next question to be considered, namely, does the defendant's device infringe that claim?

As I have stated above, the essential difference between the devices of the plaintiff and defendant is that in the case of the "Ventalarm," a dependent tube is used for the dual purpose of leading the air or gas direct to the whistle to produce a constantly audible signal, and to provide means by which the signal is stopped when the oil in the tank traps the lower end of the tube; whereas the defendant's device has no dependent tube (the air under normal pressure going directly to the whistle) and the means used for causing the signal to cease is a float and plunger functioning in the manner which I have stated. It is submitted on behalf of the plaintiff that the use of the float and plunger accomplishes the same result as the dependent tube, namely, to cause the whistle to cease, and is therefore a mechanical equivalent.

The problem of infringement by mechanical equivalents is referred to in Terrell and Shelley on Patents, Ninth Edition, at p. 148. The authors refer to *Marconi v. British Radio Telegraph and Telephone Co. Ltd* (1), where Parker, J. said:

> It is a well-known rule of Patent law that no one who borrows the substance of a patented invention can escape the consequences of infringement by making immaterial variations. From this point of view, the

(1) (1911) 28 R.P.C. 181 at 217.

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question is whether the infringing apparatus is substantially the same as the apparatus said to have been infringed . . . where the Patent is for a combination of parts or a process, and the combination or process, besides being itself new, produces new and useful results; everyone who produces the same results by using the essential parts of the combination or process is an infringer, even though he has, in fact, altered the combination or process by omitting some unessential part or step and substituting another part or step, which is, in fact, equivalent to the part or step he has omitted . . . If that part of the combination, or that step in the process for which an equivalent has been substituted, be the essential feature, or one of the essential features, then there is no room for the doctrine of equivalents.

Later, in *R.C.A. Photophone Ltd. v. Gaumont-British Picture Corpn Ltd. et al.* (1), Romer L.J. approved of the principle so laid down by Parker J. in the *Marconi* case, and continued:

The word in this passage to which I should like to call particular attention is the word "unessential". It is only in respect of unessential parts of an invention to which the principle of mechanical equivalent can be applied. The principle is, indeed, no more than a particular application of the more general principle that a person who takes what in the familiar, though oddly mixed metaphor is called the pith and marrow of the invention is an infringer. If he takes the pith and marrow of the invention he commits an infringement even though he omits an unessential part. So, too, he commits an infringement if, instead of omitting an unessential part, he substitutes for that part a mechanical equivalent. But it is not the province of the Court to guess what is or what is not the essence of the invention; that is a matter to be determined on an examination of the language used by the patentee in formulating his claims. In the case of *Submarine Signal Co. v. Henry Hughes & Sons, Ld.*, (1931) 49 R.P.C. 149, I thought that the patentee had clearly indicated that an electric oscillator was an essential feature of the invention described in his eleventh claim. I consequently held that the defendant, who had not used an electric oscillator, but something that might properly be described as mechanical equivalent of it, had not infringed. Further reflection has not caused me to change the view that I then expressed. The patentee in that case had made the electric oscillator part of the pith and marrow of his invention and the principle of mechanical equivalent was inapplicable.

Reference may also be made to *J. K. Smit & Sons Inc. v. McClintock* (2).

Some reference was made to *Electrolier Manufacturing Co. Ltd. v. Dominion Manufacturers Limited* (3), but I do not think that case is helpful to the plaintiff. There Rinfret, J. (now C.J.C.), speaking for the full Court, said at p. 443:

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

(1) (1936) 53 R.P.C. 167 at 197. (2) [1940] S.C.R. 279 at 285.
(3) [1934] S.C.R. 436.

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 (2) *Gillette Safety Razor Company of Canada, Limited v. Pal Blade Corporation, Limited,* relied on by the appellant. In the *P. & M.* case, 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, 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 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* (3), 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.

In that case it was found that the defendant's device had infringed that of the plaintiff. But it is most apparent that the precise forms of the means set out in the plaintiff's

(1) [1926] S.C.R. 105. (2) [1933] S.C.R. 142.
(3) [1903] A.C. 509 at 515, 517, 518.

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patent were immaterial, the patent itself stating that they could be changed "without departing from the spirit of the invention." In the instant case nothing of that sort is to be found. I am of the opinion that the subject-matter of the invention made by Mathey as disclosed in the whole specification, related only to a device in which the dependent tube was an integral and essential part. The doctrine of mechanical equivalency has therefore no application in this case.

From what I have said above, it is apparent also that there is a substantial difference in one of the main elements of the two structures as well as a difference in their operation. While the "dependent tube" and the "cork and plunger" may achieve substantially the same result—namely, to cause the whistle to cease—they do not perform that function in the same way. For that reason, I am of the opinion that in any event the defendant's cork and plunger is not the mechanical equivalent of the plaintiff's dependent tube.

Reference may usefully be made to *Hosiers Ltd v. Penman Ltd.* (1) and to *J. K. Smit and Sons, Inc. v. McClintock* (2).

For the reasons which I have given, I have come to the conclusion that the plaintiff has failed to establish that the defendant's device infringes its patent. It will not be necessary, therefore, to consider any of the other defences raised.

The action will therefore be dismissed with costs to be taxed.

Judgment accordingly.

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(1) [1925] Ex. C.R. 93 at 100. (2) [1939] Ex. C.R. 121 at 126.