

BARTON, ISAACS, and HIGGINS JJ. concurred.

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*Application refused.*

Solicitor, A. W. Simpson, Armidale, by *Sly & Russell*.

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SIMMONS.

C. E. W.

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95) 34 IPR

[HIGH COURT OF AUSTRALIA.]

ENGLELBERT SCHWER . . . . . APPELLANT :  
PLAINTIFF,

AND

CHARLES HENRY FULHAM AND }  
WILLIAM ROBINSON } . . . . . RESPONDENTS.  
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF  
NEW SOUTH WALES.

*Patent—New manufacture—Inventiveness—Use of known contrivance—Construction  
of sheet metal baths.*

The plaintiff brought a suit against the defendants for infringement of his patent for an improvement in the construction of sheet metal baths. The patent consisted of a device by which the strengthening board under the bath was kept in position by cast iron bearers and centre stays.

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*Held*, that the plaintiff's patent was invalid for want of invention.

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SYDNEY,  
August 18,  
22.

*Held*, also, that there was no evidence of infringement.

Decision of *Street J.*, 10th June 1910, affirmed.

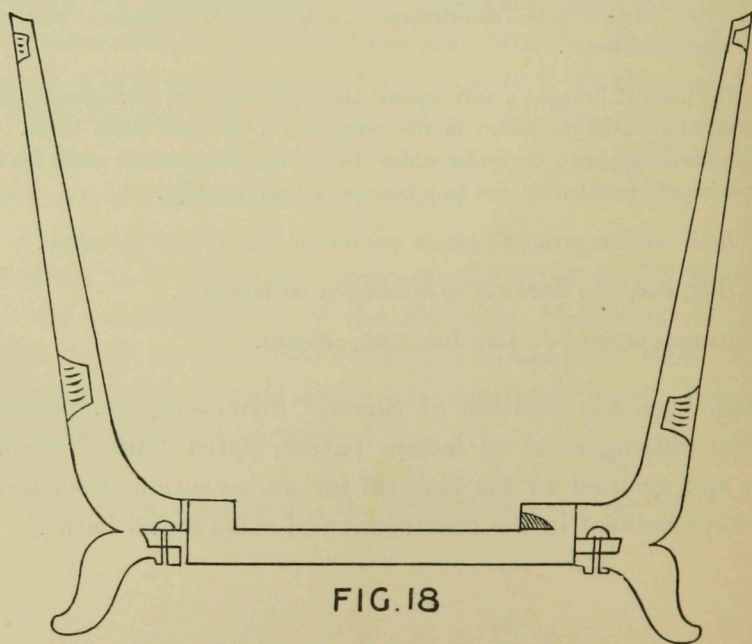
—  
Griffith C.J.,  
O'Connor,  
Isaacs and  
Higgins JJ.

APPEAL from the decision of *Street J.* dismissing the plaintiff's suit for infringement of letters patent, dated 23rd November 1908, and granted to the plaintiff for an invention described as "an improvement in the construction of sheet metal baths."

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In the specification the invention was stated to be: (1) the cast metal angle pieces on corners of bath, and the way in which they are held in position so as to form part of the beading of the bath; (2) the method in which the strengthening board is kept in position, consisting of cast iron bearers, and centre stay. The plaintiff's description of this latter part of his invention was as follows:—"The bottom of the bath is strengthened by a board which rests in cast iron bearers at each end, as shown in Fig. 19, and is supported in centre by an upright stay made with flange screwed in each end so as to enable it to be regulated to a required height. The cast iron supports on side of bath are so formed as to carry the bearers for board, and fit over seam at joint of bath, as shown in Figs. 18, 20." The plaintiff did not complain of infringement of what he claimed in his first claim, but he alleged that the defendants had taken the essential parts of his second claim, with only a colourable variation. The defendants denied the infringement, and they also disputed the validity of the second claim on the grounds of want of invention and want of novelty. *Street J.* held that the plaintiff's second claim was invalid for want of invention, and that there had been no infringement, and dismissed the suit with costs. The material facts are stated in the judgment of *Griffith C.J.*

The following are the figures referred to:—





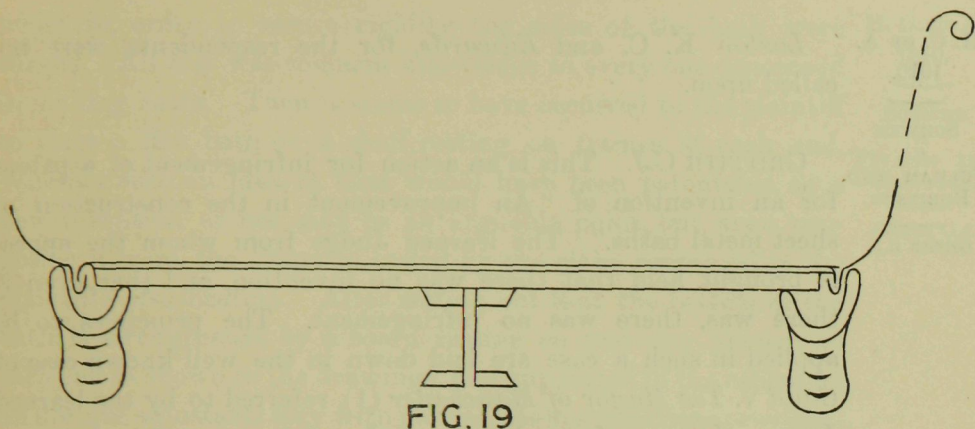


FIG. 19

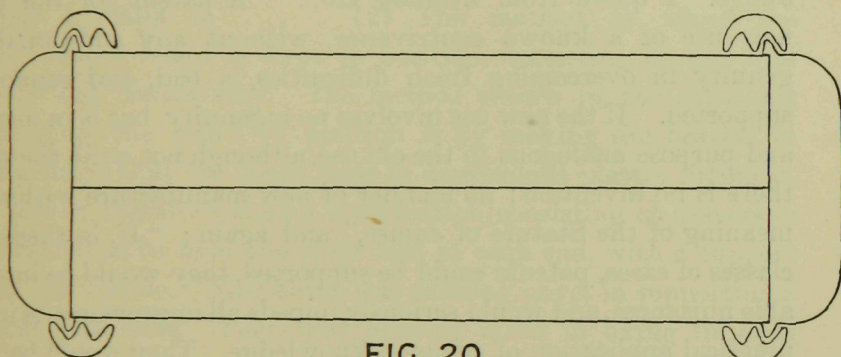


FIG. 20

*Leverrier*, for the appellant. There is ingenuity in the plaintiff's invention in devising a new method of supporting a flat sheet iron bath. The application of the idea mechanically may be very simple, but the invention is in conceiving the idea of a much simplified pattern reducing all points of contact to a minimum, and also rigidly connected with the bath. The sanitary requirements demand a few legs and a narrow board, and the plaintiff has carried this out in a way no one has thought of adopting before. No sheet metal bath was ever put on legs until plaintiff did it, or had a bearer. He really makes the platform part of the bath. When the plaintiff's design was first produced it had a large sale throughout the Commonwealth. Commercial success, immediately attending the production of a patent, is proof of novelty and inventiveness: *Haskell Golf Ball Co. v. Hutchinson* (No. 2) (1). The fact that this method was never adopted before is strong evidence of ingenuity.

[He also contended that there was evidence of infringement.]

(1) 25 R.P.C., 194.



H. C. OF A. 1910. *Loxton K. C. and Edwards*, for the respondents, were not called upon.

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GRIFFITH C.J. This is an action for infringement of a patent for an invention of "An improvement in the construction of sheet metal baths." The learned Judge from whom the appeal is brought held that there was no invention, and that, even if there was, there was no infringement. The principles to be applied in such a case are laid down in the well known case of *Gadd v. The Mayor of Manchester* (1), referred to by the learned Judge. I quote from *Lindley L.J.*: "A patent for the mere new use of a known contrivance, without any additional ingenuity in overcoming fresh difficulties, is bad, and cannot be supported. If the new use involves no ingenuity, but is in manner and purpose analogous to the old use, although not quite the same, there is no invention; no manner of new manufacture within the meaning of the Statute of James," and again: "If, in these two classes of cases, patents could be supported, they would be intolerable nuisances, and would seriously impede all improvements in the practical application of common knowledge. They would be mischievous to the State, to use the expression in the Statute of James." In the present case the facts as to what is generally called "common knowledge" as existing at the time of the alleged invention may be shortly stated. Every one knew that thin sheet metal was flexible. Every one knew that a flat-seated bath of sheet iron must rest on a flat surface, otherwise with the weight of the water and the bather in it, it might buckle in the middle. The obvious flat surface upon which to rest it was the floor. Later it was recognized that for sanitary purposes it was desirable that the bath should not rest upon the floor, but be raised above it. The obvious method was adopted of putting the bath on a shelf or platform, and if that was not strong enough, of placing a support under the middle of it, as one would do in the case of a bookshelf or any other shelf carrying weight distributed along its length. Another device for supporting sheet metal baths which had been in use for many years was to support them by iron frames at each end, the frames being made so as to fit the sides of the bath;

(1) 9 R.P.C., 516, at p. 254.



while in order to secure rigidity the sides of the bath were curved. All this was common knowledge to every one concerned in making baths. Then it seems to have occurred to the plaintiff to place a flat bath on a shelf resting on frames at each end. Whether such an idea as that would have been patentable as a new invention or not may be an arguable point, but, even supposing it were, the Court is bound by the claim contained in the plaintiff's specification. After setting out that the bottom of the bath is strengthened by a board resting on cast iron bearers on each end as shown in the drawings, and supported in the centre by an upright adjustable stay with flanges, the specifications provides: "What I claim is . . . (2) The method in which the strengthening board is kept in position, consisting of cast iron bearers and centre stay. The method shown in the drawings of keeping the board in position is by making the bearers in such a shape that the board rests in depressions exactly fitting it. The patent, therefore, is for a combination, consisting of bearers so constructed as to hold the shelf fast at each end, with a support under the middle. Now there was nothing novel in supporting a shelf at both ends. There was nothing novel in fixing its ends so as not to move laterally. This may be done in various ways by nails or screws, or projections or depressions. All this was common knowledge. There was nothing new in putting a support under the middle of a long shelf or in making the support adjustable. In substance, the combination which the plaintiff claims is a shelf with its ends fixed and a support in the middle. There was nothing more in either element of the combination or in both together. The learned Judge was of that opinion, and I agree with him.

He also held that, even if there was anything new, there had been no infringement. The difference between the plaintiff's and defendants' baths is that the board under the defendants' bath, instead of having a support in the middle, is strengthened by means of a tension rod. The object in both cases is to ensure the rigidity of the board or shelf. The rigidity of a shelf may be ensured in many well known ways, for instance, by making it thick enough to bear the weight put upon it, or by a tension rod. It is suggested that the tension rod used by the defendants is

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H. C. OF A. 1910. merely a mechanical equivalent for the prop which the plaintiff uses. If the claim had been the placing of a rigid shelf upon frames supported by feet, possibly the use of a tension rod to secure rigidity might be regarded as a mechanical equivalent for the prop. But, as the claim is framed, the intermediate support is an essential part of the combination, and when the claim is so regarded the tension rod is not a mere mechanical equivalent.

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In my opinion, the plaintiff's specification does not disclose any invention or manner of new manufacture, and, if it does, there has been no infringement by the defendants. I agree with the learned Judge on both points, and think that the appeal must be dismissed.

O'CONNOR J. I agree. The decision of the learned Judge is so obviously right that I do not think it is necessary to add anything to what has already been said.

ISAACS J. I desire to say nothing on the question of infringement. I think the appeal should be dismissed on the first ground, and that the case presents nothing more than a thoughtful application of ordinary skill by an intelligent workman to get a desired practical result.

HIGGINS J. I agree, but desire to be understood to confine my judgment to the claim as it stands.

*Appeal dismissed with costs.*

Solicitor, for appellant, *Alfred de Lissa.*

Solicitors, for respondents, *Dalrymple & Blain.*

C. E. W.