1930
Mar. 28.
Apr. 24.

REFRIGERATING EQUIPMENT LIMITED ..... } PLAINTIFF;

VS.

W. A. DRUMMOND AND WALTHAM SYSTEM INCORPORATED ..... } DEFENDANTS.

Patents—Impeachment—Interested person—Application in Canada—Invention—Method or process

The plaintiff is licensee in Canada of a patent issued to Glacifer Company, relating to improvements in cooling containers, and the defendant, Waltham System Incorporated is the owner of a patent for improvements in a method of refrigeration, and the other defendant is licensee under the same patent.

(1) [1915] 21 B.C.R. 540. (2) (1921) 21 Ex. C.R. 226.
(3) (1924) 2 D.L.R. 200; 34 B.C.R. 4.

Held, that where an individual is using an invention in respect of which another person claims to have a patent, which the unlicensed user believes to be invalid; or where a person is desirous of using anything described in a patent, but which patent he has reason to believe is void, then he has such an interest as to qualify him to initiate proceedings to annul such letters patent; and is a person "interested" within the meaning of the Rules of this Court.

2. That a patent for invention, for a new method of refrigerating, granted in Canada, upon an application therefor made more than twelve months after the application for a similar patent was made in the United States, will not be voided for such delay alone, where the Canadian patent is not exactly the same, the language thereof varying somewhat from that in the United States patent, as also do the drawings, and where slight structural changes in the means of applying the method are suggested. That in order to set aside the patent for delay in applying in Canada, the application here must be for the same invention as was applied for abroad, and the claims must not include anything not comprised in the application made abroad.
3. That there is no invention in selecting a triangular shaped cartridge in preference to any other to contain the frozen liquid placed around a container of ice cream to keep it cool nor in providing a rack whereon is set the ice cream can and the cartridge. That moreover, in view of the prior art, it was not new to provide an air space between the said cartridge and the container of ice cream.
4. That the Patent Act recognizes a method or process as having the same title to protection as a machine or article of manufacture; method and process being one and the same thing.
5. That where the method described is not new, it cannot be patented as a process. Where the method is old and the instrumentalities new, the latter may be patented as a machine or manufacture, if to do so required invention.

ACTION to impeach Canadian Patent for Invention, number 280,516.

The action was tried before the Honourable Mr. Justice Maclean, President of the Court, at Ottawa.

W. L. Scott, K.C., for the plaintiff.

R. S. Robertson, K.C., for defendants.

The facts and questions of law raised are stated in the reasons for judgment.

THE PRESIDENT, now (April 24, 1930), delivered judgment.

The plaintiff here seeks the revocation of Canadian patent no. 280,516, issued the 29th day of May, 1928, to Bemis Industries Incorporated, the assignee of the alleged inventor, Henry C. Folger; the patent was later assigned to the defendant Waltham System Incorporated; the defendant

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W. A. Drummond Ltd., has an exclusive licence for Canada under this patent. The patent is described as an Improvement in Methods of Refrigeration.

The plaintiff is the licensee in Canada, under Canadian patent no. 221,993, issued the 8th day of August, 1922, to Glacifer Company, as assignee of Elihu Thompson, the inventor. The patent relates to improvements in Cooling Containers. The validity of this patent is not here in question.

Revocation of Folger is sought upon the grounds of lack of subject matter, anticipation, and publication in other patents and trade journals of Folger, more than two years prior to the date of application for such patent in Canada. Folger obtained three patents in the United States, each, or all of which read together, describe, it is claimed, the Canadian Folger here in suit. These three patents all issued on October 11, 1924, more than three years prior to the application date of the Canadian Folger; these three patents each relate to a refrigerating apparatus and will be discussed later. Folger also applied for a fourth patent in the United States, on December 7, 1923, but the patent did not issue until November 29, 1927. This patent relates, it is claimed, to a method of refrigerating ice cream and other materials. The plaintiff contends that this patent is in effect the same as Canadian Folger which is sought to be revoked; and the plaintiff further contends, that Folger elected to obtain a patent for this alleged invention in the United States before obtaining a patent for the same invention in Canada, and did not apply for letters patent in Canada within one year from the earliest date on which application for patent was filed in the United States, and that therefore the patent in suit is void under the provisions of sec. 8 of the Patent Act. The defendants contend that the first three mentioned United States patents issued to Folger, and certain trade journals which will be later mentioned, do not describe the Canadian Folger, the patent in suit; that the Canadian patent is distinguishable from these three United States patents in that it is a patent for a method or process, and that it is distinguishable from the last mentioned United States Folger, in that the former possesses improvements not mentioned or described in the latter.

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At the trial, the defendants urged that the plaintiff was without status to institute these proceedings. It will be convenient here to dispose of this point. By sec. 25 of the Exchequer Court Act, the Exchequer Court has jurisdiction, in actions to impeach or annul a patent; and by rule 16 of the Exchequer Court Rules, such action may be instituted by a statement of claim filed by any person interested. I think the plaintiff is a party interested. It is pleaded and not denied, that the plaintiff and the defendants are manufacturing and selling to the public, what is practically the same thing, refrigerating apparatuses. If, as the plaintiff alleges, Canadian Folger was described in the three United States Folger patents, and other publications, more than two years prior to the application for letters patent for Folger in Canada, then Canadian Folger is invalid; and if the plaintiff believes it to be invalid, then, in the circumstances of this case, it is a person interested. Where an individual is using an invention, in respect of which another person claims to have a patent, which the unlicensed user believes to be invalid; or where a person is desirous of using anything described in a patent, but which patent he has reason to believe is void, then he has such an interest as to qualify him to initiate proceedings to annul such letters patent. I think therefore that the plaintiff is possessed of sufficient interest to qualify it to institute this action.

Now turning to Folger, the patent in suit. The patentee describes his own method and former methods of refrigeration as follows:—

> In the ice cream industry it has been customary for ice cream manufacturers to deliver ice cream to retailers in large trucks, and ordinarily the ice cream is refrigerated on the trucks and in the customers' cabinets by ice and salt which are packed around the cans containing the ice cream. In one method the ice cream containing cans are placed in tubs packed with ice and salt, and in another method the ice cream containing cans are placed in the body of the truck and ice and salt are packed around the cans so that when it is desired to remove a can from the truck, it is necessary to dig down into the ice and salt to expose and obtain access to the can.
>
> Each customer has a cabinet for receiving the ice cream can or cans while the ice cream is dispensed therefrom. It has been customary to pack ice and salt around the cans in the cabinet to refrigerate the ice cream. The manufacturer of the ice cream supplies the ice and salt for these cabinets. This has made it necessary to provide the truck body with compartments for receiving ice and salt for this purpose. The ice melts to a certain extent while on the truck, and usually water can be

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seen leaking and dripping from the truck. The weight of the ice and salt carried by the truck adds to the expense of transportation. Large quantities of ice and sale are required to refrigerate the ice cream containing cans on the truck and in the customers' cabinets, and the cost thereof materially reduced the profits of the ice cream manufacturer.

It is customary for the driver of the truck on arriving at a customer's destination to carry from the truck to the cabinet a supply of ice and salt, and to pack the same about the can in the customer's cabinet. This is a time consuming operation, objectionably lengthens the time required for the driver to cover his route, and further reduces the profits of the manufacturer.

It is frequently necessary to remove melted ice from the cabinet and repack ice and salt about the can to prevent melting of the ice cream therein. Moreover, the mixture of ice and salt has a variable refrigerating effect, and frequently the ice cream is either too hard or too soft and not in condition for sale.

The present invention is a distinct improvement upon the former methods, and overcomes the objections thereto referred to. In accordance with the present method, the refrigerating effect is produced by cartridges formed of metal containing a frozen liquid or solution which freezes at a temperature substantially below 32°F., and desirably this temperature is as low as 3° above zero. Different liquids may be employed, such, for example, as a solution of salt and water, or alcohol and water, or calcium chloride and water, all of which have a low freezing point. The cartridges after being nearly filled with such a solution are closed and sealed. Then they are placed in a refrigerating room having a temperature sufficiently low to freeze the solution.

To refrigerate the ice cream during transportation from the manufacturer to the retailers, the cans containing the ice cream are placed in a specially constructed truck which has compartments for receiving the ice cream containing cans and a sufficient number of cartridges for refrigerating the ice cream. A truck also has compartments for receiving cartridges for transfer to customers' cabinets, compartments for receiving exhausted cartridges taken from customers' cabinets, and a compartment for receiving empty ice cream cans.

After the truck has been loaded with ice cream containing cans and refrigerating cartridges, the driver starts on his route and delivers an ice cream containing can or cans to each customer, and also a sufficient number of cartridges properly to refrigerate the ice cream in the cabinet.

Cartridges of triangular prism form lend themselves advantageously for use with cylindrical ice cream containing cans in the customer's cabinet. Four cartridges may be placed around each ice cream containing can, one cartridge in each corner of the chamber in which the can is located. In this relation the cartridges will have their whole surface disposed directly to intercept passage of heat into the chamber and to the ice cream can. A further advantage in cartridges of triangular prism form is that they are able to hold their original shape after being subjected to the strains of repeated freezing of the solution therein. They will not swell, bulge or become otherwise distorted on any of their flat sides, and thus they are always in condition for compact stacking between the coils in the refrigerating room.

The patentee makes provision for a rack for supporting the ice cream can and the cartridges in the chamber of the cabinet, and he also claims than the air space between the

cartridges and the cans, and surrounding the latter distributes the cooling effect on the can and its contents, in an effectual manner. These two features were particularly emphasized as new by the defendant's counsel at the trial, and the patentee's reference to the same in the specifications should perhaps be quoted.

It is desirable to provide a rack for supporting the ice cream can and cartridge in proper relation in the chamber of the cabinet. A rack 41 (Figs. 1, 2 and 3) is shown herein formed of wire and comprising loop base members 43 and 45 in transverse relation and welded together at their crossing points,. Upright loops 47 and 49 rise from the ends of the base members 43 and 45 respectively, and are continuations thereof. Within and welded to the uprights is a ring 51 located up somewhat from the crossing base members. Rests 53 are welded to and project from the uprights, and are provided with diagonal braces 55 welded to the rests and uprights, said rests and uprights being of wire loop form.

In use the rack is placed into the chamber of the refrigerating cabinet so that one of the base members will extend between diagonally opposite corners of the chamber, and the other base member will extend between the other diagonally opposite corners of the chamber. The uprights will be spaced somewhat from the corners, and the rests and braces will extend from the uprights toward the corners.

After the rack has been placed in the chamber as described, an ice cream containing can is set into the ring of the rack and rests upon the base members. Then the cartridges are slid down into the corner spaces of the chamber and are supported on the rests. They are held spaced from the ice cream can by the uprights which are between the can and the cartridges.

The air in the space betwen the cartridges and can and surrounding the latter desirably distributes the cooling effect on the can and its contents. The construction of the rack is such that the ice cream can is supported slightly above the bottom of the chamber and the cartridges are supported a substantial distance above the bottom of the chamber. Their length is such that they extend somewhat above the top of the can. This relation of the cartridges to the can has been found in practice to provide very efficient refrigerating effect on the entire contents of the can.

The cabinet 37 referred to, has walls 57 of cork covered by wood layers 59 and sheet metal layers 61. The bottom 63 of the cabinet is formed of cork covered by a wood layer 65. Each chamber of the cabinet has a sheet metal lining 67.

Now, coming to the three United States patents granted to Folger in 1924, nos. 1,511,452; 1,511,453; and 1,511,454. The first mentioned relates to what is said to be new and useful Improvements in Refrigerating Apparatus, really, a vehicle or truck body provided with what is called a cooling chamber, to be used for conveying ice cream or other materials requiring refrigeration, from the place of manufacture to the place of consumption. The apparatus comprises a closed container or containers,—called cartridges in the patent in suit—holding a frozen liquid which is

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transferred from the chamber in which the liquid is frozen, to a cooling chamber for refrigerating purposes. Just as stated in the patent in suit, the frozen liquid in the container might be one of many solutions, such as salt and water, alcohol and water, or calcium chloride and water, or any other appropriate solution, its temperature being lowered to the freezing point or below such point if desired. The containers are then transferred to what is called the cooling chamber of the truck body, provision being made for supporting the containers; the containers, the patentee states, may be variously formed; in the drawings they are shown to be rectangular in form. It will suffice to say that the containers when placed in the truck body are supported by hooks on hangers, there being a plurality of frozen liquid holding containers in the cooling chamber. Substantially, the containers serve to lower the temperature of the cooling chamber and will maintain their cooling effect for substantial periods of time; when the containers have lost their substantial cooling effect, they may be removed from the cooling chamber and returned to the freezing room, for the purpose of again freezing the liquid therein for use again in the cooling chamber of the truck body. So in this patent we find the use of a container, which may be of any shape, containing a liquid frozen to the desired degree in a freezing room, thence transferred to a cooling chamber in a truck body for refrigeration purposes. The details of the construction of the truck body and the cooling chamber are not of importance and it is not necessary to determine whether or not there was invention in this patent.

Then taking the next United States patent granted to Folger, no. 1,511,453. This patent is also described as a new and useful improvement in Refrigerating Apparatus. The patentee states that different methods have been employed for refrigerating ice cream while being delivered to customers on trucks. It mentions the well known method of putting ice cream cans in tubs packed with ice and salt; another method is in providing the truck body with a chamber in which is mounted a tank and piping containing a brine solution of ice and salt for cooling the chamber in which the ice cream containing cans are placed; the

patentee then states that after the cans are transferred from the truck body to a customer's cabinet it is necessary to pack ice and salt around the cans in the cabinet to keep the cans cool in the cabinet, all of which requires time, labour and expense. The patentee then proceeds to state that his method is an improvement upon former methods, and in carrying out his method he states, that containers or cartridges are filled with a liquid which freezes at a temperature substantially below 32°F. just as in the patent just above described. Then the cartridges are transferred from the freezing chamber to a truck body, which is provided with cells for receiving the ice cream cans. The cells project into chambers provided for receiving the cartridges, and are so related thereto, that the air cooled by the cartridges may circulate around the cells and effectually cool the same. The cells and the chambers are however so separated, that when the ice cream cans are taken from the cells, the chambers containing the cartridges will not be exposed to the warm outside air, and when the cartridges are taken from the chambers, the cells containing the ice cream cans will not be exposed to the outside air. The body box is divided into compartments, each containing two cells for receiving ice cream, and an intermediate chamber for receiving the refrigerating cartridges, the cartridges in each compartment serving to refrigerate the materials in the two cells of the compartment. The cartridges are preferably of oblong form. Another feature claimed for the invention is the adaptation of the cartridges for use both in refrigerating the materials while on the truck, and after the material has been delivered to the customer. For example, the patentee states, when an ice cream containing can is delivered to a customer, one or more cartridges may be removed from one of the chambers in the truck and delivered to the customer, in order that the cartridge or cartridges may accompany the ice cream containing can and continue the refrigerating thereof; and to accomplish the latter function, the customer may be provided with a specially constructed cabinet adapted to receive the ice cream containing can and a cartridge or cartridges in proximate relation, so that the cartridges may properly refrigerate the ice cream in the can. The patentee states that the

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cabinet is the subject of his copending application for patent, which is the next patent to be considered; he states that his method of refrigeration employing the truck and cabinet is the subject of another copending application filed Dec. 7, 1923, which is the fourth mentioned United States patent granted to Folger, no. 1,651,198, issued on November 29, 1927. It is not necessary to mention the details of the construction of the truck body, the compartments, or the form of the ice cream cans and the cartridges. Briefly, while the patent is for a refrigerating means or apparatus, a truck body only, yet it describes a method or process of refrigerating ice cream right from the point of manufacture down to the premises of the customer or consumer, and the invention is described as a distinct improvement upon former methods.

Then there is the United States patent to Folger, No. 1,511,454, which relates to an alleged improvement in an apparatus for refrigerating ice cream or other materials, the apparatus being a cabinet, intended I think for use by a customer and also in a truck body, in which refrigerating effect is produced by placing in the cabinet containers or cartridges containing a frozen liquid as described in the last two mentioned patents. The cabinet has a partition of insulating material which divides the same into two compartments or chambers each being provided with separate covers; each of the chambers is adapted to receive a cell or chamber containing the materials for refrigeration, the cell being in the form of an ice cream can of cylindrical form. The can may be yieldingly supported on a rectangular frame having at opposite sides wire springs of yoke form, and having feet projecting downward from the frame. The cartridge is of oblong form preferably corrugated, with a handle. The chambers in the cabinet are formed to receive the cartridges, each chamber having a space at opposite sides of the can for receiving two cartridges. When the cover of one of the chambers is opened two of the cartridges may be lowered into these spaces, and will serve to refrigerate the ice cream or other material in the can placed in the chamber. At the bottom of each chamber there may be provided a frame comprising four blocks connected by a pair of slats. Secured to the latter and extending transversely thereof are a pair of slats. The

cartridge may rest upon the blocks. It is pointed out that when the caps are opened for removing ice cream from the cans, the construction is such, that the spaces occupied by the cartridges are not exposed to the outside air. The patentee states that it is to be noted that " there is an air space around the can, and at the top and bottom thereof through which the cooling effect of the cartridges may be transmitted and distributed to the can ". Again, the patentee refers to a copending application—which is not before me—for a truck having a body specially constructed to utilize the frozen liquid containing cartridge for refrigerating materials during transportation; the truck body is well adapted, it is said, for transporting cans of ice cream from the manufacturer to customer, each of whom might be supplied with a cabinet constructed in accordance with this patent. It is pointed out that when the ice cream cans are conveyed to customers, in the truck referred to, the driver on reaching each customer, may take two ice cream containing cans and four cartridges from the truck and place one of the cans and two of the cartridges in each of the chambers of the cabinet, and thus, the same cartridges which refrigerate the ice cream cans while on the truck, will also serve to refrigerate the ice cream cans after the latter are placed in the cabinet. The patent describes throughout a method of refrigeration with particular means of applying the same.

Folger also obtained a further patent in the United States, being No. 1,651,198, and it will be convenient at this stage to refer to this patent, upon another point raised by the plaintiff. The invention here is described as a method of refrigeration; it is to all intents and purposes the same as the patent in suit. Yet it is not exactly the same, the language of the latter varies somewhat as also do the drawings, and slight structural changes in the means of applying the method, are suggested. The application for this patent was made in the United States on December 7, 1923. The plaintiff contends that the patent in suit, is essentially the same as the United States patent issued in November, 1927, upon this application, and that inasmuch as the Canadian application was not made within twelve months from the date of the United States application that the patent is therefor void under sec. 8 (2) of the Patent

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Act. While I agree that both patents virtually describe the same subject matter, yet, they differ in the respects I have already mentioned. I do not think that the application for the patent in suit can be treated as a convention application. In that case, the application must be for the same invention as is applied for abroad, and the claims must not include anything not comprised in the application made abroad. No modification or enlargement however slight, is possible as it then clearly would not be for the invention applied for abroad. I think therefore that this contention of the plaintiff fails, and that the patent in suit cannot be voided upon that ground.

The defendant claims that the patent in question is one for a method of refrigeration; that this method was not described in any of the three United States patents issued in 1924 or elsewhere, more than two years prior to the date of the application of the patent in suit; and that these three patents were each for a refrigerating apparatus and not a method of refrigeration. The defendant at the same time contends that the means described in the patent in suit differ from those described in the three United States patents. We may first consider wherein the means in the patent in suit differs from those of the three United States patents, although, strictly speaking, it is perhaps unnecessary in view of the fact that the patent in question is one for a method only. In the former case the cartridges used are of triangular form and the patentee claims that the shape of the cartridges lend themselves advantageously for use with cylindrical ice cream containing cans in the customer's cabinet. It is claimed that another new element is introduced into the patent in suit which does not appear in any of the three United States patents, and that is, the provision of a rack for supporting the ice cream can and the cartridges in proper relation in the chamber of the cabinet. It is also alleged that provision for an air space between the cartridges and the can is provided for in this patent, which, it is said, distinguishes it from all the other patents referred to. I have already quoted from the specifications references to these three points.

There is nothing new in my opinion in the means employed for carrying out the method described in the patent in suit. The triangular shape of the cartridge does not rep-

resent invention, even if it was first given to the public through the publication of this patent. However, that form of cartridge was in use in the United States long before the application for the patent in suit was made. This form of cartridge was described and pictorially exhibited in trade journals published in the United States more than two years before the patent in suit was applied for. In the Ice Cream Review, dated June, 1925, there appears a picture of a man standing over an ice cream cabinet and inserting at the corners of the ice cream cabinet two triangular cartridges, which are said to be standard for any Waltham truck or cabinet. This advertisement was inserted by the Waltham System. The Ice Cream Trade Journal, of November, 1924, contains practically the same thing. It shows triangular cartridges partially inserted at two corners of the space occupied by a circular ice cream can in a soda fountain, and two triangular cartridges fully inserted at the other two corners of the space. Another illustration, appearing in a trade journal in 1925, shows the driver of a truck departing from a drug store with four used triangular cartridges, the suggestion being that he had just placed four newly frozen containers in the soda fountain. There was nothing new whatever in the use of a triangular cartridge. There could be no invention in selecting a triangular cartridge, in preference to one of any other shape. Neither is there anything new in the provision of an air space between the cartridge and the can. This was pointed out in one of the patents issued to Folger in 1924, and I have already quoted from patent no. 1,511,454 the reference to the air space. Neither do I think there is any invention in the provision of the rack whereon is set the ice cream can and the cartridge. There are so many obvious ways of doing this that there could not possibly be any invention in the selection of any one method. One of the Folger patents of 1924 described one means of doing the same thing. Considering alone the means described in the patent in suit for applying the method, there is nothing in the way of invention, over the information published in the group of three patents issued in 1924, and the trade journals to which I have referred. The slight changes found in the construction of the several refrigerating apparatuses

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described in the patent in suit, as compared with those described in the earlier patents granted to Folger, are in my opinion far from approaching invention. Therefore, if the selection of the instrumentalities described in the patent in question are in any way involved in the invention patented, that is a method of refrigeration, then I hold they were old and were published more than two years before the date of the application for such patent.

The Patent Act recognizes a method or process as having the same title to protection as a machine or article of manufacture; I conceive method and process to be one and the same thing, but in any event that "art" may include a method or process patent is well settled. Conceding for the moment that the patent in question describes a true method or process patent as distinguished from an apparatus or manufacture, yet before the applicant became entitled to a patent, it would be necessary that the method be new. If the method described is not new it cannot be patented as a process. Where the method is old, and the instrumentalities new, the latter may be patented as a machine, or manufacture, if to do so required invention. But the method described in the patent before me was not new, it was old, it was practised precisely as described in the United States more than two years prior to the application for patent; it was described in the three United States patents of 1924. What is the method of refrigeration claimed in the patent? It is merely the introduction of a metal container containing a frozen liquid—which is not claimed to be new—and placed in proximate relation to another container containing material, which, it is desired to continue in a frozen condition; and this method is said to be an improvement over other known methods of doing the same thing, notably by the application of ice and salt. Once the idea existed in the mind of the superiority of the use of a frozen liquid in a container over ice and salt, for refrigerating purposes, nothing remained to be done with the method except the introduction of means of applying the method, which, it seems to me, in the facts of this case, was a matter for the constructor and not the inventor of the method. Whether this method is used in a cabinet or truck body matters not. It is not more a method because

it is used in both than if it was used in one only, because, the method is the same. Taking the last of the group of three patents issued to Folger in 1924, no. 1,511,454, we find there the method described just as plainly and fully as in the patent sought to be revoked, and any one competent in this particular art could readily construct the instrumentalities necessary to practise the method, the other two patents also describe the same method. The patent owned by the plaintiff's licensor described the same method, though the means may differ. Further, the method described in the patent in question was well described in an advertisement appearing in one of the trade journals to which I have already referred; there I find the following:—

> The Waltham System is extremely simple. Sealed inside these interchangeable cartridges is a special chemical compound, whose temperature can be reduced far below the freezing point. It is a routine matter to freeze these cartridges in your hardening room to ten below zero.
>
> The driver, delivering cream at a store, simply leaves fresh cartridges at the same time. The used cartridges still retaining most of their refrigerant, come back to the hardening room and stay there just long enough to drop the temperature by the few degrees that it has risen in the store. The freezing cost is obviously slight. Cabinets, soda fountain inserts and truck bodies made by this company have been worked out to handle this system so that it yields remarkable profits.

That is really a very correct and complete description of the system or method described in Canadian Folger; that is all there is in the method, the precise instrumentalities used to apply the method is another thing.

In whatever way one looks at the patent in question whether as a method or process, as a manufacture, or as a method with means, everything described or claimed is old, and was disclosed in published patents and other publications, more than two years before the date of application for the patent in suit. I am therefore of the opinion that the patent should be revoked.

The plaintiff therefore succeeds in its action, and costs will follow the event.

Judgment accordingly.