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no reason for saying that the investing of money on mortgages of real estate, although carried on systematically and on a large scale, can be regarded as carrying on the business of a money-lender within the meaning of the Act.

Gavan Duffy J.

GAVAN DUFFY J. Nothing that I say must be taken to suggest that I think that Mrs. Neale was carrying on the business of a money-lender. It is unnecessary to deal with that question. It is sufficient to say that the learned Judge was right in coming to the conclusion that this agreement was not an agreement made in the course of the business of a money-lender.

RICH J. I concur.

Appeal dismissed with costs.

Solicitors, for the appellant, *McCarthy & Maxwell.*
Solicitors, for the respondents, *Shipway & Berne.*

B. L.

[HIGH COURT OF AUSTRALIA.]

McMULLAN . . . . . APPELLANT;
PLAINTIFF,

AND

STEWARTS & LLOYDS (AUSTRALIA) LIMITED . . . . . RESPONDENTS.
DEFENDANTS,

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

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PERTH, *Oct.* 21, 22, 27.

Practice—High Court—Appeal from Supreme Court of a State—Appealable amount—Special leave to appeal—Patent—Action for infringement—Judiciary Act 1903-1910 (*No.* 6 *of* 1903—*No.* 34 *of* 1910), *sec.* 35.

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

An action by a patentee for alleged infringement of his patents was dismissed by the primary Judge—he being unable, on a comparison of the

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plaintiff's and defendants' articles, to see any similarity between them. On appeal to the High Court,

Held, that the only question, which was one of fact, being whether the defendants' contrivance was so like the plaintiff's as to be an infringement of his patents, and the judgment of the Supreme Court not affecting the validity of the plaintiff's patents, an appeal would not lie without special leave from that judgment unless it involved a claim respecting property of the value of £300, that it did not involve a claim as to property of that value, and that the case was not such that special leave to appeal should be granted.

Appeal from the decision of the Supreme Court of Western Australia (*Burnside* J.) dismissed.

APPEAL from the Supreme Court of Western Australia.

An action was brought in the Supreme Court by Robert McMullan against Stewarts & Lloyds (Australia) Ltd. — the plaintiff alleging that the defendants had infringed certain letters patent granted to him for an improved rotary sprinkler and for an improved irrigator nipple, and claiming (so far as is material) an injunction, and damages or an account. The action was heard by *Burnside* J., who, after hearing evidence, and being unable, on a comparison of the plaintiff's and the defendants' articles, to see any similarity between them, dismissed the action with costs.

From this decision the plaintiff gave notice of appeal to the High Court.

A subsequent motion by the plaintiff for special leave to appeal was deferred until the appeal came on for hearing.

Further material facts sufficiently appear from the judgment of the Court hereunder.

The appeal now came on for hearing.

Moss (with him *Durack*), for the appellant.

Pilkington K.C. (with him *Abbott*), for the respondents.

During argument reference was made to *Frost on Patents*, 4th ed., p. 278; *Hickton's Patent Syndicate* v. *Patents and Machine*

Improvements Co. (1); *Aeolian Co.*. v. *Stoddard* (2); *Proctor* v. *Bennis* (3); *Amos* v. *Fraser* (4); *Willmann* v. *Petersen* (5).

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Cur. adv. vult.

The judgment of the COURT, which was read by GRIFFITH C.J., was as follows :—

In this action the appellant complains of an infringement by the respondents of two Commonwealth Patents, Nos. 4241 and 6676 of 1912, both relating to rotary sprinklers. The general principle of such sprinklers is a matter of common knowledge. The apparatus consists of a hollow pipe revolving upon a central standard through which the water is introduced under pressure into the arms. The rotary motion is produced by the pressure caused by jets of water escaping through openings at or near the extremities of the arms and projected in a direction the vertical plane of which is at right angles to the arms, the pressure operating in a direction opposite to those of the jets themselves. The openings are so contrived that the jet has an upward tendency. They may be, and often are, of an elongated form, the greater length being in the line of the arm. In an apparatus so constructed it is evident that the jet as it rises may be made to take a fan-like form, and that if the whole length of the opening is of uniform width the water will be equally distributed towards the central standard and towards the area beyond the extremities of the arms. The result is that the surface immediately surrounding the standard will receive a much heavier fall of spray than that beyond the ends of the arms.

The plaintiff's alleged inventions are designed to obviate this inequality. His method is, in short, to make the openings for the exit of the spray of a V or wedge shape, the narrow end being towards the standard and the larger end towards the extremity of the arm, with the result that the quantity of water projected towards the standard is much less than that projected in the opposite direction.

(1) 26 R.P.C., 339, at p. 348.
(2) 19 C.L.R., 452, at p. 456.
(3) 36 Ch. D., 740, at p. 754.
(4) 4 C.L.R., 78, at p. 87.
(5) 2 C.L.R., 1.

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Unfortunately the description of this very simple method of attaining the desired object has been so overlaid with verbiage in the complete specifications that it is difficult to discover what is the real invention intended to be claimed.

In the plaintiff's first patent the apparatus consisted of a curved elongated opening formed by fixing upon the inside of a circular tube a solid circular cone of less diameter, in such a way that the space left between the cone and the tube did not extend to so much as half the circumference of the latter, and so that the width of the opening at one end was greater than at the other. There was also a metallic shield or guide placed above the opening to direct the water upwards and outwards in the desired direction. The complete specification of this patent is entitled "An Improved Rotary Sprinkler," and in it the applicant says: "The invention essentially consists in the peculiar formation and construction of the spray proper." There is not a word to suggest that the applicant is claiming anything in the nature of a new idea. Indeed, the only statement in the whole of the specification to suggest that any principle is involved in using an elongated opening wider at one end than at the other is to be found in the words, used in the course of the description of the drawings, "whereby the water exit is in the form of a curved wedge."

This patent cannot, in the face of the plain statement just quoted, be regarded as in any sense a master patent. The invention claimed consists, as the patentee himself says, "in the peculiar formation and the construction of the spray proper."

The contrivance complained of in this action as an infringement cannot be regarded either as a copy or colourable imitation of the spray described, and it has only been necessary to refer to the earlier patent as throwing some light on the question of the state of common knowledge at the date of the later one, No. 6676.

The complete specification of this patent is entitled "Improved Irrigation Nipple." The apparatus described, which is fairly denoted by the term "nipple," is fixed close to the end of the revolving arm in a position slightly inclined from the perpendicular. The top of it is of a rounded ("semicircular or semispherical") form. In the top, in the line of the arm and cutting

across the barrel of the curved surface, is a longitudinal opening which, seen from above, is in the form of a wedge laid on its side, the smaller end being towards the standard. The purpose of adopting this form is thus stated—"in order to allow the greatest volume of water to be distributed over the greater peripheral area described by the irrigator in its travel."

The claim is as follows:—"(1) An improved irrigator nipple as *a* of the character described having a graduated or wedge or V shaped slot as *e* formed in and across its end as *d* for the exit water and substantially as and for the purpose herein set forth and as shown in the attached drawings. (2) An improved irrigator nipple of the character described and as above claimed having a graduated slot formed therein as *e* whereby the exit water is distributed uniformly over the area to be irrigated and substantially as herein set forth and for the purposes described and as shown in the attached drawings."

Before the plaintiff invented this contrivance the defendants had been selling a rotary sprinkler of which the special features are these:—The arms terminated in small round flat chambers the flat sides of which were slightly inclined from the perpendicular. In the middle of one of the sides a slit of semicircular shape was made, the convexity of the curve being upward. The semicircular piece was prised open, and the water was projected through the slit thus formed. The result was, of course, a fan-shaped jet of water rising above and along the revolving arm. As soon, however, as the plaintiff's new nipple became known, the defendants altered the construction of their slit by making the outer end of it, *i.e.*, the end towards the extremity of the arm, considerably wider than the other. This was done deliberately, and a thicker and more rigid material was adopted for the cylindrical chambers, so as to secure that the opening should retain the new form. The result was a jet of precisely the same shape as that produced by the plaintiff's invention, and having precisely the same qualities.

There is no doubt that the defendants have taken the plaintiff's idea. But the question remains whether the plaintiff's patent No. 6676 can be regarded as protecting anything more than the particular form of nipple described. The defendants' contrivance

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is not, like the plaintiff's, a nipple at the extremity of the arm, but an opening in the side of a cylindrical chamber forming that extremity. In our opinion the claim must, upon a proper construction of the specification, be limited to the particular contrivance described in it.

The only question, therefore, remaining to be decided in the case is whether the defendants' contrivance so substantially resembles the plaintiff's as to be an infringement of the plaintiff's patent. *Burnside* J. was unable, on comparison of the two articles, to see any similarity between them, and dismissed the action. Upon this question, which is one of fact, the action turns.

The defendants object that the judgment under appeal does not involve a claim respecting property of the value of £300, and that an appeal will consequently not lie to this Court without special leave. The plaintiff's claim is made up partly of a claim to damages for past infringement, which are trifling, and partly of a claim to prevent the use of the defendants' contrivance in future. If the validity of the patent was affected by the judgment, we think that the value should be taken to be £300, or, at any rate, that special leave to appeal should be given. But, as the only point decided by the judgment is that the defendants' contrivance is not an infringement of the plaintiff's patent, the matter is merely one between them, and the value of the plaintiff's claim, apart from past damages, is limited to preventing the use by the defendants of the particular contrivance in question in Western Australia. Upon the evidence the appellant has failed to show that his whole claim is of the value of £300. Under these circumstances special leave to appeal was necessary, and we do not think the case is one for special leave.

The appeal will therefore be dismissed as incompetent.

Appeal dismissed with costs.

Solicitors, for the appellant, *M. L. Moss & Dwyer.*

Solicitor, for the respondents, *A. F. Abbott.*

R. G.