

Postmaster-General is not examinable in any form. On these two broad grounds therefore the application must be refused: First, because no duty exists on the part of the Postmaster-General towards the applicants to deliver or carry their letters. In the second place, the order made under sec. 57, so long as it stands, is a complete answer to the application, and there is no way by *certiorari* or otherwise in which the order can be brought before the Court. I therefore agree that the rule *nisi* should be discharged.

Rule discharged with costs.

Solicitors, for prosecutor, *Gillott, Bates & Moir*, Melbourne.

Solicitor, for defendant, *Charles Powers*, Crown Solicitor for the Commonwealth.

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<p><small>All Wiley Ore Concentrator Syndicate v Guthridge (1906) 4 CLR 202</small></p>	<p><small>Appl Olin Corporation v Super Cartridge Co Pty Ltd (1977) 180 CLR 236</small></p>	<p><small>Foll Olin Corporation v Super Cartridge Co Pty Ltd (1977) 1A IPR 197</small></p>
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[HIGH COURT OF AUSTRALIA.]

N. GUTHRIDGE LIMITED APPELLANTS;
DEFENDANTS,

AND

THE WILFLEY ORE CONCENTRATOR }
SYNDICATE LIMITED } RESPONDENTS.
PLAINTIFFS,

ON APPEAL FROM THE SUPREME COURT OF
VICTORIA.

Patent—Infringement—Prior Publication.

The validity of a patent for improvement in ore concentrators was challenged on the ground of prior publication, founded upon a description in an engineering journal of the invention the subject matter of the patent.

It was alleged by the patentees that the description so published was unintelligible.

Held, that the question was whether the description was sufficient to convey to men of science and employers of labour information which would enable them, without any exercise of inventive ingenuity, to understand the

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MELBOURNE,
March 19, 20,
21, 22, 26.

Griffith C.J.,
Barton and
O'Connor JJ.

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invention and give a workman specific directions for the making of the machine; that, subject to proof of the state of common knowledge among persons familiar with the subject matter, and to proof of the meaning of technical terms used in the document alleged to be a prior publication, the interpretation of that document was for the Court; and that, applying these tests, the document contained a clear and intelligible description of the invention, and that consequently prior publication was proved.

Decision of *Hood J. (Wilfley Ore Concentrator Syndicate Ltd. v. N. Guthridge Ltd., (1906) V.L.R. 210)*, reversed.

Betts v. Menzies, 10 H.L.C., 117, and *Anglo-American Brush Electric Light Corporation v. King, Brown & Co.* (1892) A.C., 367, applied.

APPEAL from the Supreme Court.

The Wilfley Ore Concentrator Syndicate Ltd. were the proprietors of the Victorian patent, No. 14,753, dated 11th November, 1897, for an invention entitled "Improvements in ore concentrators," and known as the Wilfley Table. They brought an action for infringement of that patent against N. Guthridge Ltd., making the usual claims for damages, accounts and inquiries, &c. By their defence the defendants did not admit the infringement, and alleged that the plaintiffs' invention was not new, stating in their particulars of want of novelty that the alleged invention was published in Victoria prior to the date of the letters patent by copies of the "Engineering and Mining Journal of New York," of 13th February, 1897, containing a description of the plaintiffs' alleged invention, one of which copies was received at the Public Library of Melbourne on 9th April, 1897, and immediately thereafter made available to the public.

The material parts of the claim in the specifications of the plaintiffs' patent were as follow:—

"1. A transversely inclined concentrating table having a movement whose tendency is to carry the material longitudinally forward toward the tail or foot of the table, said table being provided with a number of riffles extending longitudinally a portion of the distance from its head towards its foot, said riffles varying in length for the purpose specified, the table having a smooth, plain or unriffled portion extending from the extremities of the riffles toward the tail of the table, whereby the material as

it leaves the riffles is subjected to the action of the water on the smooth portion of the table and the final separation of the mineral from the gangue effected.

"2. A transversely inclined concentrating table having a number of longitudinal riffles extending a portion of the table's length from the head towards the foot, said riffles being of unequal length, the uppermost being the shortest while the other riffles increase in length from the upper edge to the lower edge of the table, the table having a plain or unriffled portion lying at the extremities of the riffles and adapted to receive the material caught by the riffles."

"7. The combination of a transversely inclined concentrating table having a series of riffles extending longitudinally from the head towards the tail of the table, said riffles being of unequal length, the uppermost being the shortest and the riffles increasing in length from the upper to the lower edge of the table, the table being provided with a plain or unriffled portion of suitable area located at the extremities of the riffles, means for feeding the material to the upper portion of the table's head, means for discharging water on the upper edge of the table, and suitable means for imparting to the table a longitudinally reciprocating movement of a character adapted to move the material from the head toward the tail of the table."

The description in the "Engineering and Mining Journal of New York," which was headed "The Wilfley Concentrating Table," and was illustrated by two pictures referred to in the letterpress as Fig. 1 and Fig. 2, was as follows:—

"The accompanying illustration shows a new form of concentrator known as the Wilfley Concentrating table, which is made by the Mine and Smelter Supply Company, of Denver, Colo. The engraving shows the table flat, without supports, Fig. 1 representing the table and Fig. 2 the movement. It may, of course, be set on a frame at any height desired. The concentrator is a flat table 7 x 16 ft., resting on rollers, and is operated by an eccentric. This gives a jerking motion, which carries heavy material to the bottom of the bed, then forward to the head end of the table. The pulp is supplied through a feed box, which extends the whole length of the table, and is divided in such a way as to feed pulp at one

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end and clear water at the other end, where the concentrators pass off. It is claimed that by this arrangement there is a clean heading, so that the operator can always see what the table is doing, and that all the material is kept constantly under water and never exposed to the air. It is claimed for this table that the loss of material in the slimes, which often occurs, is prevented.

"The silica passes across the table (it being slightly inclined) and off at the side, in doing which it passes over tapered cleats, the result being that coarse silica passes off first, then as material is jerked forward and toward the upper end the fine silica rises to the surface and is carried off next. In this way the table acts as a sizer to a certain extent. If ore is put on a table or into any receptacle and thoroughly shaken, the coarse and fine concentrates and fine silica will go to the bottom, and the difficulty usually experienced in concentrating is to remove fine silica without large losses. A description of the cleats will further illustrate the point. The table is covered with linoleum on which are nailed from two to seven cleats, which are about $\frac{1}{2}$ in. high at the tail end of the table and taper to a feather edge toward the head end. The first cleat is put on the lower edge of the table and runs up to within 2 ft. of the head end; the other cleats are shorter and shorter as they cross the table toward the feed box making the last cleat about 4 ft. long. The pulp is fed on the table as near the tail end as possible, and the jerking motion sends the concentrates to the bottom, and at the same time moves them toward the head end. When concentration commences the coarse silica passes over the high end of the cleats, and as the ore moves forward finer silica rises as the height of the cleats decreases and passes off. This is done without materially disturbing the bed of concentrates which moves forward and around the end of the cleats until a sufficient quantity collects to go straight forward and off the head-end. The space left between the end of the first strip and the head of the table allows middlings to pass into a long trough on the side and pass to the wheel conveyor at the extreme tail end, where it is elevated and passed over the table into the feed box to be retreated."

The further facts appear in the judgments.

The action was heard by *Hood J.*, who held that there had been

no prior publication of the plaintiffs' patent, and that there had been an infringement of that patent by the defendants. He therefore gave judgment for the plaintiffs with costs: *Wilfley Ore Concentrator Syndicate Ltd. v. N. Guthridge Ltd.* (1).

From this judgment the plaintiffs now appealed to the High Court.

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Irvine, for the appellants. The issues were, first, whether the invention was new having regard to the common knowledge in Victoria and to the information contained in the "Engineering and Mining Journal of New York," and, secondly, whether there was an infringement. On the question of infringement, if the learned Judge's reading of the plaintiffs' specification is right, it is not proposed to argue that the facts do not support his conclusion. As to the first issue the learned Judge has made a fundamental mistake. He has treated the question of anticipation as being purely one of fact. The true rule as to paper anticipations is that the construction of the document which is alleged to be an anticipation is primarily for the Court. In construing the document the Court may properly rely on evidence dehors the document for two purposes, first, in order to place itself in the position of a person skilled in the art to which the invention relates, or, in other words, to ascertain the common knowledge at the time of the alleged anticipation, and secondly, for the purpose of explaining the terms of art and the processes referred to: *Anglo-American Brush Electric Light Corporation v. King, Brown & Co.* (2); *Hills v. Evans* (3). There is no doubt as to the identity of the invention intended to be described by the paper anticipation and that described by the plaintiffs' specification, and the only question is as to the sufficiency of the description in the paper anticipation. That question is one for the Court: *Betts v. Menzies* (4); *Edmunds on Patents*, 2nd. ed., p. 207. See also *Betts v. Neilson* (5); *Neilson v. Harford* (6); *Hills v. London Gaslight Co.* (7); *United Telephone Co. v. Bassano* (8); *Boyd v. Horrocks* (9); *Gadd v. Mayor &c. of*

(1) (1906) V.L.R., 210.

(2) (1892) A.C., 367.

(3) 4 DeG. F. & J., 288.

(4) 10 H.L.C., 117, at p. 134.

(5) L.R. 5, H.L., 1.

(6) 8 M. & W., 806.

(7) 29 L.J. Ex., 409, at p. 416.

(8) 3 R.P.C., 295, at p. 314.

(9) 9 R.P.C., 77, at p. 81.

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Manchester (1); *Brooks v. Steele* (2). Those being the principles of law applicable to an alleged paper anticipation, the evidence of experts as to the meaning of the document is inadmissible, and the Court is at liberty to form its own opinion as to the meaning.

Coldham and *Macfarlan*, for the respondents. The issue is, was the plaintiffs' invention novel? That is a question of fact. The alleged paper anticipation is set up as proof of want of novelty, the burden of that proof being on the defendants. It is undoubtedly the duty of the Court to interpret the document which is alleged to be an anticipation. If there is a jury, the Court should tell them what the document means. But it would be for the jury to say what effect, having regard to the common knowledge at the time, the document would have on the minds of the persons to whom it was addressed. That is to say, it is a question for a jury whether, to the minds of reasonable men, the paper anticipation would disclose the invention. Where the paper anticipation and the specification of the invention are in practically the same words, then in the result the only question left is one for the Court. But the question of identity is one of fact for the jury. Here the paper anticipation and the specification of the respondents' patent are not in the same words. Whether the document as interpreted by the Court would disclose to competent persons the patented invention is a proper matter for evidence, and this Court should not disturb the Judge's findings, for there was ample evidence to support them. [Counsel also referred to *Hill v. Thompson* (3); *Cornish v. Keene* (4); *Bush v. Fox* (5); *Hills v. London Gaslight Co.* (6); *Booth v. Kennard* (7); *British Dynamite Co. v. Krebs* (8); *Plimpton v. Malcolmson* (9); *Lyon v. Goddard* (10); *Willmann v. Peterson* (11); *Savage v. D. B. Harris & Sons* (12); *Frost on Patents*, 2nd ed., 131; *Hayward v. Hamilton* (13).]

Irvine in reply.

Cur. adv. vult.

(1) 9 R.P.C., 516, at p. 532.

(2) 14 R.P.C., 46, at p. 73.

(3) 1 Web. Pat. Cas., 229.

(4) 1 Web. Pat. Cas., 501.

(5) 5 H.L.C., 707.

(6) 5 H. & N., 312; 29 L.J. Ex., 409.

(7) 2 H. & N., 84.

(8) 13 R.P.C., 190.

(9) 3 Ch. D., 531.

(10) 10 R.P.C., 334.

(11) 2 C.L.R., 1.

(12) 13 R.P.C., 368.

(13) Johns. Pat. Man., 245.

Griffith C.J. This is an action brought by the respondents against the appellants for infringement of the plaintiffs' patent, which is described as a patent for "Improvements in ore concentrators." The defence was a denial of the novelty of the invention, and a denial of infringement. The novelty is impeached on the ground that, before the granting of the patent, a description of the identical invention had been published in a periodical circulating in Victoria. The case is not, as frequently happens, one of an alleged anticipation of an invention by the specification of a prior invention; but in this case, the publication under consideration is a description of the very invention itself. But, the plaintiffs say, the attempt to describe it was so poor that it was ineffectual, and it did not have the result of adding anything to the store of common knowledge in respect of the improvements supposed to be introduced by this invention. The principles to be applied in determining whether a patent is void on the ground of anticipation are laid down very clearly in cases decided in the House of Lords. Of course the fundamental principle is that a patent can only be granted for a new invention, because, if the subject matter of the invention is already the property of the public, it would be very unfair to give the monopoly to one person in respect of what is already in the possession of the whole community. Lord Westbury L.C. in the case of *Betts v. Menzies* (1), thus stated the rule for determining whether a prior publication has been such as to invalidate a subsequent patent:—"I pass on to the next conclusion which is involved in the answer of the learned Judges to your Lordships' question, and that conclusion, I think, is also of great importance to the law of patents, because it results from that opinion that an antecedent specification ought not to be held to be an anticipation of a subsequent discovery, unless you have ascertained that the antecedent specification discloses a practicable mode of producing the result which is the effect of the subsequent discovery. Here we attain at length to a certain undoubted and useful rule. For the law laid down, with regard to the interpretation of a subsequent specification, is equally applicable to the construction to be put upon publications or treatises previously given to the world, and which are frequently

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(1) 10 H.L.C., 117, at p. 154.

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brought forward for the purpose of showing that the invention has been anticipated. The effect of this opinion I take to be this, if your Lordships shall affirm it, that a barren, general description, probably containing some suggested information, or involving some speculative theory, cannot be considered as anticipating, and as therefore avoiding, for want of novelty, a subsequent specification or invention which involves a practical truth, productive of beneficial results, unless you ascertain that the antecedent publication involves the same amount of practical and useful information." These last words require qualification in view of the decision of the House of Lords in the *Anglo-American Brush Electric Light Corporation v. King, Brown & Co.* (1). The question there was whether certain patents had been anticipated. Lord Halsbury L.C. said (2): "But it is said that, for the purpose of judging of the novelty of the invention of 1876, one must, as nearly as one can, apply oneself to the knowledge existing at that date, and not apply what we have learned since, so as to interpret the language of the patent of 1876 by the light of later discoveries. I am not quite certain that I understand the application to this case of that principle of interpretation, which, however, I admit to be sound." There were two known appliances; one called a "Series" and the other a "Shunt," both used for electric lighting. The learned Lord Chancellor continues: "The 'Series' was known, the 'Shunt' was known, and the language seems to me incapable of any other interpretation than that the patentee did mean to combine the two previously known systems. If he did, and disclosed the mode of doing it, the novelty of the later patent cannot be supported. I confess that I am unable to entertain a doubt that it was so disclosed. What he intended was, I think, conclusively shown by the original rough sketch produced. Distinguished electricians cavil at the mode of its disclosure, criticize the language (which is not, perhaps, the most felicitously chosen), and possibly suggest doubts as to what would have been the fate of Mr. Varley's patent if it had been attacked upon the ground of the insufficiency of the specification; but that is not the question to be determined here." Every word of that last sentence is applicable to the present case. The alleged publication has been

(1) (1892) A.C., 367.

(2) (1892) A.C., 367, at p. 372.

criticized in the same way. It has been said the language is not felicitous, and is ambiguous and confusing. But that is not the test. In the same case Lord *Watson* said (1): "I do not think it necessary to deal with the conflict of testimony as to the sufficiency of Varley's specification"—that was the alleged anticipation—"for the guidance of a skilled workman. The Lord Ordinary was of opinion that the appellants had failed to prove that part of their case. But I agree with his Lordship, and with the learned judges of the First Division, in holding that the sufficiency or insufficiency of the specification for that purpose does not afford a crucial test of prior publication. Every patentee, as a condition of his exclusive privilege, is bound to describe his invention in such detail as to enable a workman of ordinary skill to practise it; and the penalty of non-compliance with that condition is forfeiture of his privilege. His patent right may be invalid by reason of non-compliance; but it certainly does not follow that his invention has not been published. His specification may, notwithstanding that defect, be sufficient to convey to men of science and employers of labour information which will enable them, without any exercise of inventive ingenuity, to understand his invention, and to give a workman the specific directions which he failed to communicate. In that case, I cannot doubt that his invention is published as completely as if his description had been intelligible to a workman of ordinary skill." That then is the principle to be applied.

One other principle must always be borne in mind, that, in considering whether a particular document is a publication of the invention in question, regard must be had to the state of common knowledge amongst persons familiar with the subject matter at the time of the publication, and for that purpose evidence is, of course, admissible. Evidence is also admissible for the purpose of construing words of art or technical terms that may be used in the document in question. But, subject to these qualifications, the interpretation of the document is a question of law for the Court.

I proceed to apply these principles to the present case, and I will refer, first of all, to what was the common knowledge so far as is material to the alleged prior publication. The invention, as I

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(1) (1892) A.C., 367, at p. 378.

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have said, is for improvements in ore concentrators. Now, it has been known for an indefinitely long time that one way of getting the valuable material out of ores is by the use of flowing water down an inclined plane of greater or less length. The simplest form is the old cradle used at the diggings. Mr. Coldham mentioned a sluice which he said was some hundreds of feet long, and I do not think he was exaggerating. It was common to all those appliances to have obstructions to the flow of the water, either in the form of depressions or of raised obstructions called cleats. Another appliance which was in common use long before 1897, when this patent was granted, was an inclined table over which water ran, carrying the material, the table being kept in agitation in its own plane. They were called by various names, sometimes "vanners," the idea being to cause a continual oscillation of the material to and fro in water, in a nearly horizontal plane, on a table. The material was separated according to its specific gravity, the lighter parts rising to the top, and the heavier parts sinking to the bottom. That was a well known principle and a well-known appliance. Some thirty or forty years ago or more, one Rittinger described what was then a new appliance, which has been spoken of in this case as the Rittinger Table. He made use of the well-known fact, that, if you put a light substance upon a horizontal table and give a continuous jerking motion to the table from one end, the loose material on the table will be carried forward. He combined that result with the result of water flowing down over an inclined table, so that there would be both the downward motion of the flowing water carrying the material in suspension, and the motion of the table transversely to that of the water, always tending to throw the material, and to some extent the water, to the other end of the table. It was found, as the resultant of those two motions, that the ore was, to a great extent, separated, the lighter material going more directly to the lower edge of the table, and the heavier material going further and further away from the end from which it came on to the table, according to its specific gravity. Of course the precise distance each part would travel would depend upon the quantity of water, the degree of inclination, and the extent of the propulsion which was given to it—what has

been called the reciprocating motion. All this was part of the common knowledge when the publication in question was made.

Now I will read the document in question in order to see what addition it* made to that common knowledge, according to the principle laid down by the Court of Appeal in the case of *The Cassel Gold Extracting Co. Ltd. v. The Cyanide Gold Recovery Syndicate* (1). *Smith* L.J. said: "The question is—Does this specification add to the stock of common knowledge so as to inform men skilled in chemistry" that by doing something they would bring about a certain result. [The learned Chief Justice then read the document alleged to be a prior publication of the plaintiffs' invention, and continued.] This description was published in the United States in a periodical in February, 1897, and was published in Victoria before the date of the patent. As I have said it was intended to be a description of the plaintiffs' invention. It must be construed by the Court according to the rules applicable to the construction of documents. I will now deal with it in detail as a mere matter of grammatical construction, and I think that there is only one grammatical construction which can be put upon it. It begins by saying that the concentrator is a flat table. Now, every mining man knows what that means. It says "The concentrator is a flat table 7 x 16 ft. resting on rollers, and is operated by an eccentric." That is a well-known form of mechanism used to produce what is called a reciprocating motion. If there were anything in the claim relating to the mode of applying an eccentric to the table, it might be an important matter to consider; but no question is raised about the mode of communicating the motion to the table. It goes on "This gives a jerking motion which carries heavy material to the bottom of the bed, then forward to the head end of the table." What is meant there is not open, in my opinion, to any doubt. It means that the jerking motion causes the heavier material to sink, the lighter material remaining on top; and the heavier material being carried forward to the "head" end of the table. Bearing in mind what was then known of the Rittinger process, it is clear that what the writer means by "head end" is the opposite end to that from which the impulse is given, and opposite to the end of the table at which the material is

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(1) 12 R.P.C., 232, at p. 254.

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received—I will call that the “feed” end, and call the other the “discharge” end. It is not disputed that that is the necessary meaning of those terms. Therefore, we begin by a statement which is nothing more than a statement of the principle of the Rittinger table, which was then a well-known appliance. Any person familiar with the Rittinger table, would say “There is nothing new in that, we have had that before, that is the Rittinger table.” Then it goes on:—“The pulp is supplied through a feed box, which extends the whole length of the table, and is divided in such a way as to feed pulp at one end and clear water at the other end, where the concentrators pass off.” “Concentrators” is obviously a printer’s error for “concentrates.” Then, after a reference to the advantages of this construction, it says:—“The silica passes across the table (it being slightly inclined) and off at the side.” What is meant by “across”? The meaning is obvious. The table being slightly inclined the material tends to go in the direction of the flow of the water, that is, downwards. That obviously is what is meant by “across.” We must remember that the writer has spoken of two of the four sides as “ends.” He accordingly regards the place where the feed box is as one side, the upper side, and the opposite side as the lower side. He goes on: “in doing which it passes over tapered cleats.” He is addressing persons who understand the principle of obstructing the flow of water carrying mineral matter in suspension by means of obstructions or riffles. Accordingly, he says:—“The silica passes across the table”—that is from the upper side to the lower side, “in doing which it passes over tapered cleats.” What is suggested there is apparently that the cleats are at right angles to the flow of the water. But he goes on to say:—“The result being that coarse silica passes off first, then, as material is jerked forward and toward the upper” (discharge) “end the fine silica rises to the surface and is carried off next.” It is a natural inference that the cleats are arranged in such a way that the material intercepted by them is jerked forward towards the upper end, that is, the discharge end, of the table. They must, then, be arranged on the table at right angles to the flow of water, since the result is that the material is jerked forward from one end of the table to the other, that is, lengthwise along the table. Then the writer

stops to make an observation which is not disputed. He says:—
 “If ore is put on a table or into any receptacle and thoroughly shaken, the coarse and fine concentrates and fine silica will go to the bottom.” The Rittinger table would remind anybody who was familiar with the subject that, when the material is intercepted by cleats, the shaking motion would not only make the heavier material go to the bottom where so obstructed, but retain it there until moved forward. He goes on:—“A description of the cleats will further illustrate the point. The table is covered with linoleum on which are nailed from two to seven cleats, which are about $\frac{1}{2}$ inch high at the tail end of the table and taper to a feather edge toward the head end.” There is no difficulty about that. The cleats are about $\frac{1}{2}$ inch high at the feed end of the table. Now, the intention being to concentrate the ore, it is clear that an open passage cannot be left exactly opposite to the feed, which would result in the ore being carried straight off the table by the water. The cleats must, therefore, necessarily go right up to what he calls the tail end, and which I call the feed end, of the table. They taper to a feather edge towards the head (discharge) end, the opposite end. We have then information on these points. First of all, there are cleats, the same sort of things as obstructions used in sluice boxes; secondly, they are arranged in such a way that the material by their aid and that of the jerking motion is carried from end to end of the table; and, thirdly, they are tapered to a feather edge towards the discharge end. If no more were said, one would be strongly inclined to think that, in order to produce those results, they must be parallel to each other, that is, at right angles to the flow of the water. Then the description goes on:—“The first cleat is put on the lower edge of the table and runs up to within 2 feet of the head (discharge) end.” That can only mean that, the table being described as 16 feet long, the lowest cleat runs along the bottom of the table and leaves a space of 2 feet at the discharge end. “The other cleats are shorter and shorter as they cross the table towards the feed box”—which I construe as “as they approach nearer to the feed box”—“making the last cleat about 4 feet long.” Here, then, we have a series of cleats described, the lowest one coming to within two feet of the discharge end, while the others are shorter and shorter as they are nearer

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to the other side of the table. If there were any doubt as to the meaning, the following words explain it. "The pulp is fed on the table as near the tail end as possible, and the jerking motion sends the concentrates to the bottom"—that, of course, means to the bottom of the water—"and at the same time moves them toward the head end."—That is, from the feed end towards the discharge end. "When concentration commences the coarse silica passes over the high end of the cleats"—that is, at the feed end of the table—"and as the ore moves forward"—that is, towards the discharge end—"the finer silica rises as the height of the cleats decreases and passes off. This is done without materially disturbing the bed of concentrates"—necessarily meaning the concentrates collected by the cleat, or obstruction offered by the cleat, and accumulated against it—"which moves forward and around the end of the cleats"—using the word "forward" in the same sense in which has been used before, *i.e.*, longitudinally along the table towards the discharge end—"until a sufficient quantity collects"—Of course, when it comes to the end of the cleat it would tend to go down towards the lower edge of the table. That is what I take to be the mere grammatical construction of this document. I should add that the accompanying illustration, in my opinion, represents one cleat along the middle of the table, parallel to the sides, and the higher end of which is placed close against the feed end. What information then would the document give to any person who was familiar with the principles I have spoken of? Surely he would consider the matter thus: "Here is a new process by which I combine with the Rittinger table the well-known principle of having riffles in sluices." It is not open to any other construction in my opinion as a matter of construction of an English document. In answer to this, the plaintiffs called a large number of witnesses, who said that they could not construct an appliance from that description. That must mean either that they are deficient in education and unable to understand an English document which the Court thinks is capable of construction by ordinary persons, or else that they did not possess sufficient ingenuity to construct a table by carrying out those directions. If the document describes a table with cleats across it, fastened on parallel to the sides, varying in length and tapered in the way

stated, then, if a man says he could not construct a table of that sort from those directions, his evidence, in my opinion, is absolutely worthless. He either does not understand plain English, or he has not the necessary mechanical capacity. A number of witnesses also said they did not understand the document. That was, in effect, giving evidence as to its grammatical construction. If a document is, in the opinion of the Court, intelligible and plain in its meaning, evidence of witnesses who say they do not understand it is really evidence on a matter of law. The construction is for the Court, not for the witnesses; and if such evidence as that were allowed, whenever sufficiently stupid witnesses could be found, they could be called to swear that they did not understand any document.

The Court disregards the evidence of the witnesses who merely state that they do not understand the grammatical meaning of a document.

The view I take is that this document is quite intelligible. It describes the construction of a table which anybody of ordinary intelligence and sufficient mechanical ability could make. That being the meaning that I think is conveyed, I think the publication did add to the stock of common knowledge; that is, that applying the principle of cleats, or other obstructions to running water, to the principle of the Ritinger table was an addition to the stock of common knowledge. I have said already that the publication was intended to be a description of the plaintiffs' invention. The plaintiffs' invention, as far as it is necessary to read it, may be taken from the claim. The appellant puts his claim in various forms. Four of them, which are not now in question, are for a combination of these contrivances with the mechanism for working them. The first claim is for "a transversely inclined concentrating table having a movement whose tendency is to carry the material longitudinally forward toward the tail or foot of the table." There is no doubt what is meant by "table." It goes on: "said table being provided with a number of riffles extending longitudinally a portion of the distance from its head toward its foot, said riffles varying in length for the purpose specified, the table having a smooth, plain or unriffled portion, extending from the extremities of the riffles toward the tail of the

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table, whereby the material as it leaves the riffles is subjected to the action of the water on the smooth portion of the table and the final separation of the mineral from the gangue effected." That is his description of the appliance of which it was necessary to give a description. The second claim is the same with a few verbal variations. The seventh claim is practically the same. The opinion I have come to is that the plaintiffs' invention had been actually described. The person trying to describe it succeeded in describing it, and it was therefore matter of common knowledge when the patent was granted. I think the evidence of any number of persons who said they did not understand the description cannot weigh in the balance. If indeed the document were ambiguous, so that a person familiar with the subject matter could not understand what it meant, then it would not add anything to the stock of common knowledge; nor would it be adding to the stock of common knowledge if any inventive ingenuity were necessary to make the appliance work; but, for the reasons I have given in detail, it does not need any ingenuity to give effect to the description. In my opinion, therefore, although this invention had not been anticipated by a prior invention, it had been published in Victoria before the patent was granted. The patent therefore is invalid, and the defendants in my opinion are entitled to judgment.

BARTON J. To what my learned brother has said I have not much to add. Clearing away the issue of infringement—for we may take it the defendants have used the patent,—we have left for consideration merely the issue which rests on the appellants, as defendants, affirming an anticipation of the plaintiffs' invention. The only evidence of that anticipation is the circulation here of the "Engineering and Mining Journal" of the 13th February, 1897, a journal, I think, published in America, and the publication quoted took place, so far as America is concerned, nine months before the respondents obtained their letters patent in Victoria, and rather later here, but still some time before the patent. The specification and claim, the document which will have presently to be compared with the article in the "Engineering and Mining Journal," was for improvements in concentrating tables, and I shall

make further reference to it presently. The question is whether, viewing those two documents together, and in the light of such evidence as is material, there has been an anticipation. The modern test is to be found in the case of the *Anglo-American Brush Electric Light Corporation v. King, Brown & Co.* (1) in a passage of Lord Watson's judgment already mentioned:—"I agree with his Lordship and with the learned Judges of the First Division in holding that the sufficiency or insufficiency of the specification for that purpose does not afford a crucial test of prior publication." (The contrary having formerly been the accepted view.) "Every patentee, as a condition of his exclusive privilege, is bound to describe his invention in such detail as to enable a workman of ordinary skill to practise it; and the penalty of non-compliance with that condition is forfeiture of his privilege. His patent right may be invalid by reason of non-compliance; but it certainly does not follow that his invention has not been published. His specification may, notwithstanding that defect, be sufficient to convey to men of science and employers of labour information which will enable them, without any exercise of inventive ingenuity, to understand his invention, and to give a workman the specific directions which he failed to communicate. In that case, I cannot doubt that his invention is published as completely as if his description had been intelligible to a workman of ordinary skill." The question here will be, whether, applying the proper test, the publication in the "Engineering and Mining Journal" is sufficient to convey to men of science and employers of labour the information which would enable them, without any exercise of inventiveness, to understand the invention and give workmen the specific directions which the paper itself fails to communicate in detail. Before the test in question is reached there is a prior question of construction. On that question, I take it, the leading case is *Hills v. Evans* (2). That case was decided in 1862, and in it Lord Westbury L.C., after a close review of the cases down to that time, held that, although the construction of the specification is for the Court (and the same rule of course applies here), where the defence of anticipation is founded on such a document as is before us in this case, the technical words or technical terms

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(1) (1892) A.C., 367, at p. 378.

(2) 8 Jur. N.S., 525.

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of art are matters of fact to be explained by evidence, and therefore it is for the jury to decide them. The work of comparing the two specifications, or in this case the specification and the alleged paper anticipation, is for the jury. To prove the defence of want of novelty, a prior publication must be shown to exist of the essential and practical working of the invention. Shortly before that case, which was decided in the House of Lords, there was a case of *Betts v. Menzies* (1), and portion of the head-note, to which I wish to refer, is this, that—"Where two specifications"—or, as in this case, a publication not being a specification, and a subsequent specification—"of different dates, relating to the same external object, contain terms of art, though the expressions used in both are identical, their construction cannot be declared to be the same without the meaning and the use of the terms of art employed therein being first ascertained by evidence, and being shown to be the same at the date of both the specifications." I mention that portion of the head-note at this stage for the purpose of expressing my opinion that in the publication in the "Engineering and Mining Journal" we can scarcely say the terms of art trouble us, or that there are in it any such technical terms as require explanation, in determining which we exercise here the functions of a jury in addition to the functions of a Judge.

We have then, first, to construe these two documents as Judges, after having any technical words in them explained to us by evidence as if we were a jury. Having made up our minds what they mean—having construed them—we have again to exercise the functions of a jury in comparing and deciding whether the words as interpreted by ourselves, contained in the publication Ex. D., do or do not denote the same "external object," to use Lord *Westbury's* expression, as the words used in the respondents' specification. I have already said I think there are no particular words of art in Ex. D., except for some controversy as to cleats and riffles. Now, I may shorten my judgment by saying that I adopt to the full the construction which my learned brother has put on Ex. D. I think it is an absolutely plain document. I do not mean that it could not possibly have been clearer, because

(1) 10 H.L.C., 117.

there are, in the course of expression, ambiguities; but I have found no ambiguity involved in its course which has not been cleared up by the context. In the ordinary transactions of life it is very difficult indeed to find a document, not drawn up by a lawyer, that is not ambiguous. Often, indeed, in documents drawn up by lawyers, if you pick them to pieces, you will find ambiguities. But there is a rule of construction that you must read the document as a whole, and when you read this document as a whole I cannot find the slightest ambiguity in it from one end to the other. There has been captious verbal criticism by witnesses, such as that upon the use of the word "upper end" when the head end, in the mind of the writer, is meant, or the end to which the pulp is being driven; but that is explained by the context. There has been criticism as to the use of the word "up"—"The first cleat is put on the lower edge of the table and runs *up* to within two feet of the head end." Witnesses either honestly believed, or affected to believe, that the person who wrote the article meant, in using that word "up" to indicate that the cleat was to run up-hill. But if the sentence is read this way—"The first cleat is put on the lower edge of the table and runs *up* to within two feet of the head end"—there is no difficulty whatever. Taking the context, that is the obvious meaning. I instance this as a sample of the verbal criticism upon which the notion has been founded, that this publication does not afford to such persons as are indicated in Lord *Watson's* remarks in the *Anglo-American Brush Electric Light Corporation v. King, Brown & Co.* (1) to "men of science and employers of labor information which would enable them, without any exercise of inventive ingenuity, to understand his invention." On this basis of criticism, it is not only possible, but absolutely easy, to destroy the value and meaning of any document such as this. Such criticism, if adopted as a means of construing like documents, would result in confusion worse confounded. What is the meaning of this document? I have not the slightest doubt the proper construction of it is that which has been placed before us by the learned Chief Justice. Taking it as a whole, it means what it says and says what it means. Then we have to compare with it the specification

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of the respondents for "Improvements in Ore Concentrators" in which we are referred to heads 1, 2 and 7 of the Claim which runs thus:—[His Honor read the claims and continued.]

Now, those portions of the claim which are material to the case are very plain, and they do not afford any difficulty in construction.

So that we have two documents, the publication which is a plain enough document and which has already been construed, and those three portions of the claim, which are likewise plain. We exercise the functions of the jury in applying the words in those documents so construed to the subject matter. Doing that, can we believe the two documents describe two different things? Putting out of our minds all question about the Wilfley concentrating table and all questions of dates, and putting these two documents together, and taking them with the construction that, after the proper tests, they bear, is it possible for a sensible man to read them together and to say they describe two different things? To my mind it is totally impossible to do so, and almost any bulk of evidence, which endeavoured to get rid of the irresistible conclusion afforded to me as a juryman in comparing those documents, would be by me wholly disregarded. There is the evidence of witnesses who have based their opinions upon constructions of the American publication which rather are indications of their endeavour to usurp the functions that really fall upon the Court in this case. That kind of verbal criticism, is not that which one would expect from an expert in engineering, and especially that portion of it that relates to concentrating tables, but it is the language of the verbal critic endeavouring to express his own peculiar view of plain language. Evidence founded on that basis is immaterial evidence, and a vast proportion of the evidence taken in this case may be swept away as totally immaterial. When the screen of verbal criticism is pierced there is no substantial difference between the two things described. Quite a number of witnesses have shown, fulfilling the conditions laid down in the case of the *Anglo-American Brush Electric Light Corporation v. King, Brown & Co.* (1), that it is not only possible but easy to design from Ex. D alone a table containing every inventive feature claimed for the Wilfley table as described in the specification.

[His Honor then dealt with the meaning of the document and continued.]

I am entirely at one with the learned Chief Justice in the conclusion he has come to, that every requirement in the portions of the claims in the specification, upon which the conflict rested, has been fulfilled by the publication on 13th February, 1897, in the American "Engineering and Mining Journal." Therefore the appellants have made out their case affirmatively on the matter of anticipation. I agree therefore that the appeal should be allowed.

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O'CONNOR J. I am of the same opinion. The substantial matter for our consideration is whether the finding of the learned Judge in the Court below, that the defendants had not established prior publication, was in accordance with the evidence. A great deal of evidence was called. A large portion of it had relation to a fact necessarily to be established by evidence, viz., the condition of existing knowledge at the date of the patent. But evidence was also called upon the issue as to whether a skilled workman could construct a machine from the description alleged to be a prior publication, and the finding of the Judge is complained of on two grounds; first, that he departed from the rule of law which gives the interpretation of a written document into his hands, and was guided in that interpretation by the opinions of the experts; and in the second place that, on the proper interpretation of the document, he ought to have found that the publication in the "Engineering and Mining Journal" was really an anticipation of the invention. In the first place, it will be noticed that the witnesses who gave this evidence were not called directly for the purpose of interpreting the document. They were called for the purpose of testing the sufficiency of the specification—that is, in order to enable the Court to come to a conclusion whether the invention had been so described that an ordinary skilled workman could construct a machine from it. In the course of that evidence, and as a reason why some of those skilled persons said they were unable to construct the machine, they attempted to interpret the document itself. It appears to me the learned Judge was in error in not making sufficient dis-

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tion between the method in which an original specification is proved, and the method in which a publication, which is contended to be a prior publication, is to be proved. The difference in the nature of the two documents has been explained in a general way in a passage in the *Anglo-American Brush Electric Light Corporation v. King, Brown & Co.* (1), in the judgment of Lord Watson which has already been quoted. That distinction is better explained in a judgment delivered by Lord Cairns L.C. in the House of Lords in the case of the *British Dynamite Co. v. Krebs* (2). In that case the first question referred to in the passage I am about to read was—Is the description of the invention in the specification sufficient? That was a case in which the sufficiency of the description in the specification of the invention was being tested. His Lordship says:—"In order to judge of the first question, your Lordships must bear in mind the provisions of the *Patent Law Amendment Act 1852*. The sixth section of that Statute requires that the provisional specification for a patent shall describe the nature of the invention, and the 9th section provides that the complete specification shall particularly describe and ascertain the nature of the invention, and in what manner the same is to be performed. In determining whether the complete specification is sufficient, the first thing is to ascertain what the invention is. This is a question of construction, and the construction of the specification is for the Court, to be determined like the construction of any other written instrument, the Court placing itself in the position of some person acquainted with the surrounding circumstances as to the state of art and manufacture at the time, and making itself acquainted with the technical meaning in art or manufactures which any particular word or words may have."

So far, the duty of a Judge, in regard to a specification, and the duty of a Judge in regard to the construction of a prior publication, are the same. Now we come to the portion of the judgment which describes the difference:—"When the nature of the invention is thus ascertained by the Court, as a matter of construction, the Court has then to inquire whether the manner in which the same is to be performed is sufficiently

(1) (1892) A.C., 367, at p. 378.

(2) 13 R.P.C., 190, at p. 192.

described in the specification to the comprehension of any workman of ordinary skill in the particular art or manufacture; and this the Court can best do by the evidence of workmen of that description, and by the evidence of what workmen of that description have actually done under the patent."

That is the ground upon which evidence, commonly given where the issue raised is that the specification is not sufficient, is heard by the Court. Now, this does not rest upon any difference between the rule of law as to the construction of a specification, or a prior publication, and the rule of law as to the construction of any other document; but it rests upon the obligation which the grant of a patent imposes on the patentee, the obligation to satisfy the Court, when the matter is raised in issue, that his publication is of such a nature that any ordinary skilled workman can, from the description in the specification, construct the machine. The reason of that obligation appears at once if we examine for a moment the history of this branch of the law. Originally, as pointed out in *Hindmarch on Patents*, at p. 151, no specification was required except in compliance with the provisions of the grant of the patent itself. He says:—"The specification or description of a patent invention, by instrument enrolled in Chancery, is not however required either by the Common Law or by the Statute of Monopolies, as has frequently been supposed, but only by the condition or proviso which is contained in the patent itself. The form of this condition in patents invariably provides that if the patentee shall not *particularly describe and ascertain the nature of his invention, and in what manner it is to be performed* by an instrument in writing under his hand and seal, and cause the same to be enrolled in Chancery within the time named (four or six months) after the date of the patent, then the patent and the privilege granted by it are to cease and become void." That obligation was imposed afterwards by Statute, viz., an obligation to file a specification, in England, under the *Patents Act* 1852, and in Victoria, under the *Patents Act* 1890 under which this patent was granted, sec. 8 (4), of which provides:—"A complete specification whether left on application or subsequently must be in the form in the Second Schedule hereto and shall particularly describe and ascertain

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the nature of the invention and in what manner it is to be performed and must be accompanied by drawings if required. Provided that a reference to the drawings accompanying the provisional specification shall be a sufficient compliance with such requirement." The requirement of the Statute is that the specification shall particularly describe in what manner the invention is to be performed. Therefore, it is plain that, if the question here were merely the sufficiency of the specification, it would be open to the Court to call evidence as to whether it was practicable for a workman of ordinary skill to construct the invention from that specification; and if the specification did not substantially supply every detail, the patent would be bad. But when we come to deal with the other question—the question of the prior publication—the issue to be tried is quite a different one. Where the alleged prior publication is in the form of a document the only duty which the Judge has to perform is the construction of the document according to that requirement. When he has before him all the evidence necessary, if any such evidence is required, to explain technical terms and the working of mechanical appliances, or the operation of chemical processes to enable him to construe the document, it is his duty to construe it according to his own view of its meaning. After that he has to consider whether in the existing state of knowledge the document is sufficient to convey to men of science and employers of labour information which will enable them, without any exercise of inventive ingenuity, to understand his invention, and to give a workman the necessary directions for its construction. Now, if we apply these rules of law to the matter under consideration, the first inquiry is—In what respects was the Judge entitled to be guided by the evidence which was given? He was entitled to be guided by evidence to explain the terms of art, and to describe the results of processes. He was also entitled to be guided by evidence as to the identity of subject matter, that is to say, whether the machine or the process described in the prior publication was the same as the machine or the process described in the plaintiffs' invention. When he had all that material before him, and when he had before him the knowledge which was then in existence regarding the subject matter of the invention, then he was bound

to construe the specification as he would construe any other document. The evidence is perfectly plain as to what the existing knowledge was. [His Honor having dealt in detail with the meaning of the document, continued.]

I am of opinion, from reading this document, that, with the material which the Judge must be taken to have obtained from the evidence in regard to the condition of knowledge in these matters when the alleged anticipation was published, and having regard to the rule laid down by Lord *Watson* in the case to which I have referred, his Honor ought to have come to the conclusion that the publication was a publication of what was substantially the invention of the plaintiffs, the infringement of which is the subject matter of the action. For these reasons I think the verdict is not according to the evidence, and that judgment should be entered for the respondents.

Appeal allowed. Judgment appealed from discharged. Judgment for the appellants with costs, except so far as the costs were increased by the issue of infringement. Respondents to have their costs of that issue to be set off against appellant's costs. Respondents to pay costs of appeal.

NOTE.—The form of the order as to costs was mentioned on a subsequent day, and it was finally drawn up as follows:—

Judgment for the defendant in the action with costs to be taxed including all costs of discovery except so far as the defendant's costs may have been increased by such of the issues raised by the plaintiff's particulars of breaches as were specifically stated by the Judge of the Supreme Court when delivering judgment to have been found in its favour but subject to the deduction next hereinafter directed that is to say that the plaintiff's costs of such last named issues be taxed and deducted from the defendant's costs taxed as aforesaid.

Solicitors, for appellants, *Blake & Riggall*, Melbourne.

Solicitors, for respondents, *Waters & Crespín*, Melbourne.

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