

resources are not income. No doubt, the returns from sales of any commodities are income of the association on the assumption I have made, but it would require an established customary meaning in fiscal provisions to enable the word “income” to be stretched to cover such subscriptions as these. I know of no such extended meaning, and the Act creates none.

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I therefore answer the questions submitted in the negative.

Questions answered in the negative. Costs to be costs of the appeal.

Solicitors for the appellant, *Blake & Riggall.*

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

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<small>Cited</small> Poll Aquashnet Co v Spalding Aust Pty Ltd 17 IPR 136	<small>Cited</small> Cons RD Wemer & Co Inc v Bailey Aluminium 25 FCR 565	<small>Cited</small> Appr Bioglan Laboratories (Aust) Pty Ltd v Crookes 17 IPR 328	<small>Cited</small> Appl L Church Hold- ings (Aust) Pty Ltd v Marne Propulsion Ltd (1991) 21 IPR 358	<small>Cited</small> Appl Pharma- cia Aktiebolag v Ueno Fine Chemicals Industry Ltd (1995) 34 IPR 445	<small>Cited</small> Refd to Raychem Ltd v Global Lightning Technologies Pty Ltd (1996) 36 IPR 572	<small>Cited</small> Appl Robert Hicks Pty Ltd v Millar (1998) 43 IPR 161	<small>Cited</small> F Hoffman-La Roche AG v New England Biolabs Inc (2000) 176 ALR 108
<small>Cited</small> F Hoffman-La Roche AG v New England Biolabs Inc (2000) 50 IPR 305	<small>Cited</small> Appl Hohensee v Ocean Breed Pty Ltd (2004) 61 IPR 195						

[HIGH COURT OF AUSTRALIA.]

STAMP APPELLANT ;
APPLICANT,

AND

W. J. POWELL PROPRIETARY LIMITED RESPONDENTS.
OPPONENTS,

Patent—Application—Opposition—Want of novelty—Prior publication—Onus of proof—Patents Act 1903-1909 (No. 21 of 1903—No. 17 of 1909), sec. 56. H. C. OF A. 1918.

An application for a patent for an “improved mode of and apparatus for drying and deodorizing nightsoil, slaughter-house refuse and other analogous materials” was opposed on the grounds of want of novelty and prior publication, and the Commissioner of Patents upheld the opposition. On appeal to the High Court, *MELBOURNE, March 8, 20.*
Barton,
Gavan Duffy
and Rich JJ.

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Held, that the opponent had not discharged the onus of showing either that there was not a novel invention or that the invention had been described in a prior publication, and therefore that a patent should be granted.

McGlashan v. Rabett, 9 C.L.R., 223, applied.

APPEAL from the Commissioner of Patents.

John Wynne Stamp applied for a patent for an “improved mode of and apparatus for drying and deodorizing nightsoil, slaughter-house refuse and other analogous materials.” The complete specification contained the following statement of the invention and the mode in which it was to be performed:—“This invention relates to means whereby wet substances such as offal and nightsoil may be dried and deodorized to render the same innocuous and fit for use as manures. According to the invention the material is treated in a continuous manner, *in vacuo*, in a revolving cylinder that is heated externally in a container by applied dry heat from a suitable source. Quantities of the material are admitted from time to time to the cylinder as it continues to revolve, and means are provided for drawing off and condensing the vapour as it accumulates in the drier, and for removing the desiccated material therefrom.”

A diagram was then set out with a description thereof; and then followed the claims, which were as follows:—

“1. In the desiccation of nightsoil and other like materials, treating the same *in vacuo* in an air-tight cylinder revolving within a fixed heated container, the cylinder having means whereby, as it continues to revolve, the wet mixture is fed thereto from an outside chute, and the vapours are withdrawn therefrom.

“2. In apparatus for the desiccation of nightsoil and the like, an air-tight cylinder horizontally mounted and revolving within a fixed heated container, trunnions on the cylinder, a charging pipe coming into the cylinder through one trunnion and a vapour exhaust-pipe passing out through the other trunnion, means for revolving the cylinder, and means for maintaining a vacuum therein, as specified.

“3. In apparatus for the desiccation of nightsoil and the like in combination, an air-tight cylinder horizontally mounted and revolving within a fixed heated container, trunnions on the cylinder,

a charging pipe coming into the cylinder through one trunnion and a vapour exhaust-pipe passing out through the other trunnion, a vacuum pump, a condenser between the pump and the vapour exhaust connected into each, and means for charging the cylinder when stationary and for discharging the same through the container, as set forth.

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“4. Apparatus for the desiccation of nightsoil and the like according to claim 2, in which the cylinder is provided with transverse tubes . . . and a charging man-hole, and the container with charging and discharging means to and from the cylinder respectively, as herein described.

“5. Apparatus for the desiccation of nightsoil and the like according to claim 2, in combination with a container having a grate for burning fuel, an uptake or chimney and means for discharging the cylinder into a receptacle below the container as specified.

“6. Apparatus for the desiccation of nightsoil and the like according to claim 2, in which the cylinder charging pipe is in communication with an ample chute or receptacle for the liquid material, said receptacle having a splash shield and the charging downpipe therefrom a cock, as herein specified.

“7. In apparatus for the desiccation of nightsoil and the like, the parts arranged, constructed and combined substantially as herein described and operating in the manner and for the purposes specified.”

The application was opposed by W. J. Powell Proprietary Ltd. on the grounds of want of novelty and prior publication. The Commissioner of Patents upheld the opposition, and in giving his decision he said :—“ I am satisfied that the specification describes a novel invention in regard to the construction, arrangement and combination of the apparatus, and had the claims been so drawn as to confine the invention within this limitation I would have had no hesitation in dismissing the opposition. I am bound to decide the matter upon the claims, and it is to the claims that objection has been taken. The first claim is for a method of treatment which it is claimed in evidence by the opponent is wanting in invention, insomuch that it is only differentiated from the Redfield

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
Odorless Vacuum Dryer by the use of a 'fixed container' in place of a 'rotary heated container.' It has been shown that a treating cylinder within a fixed heated container was used in the Cummer Dryer prior to the date on which the applicant applied for a patent. On this evidence I am of opinion that claim 1 cannot be sustained. In claim 2 I find that the arrangement is only distinguished from the Redfield machine by the fact that the treating cylinder is accommodated within a fixed heated container as against a rotary heated container. For the reasons stated in regard to claim 1, I am of opinion that the claim is wanting in subject matter. Claim 3 is for a combination forming a subordinate arrangement in apparatus for the desiccation of nightsoil and the like which I am unable to find in the forms of apparatus put in evidence. Claims 4, 5 and 6 relate to 'apparatus for the desiccation of nightsoil and the like according to claim 2,' but as claim 2 is for a combination constituting a subordinate arrangement in apparatus for the purpose specified and not for a complete apparatus performing the function referred to, I fail to understand the meaning of the claims. It is obvious that correction is necessary, and the form which such correction must take must be guided by my decision in regard to claim 2. I also find that claim 7 is ambiguous. If it is contended that the combination comprises the complete apparatus, it is evident that it cannot be expressed as a part, which is signified by the first word of the claim, namely 'In.' The Commissioner then allowed the applicant two months within which to amend his specification so as to confine the invention within the protection to which he was entitled, and decided that in the event of the applicant not applying for leave to amend within that time a patent should not be granted.

From that decision the applicant appealed to the High Court.

Schutt (with him *J. R. Macfarlan*), for the appellant.

Starke, for the respondent.

[During argument reference was made to *Terrell on Patents*, 4th ed., pp. 78-79, 175-176; *McGlashan v. Rabett* (1); *N. Guthridge Ltd.*

v. *Wilfley Ore Concentrator Syndicate Ltd.* (1); *Frost on Patents*, H. C. OF A. 4th ed., vol. I., p. 46; *Linotype Co. Ltd. v. Mounsey* (2); *Beavis v.* 1918.
Rylands Glass and Engineering Co. (3); *Cannington v. Nuttall* (4).] 

BARTON J. read the following judgment:—The objector, who is the respondent, based his opposition on two grounds—(1) “that the invention is not novel,” and (2) “that the invention has been described in a book or other printed publication published in the Commonwealth before the date of the application or is otherwise in the possession of the public.” These grounds are denoted (e) and (f) among those on which sec. 56 allows an objection to the grant of a patent to be founded.

In such a case it lies on the opponent to show that the patent if granted would be clearly bad on the ground alleged: *McGlashan v. Rabett* (5). In that case *Griffith* C.J. acted upon the principle that the Court “should not refuse to allow the grant of a patent unless it is quite clear that it cannot stand upon the ground of want of novelty” (6). That applies to both the grounds taken here. It should be proved affirmatively that the invention already exists or has been previously described in print. The question of want of substantial inventive faculty has been to some extent discussed, as it is also in the Commissioner’s decision, and in the case cited the Chief Justice pointed out that there are many objections that run more or less into the question of novelty; for instance, that there is no substantial inventive faculty involved in such difference as there may be between the new appliance and others already existing. A good deal was said on that head in the argument.

In the present case it is not necessary, and at this stage it might not be wise, to say more than that the objector has not, in my judgment, discharged the onus laid upon him of establishing that the combination is not new, and in that regard an invention, or that the invention as claimed has ever been described in book or print published in the Commonwealth. He has not enabled one to say affirmatively that any combination substantially identical had

(1) 3 C.L.R., 583.

(2) 9 C.L.R., 194.

(3) 17 R.P.C., 704, at p. 712.

(4) L.R. 5 H.L., 205, at p. 216.

(5) 9 C.L.R., 223.

(6) 9 C.L.R., at p. 228.

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ever been used before the appellant lodged his complete specification, or that the same combination had been described in any publication in the Commonwealth. In fact the second of these grounds cannot be said to have been argued by the objector. The various claims in the specification were freely discussed. In effect claim 1 corresponds with the first paragraph of the appellant's statement.

I think the appeal should be allowed.

Of course the conclusion arrived at is no decision that the patent will be valid when granted.

GAVAN DUFFY J. I agree.

RICH J. I agree.

Appeal allowed with costs. Decision of Commissioner set aside with £15 15s. costs to the appellant. Patent to be granted.

Solicitors for the appellant, *Fink, Best & Hall.*

Solicitors for the respondents, *Braham & Pirani.*

B. L.