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[HIGH COURT OF AUSTRALIA.]

RADIATION LIMITED AND ANOTHER . APPELLANTS ;
PLAINTIFFS,

AND

GALLIERS & KLAERR PROPRIETARY }
LIMITED } RESPONDENT.
DEFENDANT,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

H. C. OF A. Patent—Infringement—Specification—Ambiguity—Gas-heated cooking apparatus—
1938. Burner at back of oven at lower end—Flue outlet arranged at lower end of oven—
Effect of words in claim—“Substantially as described.”

MELBOURNE,
Feb. 22, 23 ;
Mar. 25.
—
Latham C.J.,
Starke and
Dixon JJ.

The plaintiff sued for infringement of a patent relating to “gas-heated cooking apparatus of the kind in which the flue outlet is arranged at the lower end of an oven or cooking chamber.” The claim upon which the plaintiff relied was: “In gas-heated cooking apparatus of the kind specified, the employment between a rear burner and a rear flue outlet, of a partition which separates the said parts and enables the gaseous products to pass out of the oven without interfering with the proper combustion of the gas and the effective circulation of the hot gases through the oven interior, substantially as described.” The partition was in the form of an inclined plate the upper edge of which merged into the rear surface of the oven. It was placed at the bottom of the rear of the oven, but did not extend completely across it, with the result that openings were left at both ends of the partition for the exit of the air. The rear outer wall of the stove was carried a short distance outwards at the bottom so as to form a recess of which the partition was the inner wall. The defendant’s stove, which was alleged to be an infringement, had a rear burner at the bottom with openings on each side of it near the edges of the stove. The wall of the stove was not formed with a lower recess, but the openings led into a rear chamber which was attached to the back of the stove by screws. In both cases the effect on the air currents within the stoves was similar.

Held that the claim was not ambiguous, and that the defendant had infringed the plaintiff's patent.

Effect of the words "substantially as described" when appearing in a claim to a patent considered.

Decision of the Supreme Court of Victoria (*Macfarlan J.*) reversed.

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APPEAL from the Supreme Court of Victoria.

This was an appeal by the plaintiffs, Radiation Ltd. and Harry James Yates, from a judgment of the Supreme Court of Victoria (*Macfarlan J.*) dismissing an action against Galliers & Klaerr Pty. Ltd. for infringement of a patent relating to improvements in gas-heated cooking apparatus of the kind in which the flue outlet was arranged at the lower end of an oven or cooking chamber. The defences relied upon were that upon a proper construction of the patentees' claims there had been no infringement and that upon any construction wide enough to involve infringement the claims were void for ambiguity. The terms of the specification, the facts and the arguments are sufficiently set out in the judgments hereunder.

Herring K.C. and *Dean*, for the appellants.

O'Bryan K.C. and *Pape*, for the respondent.

[Counsel referred to *Halsbury's Laws of England*, 2nd ed., vol. 24, pp. 551, 641, 658; *Incandescent Gas Light Co. Ltd. v. De Mare Incandescent Gas Light System Ltd.* (1); *Terrell on Patents*, 8th ed. (1934), pp. 153, 159, 160; *North British Rubber Co. Ltd. v. Gormully & Jeffery Manufacturing Co.* (2), affirmed in *Gormully & Jeffery Manufacturing Co. v. North British Rubber Co. Ltd.* (3); *Aktiebolaget Separator v. Dairy Outfit Co.* (4); *Shave v. H. V. McKay Massey Harris Pty. Ltd.* (5); *Ridd Milking Machine Co. Ltd. v. Simplex Milking Machine Co. Ltd.* (6); *Nobel's Explosives Co. Ltd. v. Anderson* (7); *Edison Bell Phonograph Corporation Ltd. v. Smith & Young* (8); *Holmes v. Associated Newspapers Ltd.* (9); *R. W.*

(1) (1896) 13 R.P.C. 301, at p. 330.

(2) (1897) 14 R.P.C. 283, at p. 297.

(3) (1898) 15 R.P.C. 245, at p. 256.

(4) (1898) 15 R.P.C. 327.

(5) (1935) 52 C.L.R. 701, at p. 710.

(6) (1916) 2 A.C. 550, at pp. 552, 553.

(7) (1894) 11 R.P.C. 115, at p. 122.

(8) (1894) 11 R.P.C. 389.

(9) (1910) 27 R.P.C. 136, at p. 149.

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Crabtree & Sons Ltd. v. R. Hoe & Co Ltd. (1); *Ackroyd & Best Ltd. v. Thomas & Williams* (2); *Dudgeon v. Thomson* (3); *Consolidated Car Heating Co. v. Came* (4); *Mergenthaler Linotype Co. v. Intertype Ltd.* (5).]

Cur. adv. vult.

Mar. 25.

The following written judgments were delivered :—

LATHAM C.J. This is an appeal from a judgment for the defendant in an action in the Supreme Court of Victoria in which the plaintiffs claimed relief in respect of the infringement of a patent of which they were the proprietors. Various objections to the validity of the patent raised by the pleadings were withdrawn before the trial. The only issues at the trial were those of infringement and ambiguity.

The plaintiffs' invention, as stated in the specification, "relates to gas-heated cooking apparatus of the kind in which the flue outlet is arranged at the lower end of an oven or cooking chamber." The specification continues :—" In a well-known apparatus of this kind the flue outlet is arranged at one side, and the burner along the back of the oven near its lower end. For some purposes it is desirable to arrange the flue outlet at the lower end of the back of the oven, and it is the object of this invention to enable the flue outlet to be placed in this position without altering the position of the burner, and also without adversely affecting the efficiency of the apparatus."

Any oven in a gas stove which is heated by an internal burner must have an air inlet and also an outlet for heated air, which outlet, for practical reasons of comfort and convenience, must be towards the back of the stove. If the burner is at the rear and at the bottom of the oven and the outlet is at the top at the rear, there is not a thorough circulation of air through the oven and heat is wasted. If both burner and outlet are at the bottom, the heated air will rise and travel up to the top of the oven, across, down, across the bottom, and out by the outlet. But, if the current of outgoing air containing the products of combustion passes over

(1) (1935) 52 R.P.C. 367, at pp. 380, 382; (1936) 53 R.P.C. 443, at pp. 449, 450.

(2) (1904) 21 R.P.C. 403.

(3) (1877) 3 App. Cas. 34.

(4) (1903) A.C. 509, at pp. 516-518.

(5) (1926) 43 R.P.C. 381.

the burner at the bottom, there is interference with the effective operation of the burner and it may be smothered and may go out. Accordingly, when a system with a bottom burner and a bottom outlet was adopted, the outlet was placed at the side of the oven. The location of the outlet in this position produced certain inconveniences in the installation of stoves. It was more convenient to have the outlet in the back of the stove, where a flue could be more readily attached. The inventor made this possible by introducing a partition between the rear burner and the outlet. The specification states : “ The invention comprises the employment between a rear burner and a rear flue outlet, of a partition which separates the said parts and enables the gaseous products to pass out of the oven without interfering with the proper combustion of the gas and the effective circulation of the hot gases through the oven interior.” It is this invention which it is alleged that the defendant has infringed. The specification also describes another invention, relating to the adaptation of the partition to serve as a hood for the burner, but this invention is not in question in the present case.

The specification refers to certain explanatory drawings, and, after the description of the invention in relation to these drawings, it is stated that “ the invention is not limited to any particular form or construction of the partition plate, as these details may be varied to meet different requirements.”

The drawings and the accompanying description show an application of both ideas, namely, the partition and the hood over the burner. The partition illustrated is in the form of an inclined plate the upper edge of which merges into the rear surface of the oven. It is placed at the bottom of the rear of the oven. It does not extend completely across the interior width of the oven, with the result that openings are left at both ends of the partition for the exit of the air. The rear outer wall of the stove is carried a short distance outwards at the bottom so as to form a recess of which the partition is the inner wall. The current of air proceeds up from the burner, across the top, down the front, and back across the floor of the oven, where it divides into two streams towards the two openings at the end of the partition. It does not pass over the burner, and it does not interfere with the action of the burner. Through the openings

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mentioned the air enters the rear chamber, from which it issues by an outlet to which a flue or chimney can be attached. The claim upon which the plaintiffs sue is as follows: "1. In gas-heated cooking apparatus of the kind specified, the employment between a rear burner and a rear flue outlet, of a partition which separates the said parts and enables the gaseous products to pass out of the oven without interfering with the proper combustion of the gas and the effective circulation of the hot gases through the oven interior, substantially as described."

The defendant's stove which is alleged to be an infringement has a rear burner at the bottom with openings on each side of it near the edges of the stove. The wall of the stove is not formed with a lower recess, but the openings mentioned lead into a rear chamber which is attached to the back of the stove by screws. This rear chamber has been called a collector or collecting box because it collects the heated air and gases immediately prior to their escape into the atmosphere or into the flue. The air travels as in the plaintiffs' stove, passes through the openings on each side of the burner into the rear chamber, and issues through another outlet in the rear chamber to which a flue can be attached.

The inside view of the defendant's stove discloses an oven with a vertical back and a rear burner with an outlet on each side of it. A similar view of the plaintiffs' stove, as shown in the drawings, discloses an oven with the lower part of the back inclined from the bottom upwards in a forward direction and a rear burner with an outlet on each side of it. The back of the defendant's stove has a rectangular metal box fixed to the main structure of the stove, and this box has an outlet to which a flue can be attached. The back of the plaintiffs' stove as illustrated has a similar box with a similar outlet, but the box is produced, not by attaching a separate construction to the outside of the stove, but by moulding the rear wall of the stove with a recess and placing a partition inside the stove. Both stoves contain two chambers—one an oven chamber in which the cooking is done, and the other a small rear chamber (the collector) into which the escaping air and gases flow through openings from the front chamber, and from which they escape through an outlet into a flue or to the atmosphere. In each case a metal plate divides the

front chamber from the rear chamber. In each case this plate is between the rear burner and the outlet from which the air ultimately escapes from the stove. The behaviour of the currents of air is, as already stated, precisely the same in each case.

The defendant's principal contention may be expressed by saying that the plaintiffs' invention consists in introducing a partition into a cooking chamber and thus making two chambers, while the defendant does not introduce anything into the cooking chamber, but simply makes two holes in it, one at each end of the burner, and then attaches a box outside the cooking chamber.

In considering this question of infringement it is first necessary to ascertain what invention is claimed by the plaintiffs, the specification being used for the purpose of ascertaining the meaning of the claim. Nothing that is not claimed can be protected.

A claim which is not in its own terms limited to a particular manner of carrying out the alleged invention should not, with the object either of securing its validity or of excusing a possible infringement, be limited to a particular manner of carrying out the invention. It may be that the claim made is wider than the invention disclosed, and in that case the claim will be bad. But no such question arises in this case, because the validity of the patent is not disputed.

It is argued for the defendant that the claim should be limited to the particular construction described and illustrated in the specification. This argument depends upon the fact that the claim is limited by the words "substantially as described." These words, according to the latest authority on the subject, refer the reader back to the specification (*R. W. Crabtree & Sons Ltd. v. R. Hoe & Co. Ltd.* (1)). No general rule as to their significance can be laid down, but they do operate to limit the words used in the claim by reference to the substance of the description which has preceded the claim in the specification. The effect of the words may vary in different specifications (2). In the present specification these words make it necessary to inquire what is the substantial description of the invention claimed. A distinction is drawn in the claims and in the body of the specification between the description of the

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(1) (1936) 53 R.P.C. 443.

(2) (1936) 53 R.P.C., at p. 449.

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invention and the illustrations of it, which latter are referred to as explanatory. The description given is to be understood in the light of the illustrations of a particular application of the invention. When the description is so read the result is, in my opinion, that the invention described and claimed is an invention which consists in the use of a partition between a rear burner and a rear flue outlet in a gas cooking apparatus where the flue outlet is arranged at the lower end of the stove. There is nothing in this description which is confusing or misleading or difficult to understand. If the claim is construed as limited by this description, it is, in my opinion, clear that the defendant has infringed the letters patent. His stove has a partition between a rear burner and a flue outlet, that flue outlet being arranged at the lower end of the stove.

The argument against this construction appears to me to depend mainly upon the words "oven" and "cooking chamber" in the specification. It is urged that these words are so used as to denote and to be confined to flue outlets from the chamber in which the cooking takes place, that is, the first chamber as distinct from any second chamber or collector. The words "oven" and "cooking chamber" are not words of art, and they are not, I agree, used in a very precise sense in the specification, but at no stage is the meaning of the specification at all obscure. The leading idea of the invention is to be found in the introduction of a partition between the rear stove burner and the rear flue outlet. The use of the word "between" shows that the invention relates to the interposition of a partition between a burner which is in front of the partition and a rear flue outlet which is behind the partition. This is the invention which is described and claimed, and the defendant's stove possesses these features. The claim is also made with reference to, and accordingly is limited by, the result achieved by the use of the partition, namely, the enabling of the gases to pass out of the oven without interfering with combustion or proper circulation. This object is achieved also in the defendant's stove. The gases pass out of the oven, whether the word "oven" is construed as meaning the first chamber or the first chamber together with the second chamber. In my opinion, in the claim the word "oven" is used in the sense of the first chamber. The gases pass out of the space

in which the cooking is done into the space behind the partition in which no cooking is done. The same thing happens in the defendant's stove.

The defendant relied upon certain features in the construction of its stove with which it is desirable to deal in more detail. In the first place it was contended that the rear wall of the defendant's stove, though dividing the front chamber from the rear chamber, is not a partition in the relevant sense because it is not a partition within the cooking chamber. It is true that the plaintiffs, in their description of a manner of applying their invention, show a subdivision of one chamber into two by a partition, while the defendant, in its stove, adds a chamber at the back of the oven chamber. In my opinion there is no difference in substance between the two stoves in this respect. The difference is merely a difference in workshop design. It is a difference between, on the one hand, making an oven with a recess and putting a plate in front of the recess so as to make it into two chambers, and, on the other hand, making an oven and adding another chamber behind it.

But further, the plaintiffs' claim does not refer to any introduction of a partition into a cooking chamber. It refers to the provision in a stove between a rear burner—that is, a burner at the back of the cooking chamber—and a rear flue outlet of a partition which separates the burner and the outlet. Such a partition must necessarily serve as the rear wall of the cooking chamber.

In the second place it was contended for the defendant that the rear wall of the defendant's stove was not a partition between a burner and a rear flue outlet. In my opinion the rear flue outlet to which reference is made in the plaintiffs' claim is the outlet at the back of the rear chamber which is adapted to lead into a flue and not the two outlets which lead from the front chamber into the rear chamber. The body of the specification may be referred to for the purpose of understanding the claim. When this is done it is at once apparent that the partition cannot be described as being between the rear burner and the rear flue outlet unless the latter phrase is read as meaning an outlet behind the partition. The text and illustrations of the specification show the partition so placed.

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It plainly is not “between” the burner, which is at its foot, and the openings from the front chamber, which are at its sides.

In the third place it was argued for the defendant that, if the rear wall in the defendant’s stove can be described as a partition, it does not divide the cooking chamber into two parts but divides a cooking chamber from a separate chamber, which is properly to be called a collector.

The evidence, in my opinion, shows that the rear chamber in both stoves perform identical functions. In both cases, when the air has passed into the rear chamber, it has ceased to act in the operation of cooking, it is simply discharging itself and cannot in either case be regarded as being within a cooking chamber.

An issue of infringement has to be decided by what the defendant has done, not by what he might have done had he done either more or less than he has in fact done. In the present case there is evidence to show that the defendant’s stove will perform its functions perfectly as a cooking apparatus without the attached rear chamber, the air being left to find its way directly into the atmosphere by means of the openings at the end of the burner. But this fact appears to me to be immaterial. The defendant’s stove of which complaint is made has in fact a rear chamber, and the stove must be considered as it actually exists.

In my opinion the defendant’s stove possesses all the relevant features of a stove made in accordance with the plaintiffs’ patent.

It is a stove with a rear burner and a rear flue outlet; these are separated by a partition—a dividing plate; the result of the arrangement is that, as the specification states, “the gaseous products pass out of the oven without interfering with the proper combustion of the gas and the effective circulation of the hot gases through the oven interior.”

I am, therefore, of opinion that infringement has been established and that the appeal should be allowed. An injunction should be granted and an order for accounts should be made.

It is not necessary, in this case, in order to provide a full remedy for the plaintiffs, to order the delivery up of infringing articles. Neither the defendant’s stove (apart from the collecting box) nor the collecting box (apart from the stove) infringes the plaintiffs’

patent. If the defendant should use or dispose of them in such a way as to infringe the patent, the injunction will operate, and, in that event, the plaintiffs should be at liberty to apply for an order for delivery up.

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STARKE J. This is an appeal from a judgment of the Supreme Court of Victoria dismissing an action in which the infringement of letters patent was alleged. The defences ultimately relied upon were that the specification did not sufficiently describe the invention claimed and that the letters patent had not been infringed.

The invention relates to improvements in gas-heated cooking apparatus of the kind in which the flue outlet is arranged at the lower end of an oven or cooking member. In "apparatus of this kind," according to the specification, "the flue outlet is arranged at one side, and the burner along the back of the oven near its lower end." The object of the invention was to enable the flue outlet to be placed at the lower end of the back of the oven without altering the position of the burner. The specification states that "the invention comprises the employment between a rear burner and a rear flue outlet, of a partition which separates the said parts and enables the gaseous products to pass out of the oven without interfering with the proper combustion of the gas and the effective circulation of the hot gases through the oven interior." Explanatory drawings accompany the specification, from which it appears that between the burner tube and the flue outlet an inclined partition plate is arranged, the upper edge of which merges into the rear surface of the oven. But the specification explicitly states that the invention is not limited to any particular form or construction of the partition plate and that the details may be varied to meet different requirements. Four claims followed, but on this appeal infringement was only relied upon in respect of the first claim, which is: "In gas-heated cooking apparatus of the kind specified the employment between a rear burner and a rear flue outlet, of a partition which separates the said parts and enables the gaseous products to pass out of the oven without interfering with the proper combustion of the gas and the effective circulation of the hot gases through the oven interior, substantially as described."

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This appeal, in truth, depends upon the proper construction of this claim. The specification must be read as a whole, but claims in particular must not be cut down or extended by reference to the body of a specification (*Electrical and Musical Industries Ltd. v. Lissen Ltd.* (1) ; *Norton & Gregory Ltd. v. Jacobs* (2)). It is argued that the claim is limited to the employment of the particular form of partition plate illustrated in the drawings. The specification, as already noticed, does not so limit the invention nor do the words of the claim, "the employment between a rear burner and a rear flue outlet, of a partition which separates the said parts." But it is said that the words in the claim, "substantially as described," tie the claim to the particular form of construction illustrated in the drawings. The effect of the words depends upon the construction of the claim as a whole, but "in general the words exercise a limiting effect by tying" the claim "more closely to the preceding description" (See *Fletcher Moulton on Patents* (1913), p. 128). They do not, however, limit the claim to the precise construction shown in the drawings but rather to the kind of apparatus mentioned and the method described in the specifications and illustrated in the drawings.

The kind of apparatus mentioned in the specification is a gas-heated cooking apparatus in which the flue outlet is arranged at the lower end of an oven or cooking chamber. And the method is the employment of a partition, not the particular form illustrated in the drawings, between a rear burner and a rear flue outlet which separates the said parts. It was suggested, however, that the claim is bad because the invention is not sufficiently described in that the position of the flue outlet is not distinctly stated. But the claim predicates an apparatus in which the flue outlet is arranged at the lower end of an oven and the partition is employed between a rear burner and a rear flue outlet. The directions given are such that any competent workman would understand and be able to carry out successfully the invention claimed. The objection based upon the insufficiency or ambiguity of the specification cannot therefore be supported.

(1) (1937) 54 R.P.C. 307, at p. 322.

(2) (1937) 54 R.P.C. 271, at p. 276.

Whether the letters patent have been infringed is a matter of fact. The construction of the claim which I have adopted makes it reasonably clear that the device made and used by the respondent—the defendant in the action—is an infringement of the letters patent. It has constructed and used a gas-heated cooking apparatus in which the flue outlet is arranged at the lower end of the oven, and it employs between the rear burner and the rear flue outlet the back wall of the oven as a partition which separates the said parts. It has dispensed with the inclined partition plate illustrated in the drawings accompanying the specification of the letters patent and substituted for it the back wall of the oven as a partition. But the function and operation of the back wall of the oven are precisely the same as the partition plate, and what has been done involves the taking from the patentee the substance of his invention.

The appeal should be allowed, an injunction restraining further infringements granted, and an account of profits directed. But I see no necessity, at present, for an order directing delivery up of infringing parts. A rearrangement of the rear flue outlet might possibly avoid any infringement of the letters patent.

DIXON J. The appeal is from a judgment of *Macfarlan J.* dismissing an action for infringement of a patent. The action is unusual in the circumstance that the defendant took the commendable course of confining its defence to two grounds only, doubtless its best. The grounds were that upon a proper construction of the patentee's claims there had been no infringement and that upon any construction wide enough to involve infringement the claims were void for ambiguity.

The invention is relatively simple, and it concerns a thing of common domestic use, a gas stove. It appears that some difficulty had been found in the choice of the most suitable position for the orifice through which the products of combustion are to escape from the oven into the outer air. The best place for the burners is near the floor of the oven; below the burners an entrance is usually provided for the fresh air supplying the oxygen for combustion. The heated air or hot gases, of course, ascend and, as they lose temperature, descend again. A circulation is to be maintained, and

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so it is desirable that the aperture to let the gases out should be low down in the oven. There are practical objections to placing it on one side or other of the stove. For, where flues are provided, the construction of some houses requires a left hand aperture and of others a right. Thus it is better to put the orifice in the back wall of the stove. But, if the burner runs along the back of the stove, which is a convenient place for it, much of the heat will escape through any aperture immediately above it without circulating in the stove. The purpose of the invention is to prevent this consequence of having the outlet low down at the back of the oven.

The existence of gas stoves in which the flue outlet is arranged low down in the oven is presupposed by the specification, which clearly states that it is to them that the invention relates. A short passage is adequate to describe the invention. "For some purposes it is desirable to arrange the flue outlet at the lower end of the back of the oven, and it is the object of this invention to enable the flue outlet to be placed in this position without altering the position of the burner, and also without adversely affecting the efficiency of the apparatus. The invention comprises the employment between a rear burner and a rear flue outlet, of a partition which separates the said parts and enables the gaseous products to pass out of the oven without interfering with the proper combustion of the gas and the effective circulation of the hot gases through the oven interior." A way out is given to the gases by making the length of the partition, as well as of the burner, less than the entire width of the oven and so leaving a space at one or both ends. The upper end of the partition joins the back wall of the oven, and both the flame from the burner and the ascending heat are thus shut off from the aperture at the back of the oven. The descending gases pass through the intervals between the side walls of the stove and the ends of the partition or, if there be an interval at one end only, through that. They travel behind the partition to the aperture, whence they escape into the flue, or in default of a flue, into the outer air.

The decision of the case depends upon one claim, the first. It begins with the words, "In gas-heated cooking apparatus of the kind specified." This, I think, clearly refers to gas stoves with

“the flue outlet at the lower end of the back of the oven” and “the burner along the back of the oven near its lower end.” The claim is confined to “cooking apparatus” of such a kind. What is claimed is “the employment” in such stoves “between a rear burner and a rear flue outlet, of a partition which separates the said parts and enables the gaseous products to pass out of the oven without interfering with the proper combustion of the gas and the effective circulation of the hot gases through the oven interior, substantially as described.” The words “substantially as described” have, no doubt, a limiting effect, because they draw down into the claim the form of construction described in the body of the specification. Probably the only consequence of any importance is that the claim must be confined to a form of construction allowing the escape of the gases round the ends or one end of the partition. As for the nature of the particular plate itself, the specification expressly states that the invention is not limited to any particular form or construction of that element, “as these details may be varied to meet different requirements.”

The defendant is a company the business of which includes the manufacture of stoves. It makes a stove in which the burner is near the floor of the oven and at the rear. The burner is shorter than the width of the stove. It is placed in proximity to the back wall of the oven, and two rectangular apertures are made in the back wall at each end of the burner. Each aperture is between the end of the burner and the adjacent side wall. Just as in the patentee’s oven the gases flow through the intervals between the ends of the partition and the side walls, so in the defendant’s oven they flow through the spaces in the back wall between the burner and the side walls. In the defendant’s stove a chamber or box or conduit is placed outside the back wall and over both the spaces or orifices. In the centre of the back of this chamber there is a single outlet to which a flue may be attached. The gases which pass through the rectangular apertures in the back wall of the oven are received into the chamber and led by it to the flue outlet.

The patentee complains that the defendant’s stove so constructed constitutes an infringement of the first claim in the specification. The infringement is said to consist in using the rear wall of the oven

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as a partition between the flue outlet through which the gases finally escape from the stove and making the rectangular apertures or slits in the back wall of the oven in order to provide the intervals between the partition and the side walls to enable the gases to escape behind the flue.

For the sake of clearness, a distinction should be drawn between two different kinds of resemblances upon which reliance is placed. From each of the two rival constructions a cooking chamber and ducts or passage ways for the escape of the gases result which in their operation and effect can hardly be differentiated. But it is necessary to distinguish such a resemblance from similarity in the mode of construction by which the result is achieved in each of the two designs. The defendant denies that in the mode of construction any sufficient similarity exists. If this be right, the fact that by two dissimilar constructions the same or substantially the same course for the escape of the gases was provided in the two stoves would not mean that there was an infringement. Although the defendant does not concede that the courses provided in both stoves are substantially the same, the mode of construction and not the result formed the chief ground for saying that there was no infringement. The defendant's reasons for saying that its stove did not infringe are capable of being stated in various ways, and naturally in the course of argument they assumed different forms. But I think that they may be reduced to the simple statement that in the defendant's stove no flue outlet exists in the back of the oven and no partition is employed, whereas the patentee's monopoly is limited to placing a partition between a shortened burner and a flue outlet in the back wall of the stove. A partition was no new thing in a stove, and it is said on behalf of the defendant that the invention claimed consists in the employment of a partition in a particular manner in stoves with a rear flue outlet placed low in the back wall over a burner parallel with the same wall. The view of the matter which is thus presented is open to little criticism except that it does not bring out the substance of the patentee's invention. It is true that the specification describes the invention in terms of the changes made in a known kind of stove, namely, a stove with a rear burner and a flue outlet low in the back of the cooking chamber. It is

consequently true that the employment of a partition as a screen between the burner and the outlet is the central feature of the account given of the invention. The manner in which the partition is employed so that it “enables the gaseous products to pass out of the oven” without interfering with combustion and the circulation of the gases is, no doubt, an essential element and is described in the same way in the body of the specification. But this form of statement is natural in all improvements in existing physical things and is the common form in describing changes of construction. When directions of such a character are followed a complete article results of a new fashion. Those who have the advantage of seeing the resultant thing may readily manufacture a similar article which, so to speak, is complete *ex ovo* and cannot be separated, except notionally, into the old parts and the new introduced by the invention. But it does not follow that the complete thing so constructed does not include a substantial adoption of the feature claimed by the patentee of the prior invention.

The substance of the invention claimed in the present case appears to me to be the arrangement of a screen between the flue outlet and the flame so that the gases could travel through the apertures at the sides of the screen and behind it to the flue outlet. The application of the arrangement is, of course, to a stove with a rear burner and a rear flue outlet, both low down, and to that kind of stove the claim is accordingly confined. The screen is called a “partition” in the claims and a “plate” sometimes in the description in the specification. The flue outlet is described as in the lower end of the back of the oven, and, no doubt, in so speaking the specifier was thinking of the existing oven into which the alteration would be introduced where the flue outlet would be in the back wall of the cooking chamber. But, on a question of infringement, the issue is not whether the words of the claim can be applied with verbal accuracy or felicity to the article or device alleged to infringe. It is whether the substantial idea disclosed by the specification and made the subject of a definite claim has been taken and embodied in the infringing thing. It is, no doubt, sometimes the case that an inventor explains in his specification steps or methods involving an idea, conception or principle of wider application or of deeper

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significance than that for which he claims. Sometimes a claim, particularly a claim for a combination, is expressly confined to a particular form of construction or the like, and in such a case it is useless for the patentee to complain that his idea of what he calls his principle has been applied in a different construction or has been expressed by means of a mechanical equivalent of some element which his claims make of the essence of his monopoly. Such cases are well illustrated by the decisions of this court in *Walker v. Alemite Corporation* (1) and *Shave v. H. V. McKay Massey Harris Pty. Ltd.* (2). But the words of *James L.J.* in *Clark v. Adie* (3) must not be forgotten: "The patent is for the entire combination, but there is, or may be, an essence or substance of the invention underlying the mere accident of form; and that invention, like every other invention, may be pirated by a theft in a disguised or mutilated form, and it will be in every case a question of fact whether the alleged piracy is the same in substance and effect, or is a substantially new or different combination." Here I think that the defendant has taken the substance of the invention described by the patentee and stated in the first claim of the specification.

The defendant has removed the central flue outlet to the back of the box or conduit and has used the wall of that part of the "cooking apparatus" as the aperture for the emission of the gases. By cutting the rectangular holes at each end of the oven wall in front of which the burner runs, the defendant has converted that wall into a screen or partition between the burner and the flue outlet and has enabled the gases to escape round the screen so formed to the flue outlet at its back. To say that it is the oven wall, and not a partition, that the flue outlet is an aperture in a collection box and not in the oven or in the back wall of the oven, appears to me to make what may be a good verbal point but to ignore the substantial configuration resulting from the patentee's invention and the character of the entire stove produced by its application to the relevant purposes of providing an escape for the gases through a rear aperture without interference with combustion and circulation.

In my opinion the defendant has infringed the first claim.

(1) (1933) 49 C.L.R. 643.

(2) (1935) 52 C.L.R. 701.

(3) (1875) 10 Ch. App. 667, at p. 675.

The attack upon the specification and claim for ambiguity was based upon the view that, if all means of separating a rear flue outlet from a burner were included, then screens, baffle plates or other obstacles would be covered if a passage or conduit for the gases terminated in a flue outlet, by whatever course the passage or conduit might first be led, so long as somewhere between that point and the burner a dividing plate or the like was inserted. This is not my interpretation of the claim. It is, I think, clearly restricted to stoves having a flue outlet at the lower end of the back of the oven. The words "gas-heated cooking apparatus of the kind specified" bring about this limitation. No doubt the words "lower end of the back of the oven" are of a kind calculated to invite the argument, which is so often used in relation to the language of a specification describing position, namely, that it admits of so much variation in the precise point at which the thing is to be placed that it is ambiguous. In such a matter the specifier is very much in the dilemma between width involving ambiguity and narrowness encouraging and permitting misappropriation of the real invention. In deciding whether he has avoided both horns of the dilemma a court should be guided by its opinion of the real meaning which he has succeeded in conveying. In the present case I think it is clear enough that the claim is limited to an aperture below the centre horizontal line of the structure called the oven, placed somewhere at the back and separated from a rear burner by a dividing screen, whether it be called a partition or by some other name; and I also think that it follows that the partition must separate rather vertically than horizontally, though, of course, it need not be strictly perpendicular or make a right angle with the oven floor. There can, I think, be no real doubt about what the claim covers, and I do not think that it is bad for ambiguity.

In my opinion the appeal should be allowed with costs, the judgment of the Supreme Court discharged, and in lieu thereof there should be an injunction against infringement and an order that the defendant pay the costs of the action.

To frame an order for delivery up which will not inflict hardship upon the defendant involves some difficulty. The back wall of the oven including the so-called collection box appears to constitute

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the infringing part. But I think the defendant ought to have an opportunity of reconstructing ovens now forming part of its stock so as to remove all the elements of infringement. It will be enough in the meantime to reserve to the plaintiffs liberty to apply for an order for delivery up.

Appeal allowed with costs. Order of Supreme Court set aside. Defendant to pay plaintiffs' costs of action. Injunction restraining the defendant its officers, servants and agents from infringing plaintiffs' letters patent No. 4887/26. Liberty to plaintiffs to apply to Supreme Court for an order for delivery up on oath of all articles in his possession or control made in infringement of the said letters patent if further infringement takes place or is threatened. Order that an account be taken of the profits made by reason of defendant's infringement of the said letters patent and that the defendant pay to the plaintiffs the amount of such profits.

Solicitors for the appellants, *Gillott, Moir & Ahern.*

Solicitors for the respondent, *Whiting & Byrne.*

H. D. W.