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Appeal allowed. Order appealed from discharged. Question answered that the whole sum mentioned should be deducted from the taxpayer's gross income for the year 1911. Case remitted to County Court. Respondent to pay the costs of and occasioned by the special case and of this appeal.

Solicitors, for the appellant, *Whiting & Aitken.*

Solicitor, for the respondent, *Guinness*, Crown Solicitor for Victoria.

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[HIGH COURT OF AUSTRALIA.]

COMMISSIONER OF PATENTS . . . APPELLANT;

AND

LEE . . . RESPONDENT.

ON APPEAL FROM A JUSTICE OF THE HIGH COURT.

H. C. OF A. *Patent—Application—Want of subject matter—Working direction for use of existing*
1913. *appliances—Patents Act 1903-1909 (No. 21 of 1903—No. 17 of 1909), secs. 4,*
36, 46.

SYDNEY,
March 31;
April 7.

Griffith C.J.,
Barton and
Gavan Duffy JJ.

An application was made for a patent for “improvements in the manufacture of charcoal.” The claims in the specification were as follow:—1. A process of manufacture of charcoal, wherein wood is packed in a chamber with top and bottom closed vents, is lighted at the bottom and the bottom vents then closed, and the direction and volume of the indraught and of the

gaseous products of combustion are controlled by manipulating the top vent closures in such manner that the charge is burned regularly and combustion proceeds evenly from bottom to top, whilst the indraught passes downwardly through the unburned portion of the charge, and the gases of combustion pass upwardly through the same. 2. A process of burning charcoal characterized by the sealing of the bottom lighted charge in a chamber, and the controlling of indraught and gas emission by closed apertures in the top of the chamber in such manner as to ensure uniform burning of the charge from bottom to top, and the preheating of the indraught by contact with the unburned charge and the preheating of the unburned charge by the contact of the gases of combustion therewith, substantially as described. No further direction was given as to the manner in which the top vents were to be manipulated for the purpose of producing a downdraught through some and an updraught through others, or, if there were only one, an updraught and a downdraught through the same vent, nor was any new form of kiln or retort suggested.

Held, by Griffith C.J. and Barton J. (*Gavan Duffy J.* dissenting), that the alleged invention was merely a working direction to be observed in the use of existing appliances, and, therefore, that the application was properly refused by the Commissioner.

Decision of *Isaacs J.*: *Lee v. Commissioner of Patents*, 15 C.L.R., 161, reversed.

APPEAL from *Isaacs J.*

An application was made by William Thomas Lee, the assignee of Oscar Wright, for a patent for "improvements in the manufacture of charcoal." The material parts of the complete specification, and two of the claims therein, and also the other material facts, are set out in the judgments hereunder.

The Commissioner of Patents refused to accept the complete specification on the ground that what the applicant sought to protect by letters patent were mere working directions for the use of an old machine for an old purpose. On appeal by the applicant to the High Court, *Isaacs J.* allowed the appeal and directed that the application and specification should be accepted, excising a third claim which had been abandoned before the Commissioner: *Lee v. Commissioner of Patents* (1).

From this decision the Commissioner now appealed to the Full Court of the High Court.

Rolin K.C. (with him *H. E. Manning*), for the appellant. What is said to be an invention in this case is merely a direction

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for working an old machine. All that the applicant directs to be done is to close the bottom inlets as soon as the charge is alight. This is an idea which, by itself, is not patentable. If at any time in using this idea the bottom inlets are left open, the new process is at an end, for what is then being done is what was done under the old process. [He referred to *In re Waterhouse's Patent* (1); *Patterson v. Gaslight and Coke Co.* (2); *Partington and Kellner-Partington Paper Pulp Co. Ltd. v. Hartlepoons Pulp and Paper Co. Ltd.* (3); *Frost on Patents* 4th ed., vol I, p. 61; *Halsbury's Laws of England*, vol. XXII., article "Patents," p. 140; *Rogers v. Commissioner of Patents* (4).]

Flannery, for the respondent. A patent may be granted for a process of using an old machine in such a way as to produce a better result: *Patterson v. Gaslight and Coke Co.* (5); *Partington and Kellner-Partington Paper Pulp Co. Ltd. v. Hartlepoons Pulp and Paper Co. Ltd.* (3); *Willmann v. Petersen* (6); *British Vacuum Cleaner Co. Ltd. v. London and South Western Railway Co.* (7). The method is new, and on the evidence must be taken to involve the exercise of the inventive faculty. There is also a means described of carrying out the method. [He also referred to *Frost on Patents*, 4th ed., vol. I, p. 62; *Dowling v. Billington* (8); *Hickton's Patent Syndicate v. Patents and Machine Improvements Co. Ltd.* (9).]

Rolin K.C., in reply.

Cur. adv. vult.

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GRIFFITH C.J. read the following judgment:—The alleged invention is for "Improvements in the manufacture of Charcoal." The claims are for:

(1) "The herein-described process of manufacture of charcoal, wherein wood is packed in a chamber with top and bottom closed vents, is lighted at the bottom and the bottom vents then closed, and the direction and volume of the indraught and of the

(1) 23 R.P.C., 470.
(2) 2 Ch. D., 812; 3 App. Cas., 239,
at p. 246.
(3) 12 R.P.C., 295.
(4) 10 C.L.R., 701.

(5) 3 App. Cas., 239.
(6) 2 C.L.R., 1.
(7) 29 R.P.C., 309.
(8) 7 R.P.C., 191.
(9) 26 R.P.C., 339.

gaseous products of combustion are controlled by manipulating the top vent closures in such manner that the charge is burned regularly and combustion proceeds evenly from bottom to top, whilst the indraught passes downwardly through the unburned portion of the charge, and the gases of combustion pass upwardly through the same."

(2) "A process of burning charcoal characterized by the sealing of the bottom lighted charge in a chamber, and the controlling of indraught and gas emission by closed apertures in the top of the chamber in such manner as to ensure uniform burning of the charge from bottom to top, and the preheating of the indraught by contact with the unburned charge and the preheating of the unburned charge by the contact of the gases of combustion therewith, substantially as described."

A third claim was abandoned before the Commissioner.

It is common knowledge that charcoal is the product of the imperfect combustion of wood and other combustible matter, vegetable or animal. The art of charcoal-burning has from time immemorial consisted in regulating the combustion so as to prevent it from becoming perfect. For this purpose the process has been conducted in such a manner that the supply of air is limited, this result being attained by heaping clay or earth around the ignited wood or igniting it in a pit, and later by putting the wood in kilns or retorts to which the admission of air is regulated by doors, slides, bars or in any other convenient method. It is manifest that this admission must be regulated and finally stopped when the ignition is sufficient; for otherwise the kiln would become a furnace.

In 1909 the applicant obtained a grant of a patent (No. 15,551/09) for "Improvements in certain kilns or retorts for the manufacture of charcoal." The essence of the invention was the providing of several vents or chimneys in the top or cover, surrounding the control vent, all having removable covers or lids, with a series of channels for the admission of air at the bottom. The purpose of the invention was to control the combustion so as to make it as far as possible extend equally over each horizontal layer or stratum of wood. This result, it was claimed, could be

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obtained by opening or closing the several vents as circumstances might require.

In the specification now in question the applicant says:—
“ Heretofore, charcoal has been ‘ burned ’ in covered heaps and in meilers and kilns, and in some cases in chambers constructed of iron sheets or plates, these plates being in certain known constructions of said chambers lined with a refractory substance such as fire-brick or asbestos millboard. The air-vents and smoke-vents have been variously arranged in these chambers. The present invention is characterized by the manner of manipulating the drafts during the burning process, whereby the improved effects before mentioned are attained.

“ According to this invention a charge of wood is enclosed in a chamber which is entirely closed except at the top, where it is provided with one or more apertures fitted with slide plates or other closures by means of which the aperture areas may be varied at will. The charge is ignited at the bottom and the kiln head then covered, one or more of the apertures in it being opened only sufficiently to allow the necessary ingress of air and exit of gases of combustion to ensure continuance of combustion at the necessary degree for the production of good charcoal without formation of ash.

“ The top or cover plate is fitted with one or several apertures, each fitted with a slide plate or grated damper or other valve arrangements by means of which the area of the aperture or apertures may be varied at will.

“ In operation, the kiln is more or less completely charged with wood packed in the usual manner known to charcoal-burners, and is ignited at the bottom through a vent door or doors provided for that purpose. When the charge is alight these bottom doors are closed and the head of the kiln is placed in position and the joints thereof luted or otherwise made close. The head aperture or apertures are opened only sufficiently to admit the necessary volume of air to maintain combustion and to allow exit of the gases produced. The adjustment is varied from time to time so as to keep the temperature uniform about the

proper point to secure a satisfactory product. When the burning operation is complete the head aperture or apertures is or are closed, and the kiln and its contents allowed to cool off before the product is unloaded.

"As there is an opening (or openings) in the top only of the kiln, during the burning operation, and as combustion proceeds upward, the incoming air and the outgoing gases traverse the raw wood lying above the charcoal, a natural circulation being set up which distributes itself in such a manner as to promote a uniform progress of combustion throughout the charge."

It will be observed that, so far, nothing turns on the number of the openings in the top or cover of the kiln, which may be one or more.

Later, the specification proceeds:—"The various vents, D and E in the cover, which are fitted with closures, as shown, are manipulated during the burning of the charge, the necessary heat for which is supplied by the combustion of the charge. This manipulation is conducted in such a manner that a sufficient indraught, but no excess of air, is permitted at one or more of the vents, whilst exit of gases and smoke is permitted at another or others of the vents, the object being to direct the feed-air downward through the charge, the combustion of which proceeds from bottom to top of the charge, and to cause the combustion products to traverse the unburnt portion of the charge before finding exit from the chamber. As the burning proceeds sometimes irregularly the draughts must be watched and the closures manipulated so as to influence the direction of the combustion and encourage even burning from bottom to top. Irregularity of the burning may be detected by observing the temperatures at different positions on the shell. Waste of heat is inhibited by the lining of fibro-cement, asbestos board, or like refractory material."

No further direction is given as to the manner in which the vents are to be manipulated for the purpose of producing a down-draught through some and an updraught through others, or, if there is only one, an updraught and a downdraught through the same vent. I have already read the claims.

The Commissioner, concurring in opinion with the Examiner, thought that what the applicant seeks to protect by letters

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patent, are mere working directions for the use of an old machine for an old purpose.

No new form of kiln or retort is suggested. The use of several vents in the top is not new, as appears from the patent of 1909.

I have already pointed out that no directions are given as to the mode of manipulation if there are several vents, and that there need not be more than one vent.

Under these circumstances it appears to me that the discovery, if any, is that the admission of air at the bottom of the kiln or vessel which is necessary in order to cause ignition may be discontinued at an early, as well as at a late, stage of the operation, and that the process of imperfect combustion will nevertheless go on effectually.

Isaacs J. on this point said (1):—"The Commissioner took the view that closing the bottom vent was a mere working direction for the manipulation of the draught. But, according to the facts I have mentioned, it is something quite different. It does not manipulate the draught; it abolishes it. It is not a working direction, because it is entirely contrary to the prior system of working, and no operator previously would have considered it within the limits of practical charcoal burning to cut off entirely the access of the lower air. In these circumstances it appears to me the applicant's specification should not have been refused for the reason given by the Commissioner.

"Mr. *Manning* sought to show, alternatively, that there was no subject matter. But in this case it all comes round to the same thing. The essential point to remember is the complete elimination of an upward draught, with the resulting remedying of a defect heretofore considered incurable. That is sufficient subject matter."

With all respect, I do not think that an upward draught is eliminated. Sparks still fly upward. An upward draught is, of course, created when the fire is lighted at the bottom of the pile of wood, and it must be continued to the end of the operation so long as any wood remains to be ignited. What the applicant calls the "exit of the gases produced" is this upward draught

(1) 15 C.L.R., 161, at p. 169.

called by another name. The real difference between the alleged new method and the old is not that the upward draught is eliminated, but that the air to feed the draught after it has once been started from below is introduced at the top of the vessel instead of at the bottom.

That imperfect combustion may be produced in such a manner is familiar to everyone who has seen rubbish burning in a pit, the flames not having yet reached the surface, and being covered by unignited material. The air supplying the oxygen necessary for combustion in such a case percolates downwards through some interstices of the rubbish and the smoke percolates upwards through others. The same phenomenon occurs in the case to which the applicant refers in his declaration by way of illustration, namely, a cargo smouldering in the hold of a ship.

It is obviously immaterial whether the first ignition is created by lighting the material from the top, other material being afterwards piled upon it, or whether it is created by the more usual means of fire applied below. Under these circumstances, the alleged invention may, as it seems to me, be summarized in either of two expressions: "When ignition is sufficiently started you can make charcoal by letting the wood smoulder without admitting air from the bottom," or "You may stop the admittance of air from the bottom as soon as the charcoal is sufficiently ignited." I do not see how either statement can be regarded as anything but a working direction to be observed in the use of existing appliances.

None of the cases cited to us warrant the conclusion that such a discovery without more is patentable as a new manner of manufacture.

The case of the second claim in *Patterson v. Gaslight and Coke Co.* (1) seems the nearest in principle. In that case *James L.J.*, who delivered the judgment of the Court of Appeal, after reading the second head of claim, said (2):—"There is in that no suggestion of any new apparatus—of any new process. There is no device or scheme of any kind. Lime purifiers in succession were in general, almost universal use, wherever lime could be freely used. The gas entered one, passed from that to another,

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(1) 2 Ch. D., 812.

(2) 2 Ch. D., 812, at p. 834.

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and then generally, or sometimes, to a third ; the gas, partly purified in the washers and scrubbers, passed through the series of lime purifiers into an oxide of iron purifier. That was the process before, and that is to remain the process after and under the plaintiff's patent. What he claims to have discovered is, that if the carbonic acid, which is the first thing taken up by the lime, is not wholly taken up at the beginning, and is allowed to enter the last purifier or purifiers, it in fact poisons the latter, decomposes the sulphide of calcium already formed, disengages the other sulphur absorbed by the sulphide, and of course fills the gas again with the sulphur impurities which had been removed. This is a very valuable working caution and direction, but it is impossible to make anything more of it than a working caution and direction. It really amounts to nothing more than a direction to be sufficiently liberal in the use of the caustic lime in the first stage, and an instruction that the moment it is so far carbonated as not to arrest the carbonic acid, it should be removed and a fresh supply of lime got. It may be a direction and instruction of the greatest possible value and utility, but it is utterly impossible to make such a direction and instruction, however valuable, the subject of a patent. It does not differ in principle, although it does differ enormously in scale, from a cook's instructions and directions as to the best means of manipulating articles of food. How could an infringement of such a patent be predicated ? Would it do to say, in the days of your uninstructed ignorance you allowed the lime to remain three or four days ; now that I have taught you better you remove it every forty-eight hours ? Could the Court say in words (if not in words, could it in effect say), we restrain you from working your lime purifying process in any such way as will not allow the carbonic acid to enter the last purifier in sufficient quantity to do substantial mischief, or in less quantity on an average than it used to do in former times on an average ? No one has a right to prevent a workman from using care to keep his tools in the most efficient state. No one has a right to prevent a manufacturer from cleansing his vessels, and throwing away the useless contents whenever he likes, or to ask him his motives or intentions in doing so."

So in this case I would ask: "Would it do to say that in the days of your uninstructed ignorance you allowed air to have ingress at the bottom of the kiln during the greater part of the operations; now that I have taught you better you will stop it after a short time?" Or, again, can the Court say in effect: "We restrain you from working your apparatus in any such way as will not allow air to enter at the bottom in sufficient quantity to do substantial mischief?"

I humbly agree with the Court of Appeal that no one has a right to prevent a workman from using his tools in the most efficient manner.

The cases relied upon in support of the contention that a patent may be granted for a new process or method were all cases in which there was either a new apparatus, or a new product, or the application of an old apparatus to a new use not in manner or purpose so analogous to the old use as not to involve the exercise of ingenuity, or a combination of known devices or apparatus. In none of them is the word "process" used to denote a mere variation in the manipulation of existing apparatus to produce an identical product.

If a patent were granted in the present case, any charcoal burner who in the exercise of his judgment, or even accidentally, shut off the ingress of air at the bottom of the kiln sooner than usual, would be liable at least to be threatened with an action for infringement.

As I have shown, the air must be shut off at some period of the operation, that is, when the wood is sufficiently ignited to go on burning. The question of when that time has arrived is necessarily a matter of opinion, depending upon the experience and skill of the operator. A patent which would prevent him from using his experience and skill for that purpose would be an entire novelty.

If it is sought to support the claim as one for a method of manipulating the vents in the cover, the specification is obviously bad for non-compliance with sec. 36 of the *Patents Act*, which requires that the complete specification shall describe and ascertain the invention and the manner in which it is to be performed. I have already pointed out that the alleged invention allows the

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For these reasons I am of opinion that the Commissioner was right in rejecting the specification.

BARTON J. I have had some hesitation in coming to a conclusion as to whether this specification is bad for want of subject matter. On the whole I think that it is, for the reasons just expressed by the Chief Justice.

GAVAN DUFFY J. read the following judgment:—This was an application by William Thomas Lee, as assignee of Oscar Wright, that a patent might be granted for an invention entitled “Improvements in the manufacture of charcoal and in kilns therefor.”

The Commissioner of patents refused to accept the complete specification on the ground that what was sought to be protected by letters patent was a mere working direction for the use of an old machine for an old purpose. *Isaacs J.*, on appeal from the Commissioner, held that what was sought to be protected was a process involving the practical operation of an inventive idea; and I agree with him.

Charcoal is ordinarily made thus:—Wood or other combustible matter is enclosed in a kiln or retort, and the enclosed material is ignited at the bottom and an imperfect combustion is produced by passing a draught or current of atmospheric air through the enclosed mass from bottom to top during the process of burning.

In or before the year 1909 Oscar Wright invented a method of regulating the draught which is described in the Commonwealth Patent No. 15,551. That patent is for an improved kiln or retort, the improvements consisting of a plurality of top vents to regulate more efficiently the upward draught and a system of radial earth channels under the kiln for the purpose of controlling and regulating the admission of air from below. The upward draught or current of air, whether regulated in the manner provided under Patent No. 15,551 or not, produced the results thus described in Oscar Wright’s affidavit:—“When a lighted charge of wood is enclosed in a carbonizing retort, the gases produced being allowed to pass upward through the heat and escape at the top, the com-

bustion proceeds upward from bottom to top. Firstly, the volatile constituents in the lower layers are driven off, leaving the remaining carbon (charcoal) in a heated or glowing condition. As the combustion proceeds upward the higher layers in successive order are denuded of their volatile products, and the fresh air entering from the bottom continues to feed the fire from below, and reduces much of the carbon to ash."

Shortly stated, then, the use of an upward draught not only turned the wood into charcoal but turned much of the charcoal into ash. How was it possible to produce a draught which would be effective for the purpose of turning wood into charcoal, and which would not cause the destruction of any substantial portion of the charcoal after conversion? Oscar Wright claims to have solved the problem. I quote the exact words of his affidavit:—"The method of burning described in the specification of my application for Patent No. 2021 involves the abandonment of the central idea which distinguishes the earlier processes, and was based on an appreciation of the fact that access of air must be prohibited from material which has already undergone the coking process, and the volatile elements removed from the chamber, leaving the carbon of the timber behind in the form of charcoal. As already explained, the removal of the already formed charcoal from contact with air was not possible or practicable by the removal of the charcoal from the kiln, and I am not aware that such removal was ever suggested before. It was practically necessary to leave the whole charge in the kiln, but to control the draught so that the incoming air would have access only to the volatilizing products and would be excluded from the carbon. This I conceived could be accomplished by closing entirely the air inlets in the bottom of the chamber and admitting the air under control only at the top of the charge, the charge being first lighted at the bottom. A characteristically different effect was found to be obtained when this new process was adopted. In the burning operation air passes downward through the gradually heating charge above, and feeds the fire from above only. When that fire tends to become intense it produces a corresponding magnitude of updraught, and this updraught reacts against the incoming draught and chokes it back. The incoming and outgoing draughts therefore regulate each other,

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and it is found that the fire becomes self controlled to a very large extent, and with relatively small attention the kiln can be caused to carbonize the contents satisfactorily. The manipulation of the top closure is desirable occasionally to control the movement of the fire. Combustion proceeds upwardly, and the oxygen contained in the incoming air is consumed at the top of the fire and does not reach deeper down in the kiln than the upper part of the fire zone; consequently the already charred timber which is located below the fire is not affected by contact with fresh air and consequently the carbon already produced is not reduced to ash. . . . These results are different from the results obtained in the prior type of kiln, and the process is different in that in the one case air is necessarily made to pass through the already produced charcoal, under conditions which promote combustion thereof, and the heat generated in the combustion of charcoal is utilized to effect coking or charring of the wood, whilst in the other case air is admitted only to the upper strata of the charge in which the coking process is progressing, and the oxygen in the air is consumed in burning off the volatile products only, and the heat generated in the combustion of the volatile elements is in substance the only heat used to effect coking or charring. The charcoal is in the latter case as it were automatically removed from the zone of combustion as soon as it has been produced, and its full weight and quality are preserved."

If this statement is correct, Oscar Wright was the first person to discover that a draught of atmospheric air admitted through the top of a kiln in which a mass of wood was slowly burning from the bottom upwards, might be made to descend so far as sufficiently to feed the ascending fire at the top, and yet not descend far enough to assist combustion in the already carbonized wood below; and he was also the first person to apply his discovery in the actual production of charcoal. On these facts, which, for the present purpose, we must take as proved, I think there is sufficient "subject matter" to justify the acceptance of the complete specification.

The law is clearly stated by *Isaacs J.* in the judgment appealed against. He says (1):—"A process or method is patentable

(1) 15 C.L.R., 161, at p. 170.

where, as here, it involves the practical operation of an inventive idea. In *Boulton v. Bull* (1) *Heath* J. said:—‘The method is a principle reduced to practice,’ and then *Buller* J. said (2):—‘It is necessary to inquire, what is meant by a principle reduced into practice. It can only mean a practice founded on principle, and that practice is the thing done or made, or in other words the *manufacture* which is invented.’ So *Eyre* L.C.J. said (3):—‘The word “*manufacture*” in the Statute . . . applied not only to things made, but to the *practice of making*, to principles carried into practice in a new manner, to new results of principles carried into practice Under the *practice of making* we may class all new artificial manners of operating with the hand, or with instruments in common use, new processes in any art producing effects useful to the public.’ The learned Lord Chief Justice added (4), speaking as early as 1795:—‘Probably I do not overrate it when I state that two-thirds, I believe I might say three-fourths, of all patents granted since the Statute passed, are for *methods of operating* and of manufacturing, producing no new substances and employing no new machinery.’ See also *per Tindal* L.C.J. in *Crane v. Price* (5). Mr. *Manning* urged that there must be not only inventive originality in the idea, but also invention in the corporeal way it was carried out. That view was expressly rejected by the Court of Appeal in *Hickton’s Patent Syndicate v. Patents and Machine Improvements Co. Ltd.* (6), and the proposition was definitely and clearly enunciated that, if you state an inventive idea and also show a means of carrying it into effect, that is patentable subject matter. *Eyre* L.C.J. in *Boulton v. Bull* (7) had long before said so much. His words were:—‘Undoubtedly there can be no patent for a mere principle, but for a principle so far embodied and connected with corporeal substances as to be in a *condition to act*, and to *produce effects* in any art, trade, mystery, or manual occupation, I think there may be a patent.’ I am not aware of any authority to the contrary. It was said that *Rogers’s Case* (8) is opposed to this view, but I do not think so. The majority of

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(1) 2 Bl. H., 463, at p. 481.

(2) 2 Bl. H., 463, at p. 486.

(3) 2 Bl. H., 463, at p. 492.

(4) 2 Bl. H., 463, at p. 494.

(5) 4 Man. & Gr., 580 at 603.

(6) 26 R.P.C., 339, at p. 347.

(7) 2 Bl. H., 463, at p. 495.

(8) 10 C.L.R., 701.

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the Court came—as I think—to the conclusion of fact that there was no invention in either the idea or the mode of utilizing it.”

It may be that the method or process which the applicant claims to have invented is already well known to experts; it may be that it has been used empirically by persons quite unacquainted with scientific principles and phenomena; it may be that it is in fact unworkable and useless: these questions were not raised before the Commissioner; and, had they been raised, neither he nor this Court would have been in a position to determine them adversely to the applicant on the evidence at present available. If necessity arises, they may be determined in the future should the novelty or usefulness of the invention be challenged.

Another matter was argued before us which was not raised before the Commissioner or before *Isaacs J.* It is said that, even if there be sufficient “subject matter,” there is no sufficient description of the method in which the regulation of the draught or current is to be conducted. I think there is some uncertainty as to whether the specification contemplates the use of the apparatus protected by Patent No. 15,551 as essential for the efficient working of the present invention, and there is, perhaps, some want of detail in describing what must be done where manipulation of the vent closures becomes necessary; but these defects, if they exist, could, and no doubt would, have been cured by amendment had the objection been taken before the Commissioner. I do not think the objection should be allowed to prevail now.

For these reasons I think the appeal should be dismissed, and that the order made by *Isaacs J.* should stand.

Appeal allowed. Order appealed from discharged. Appeal from Commissioner dismissed.

Solicitor, for the appellant, *Gordon H. Castle*, Crown Solicitor for the Commonwealth.

Solicitor, for the respondent, *B. A. McBride*.

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