

1946
 Mar. 5, 6
 Jun 24
 —
 1947
 Jan. 15
 —

BETWEEN :

THE CUSTODIAN, PLAINTIFF;
 AND
 PROPELLER WOODWORKING
 COMPANY OF CANADA LIMITED } DEFENDANT

*Patent—Invention claimed for new improvements in manufacture of skis
 —Anticipation—Prior user—Experimental use—Public use—Patent Act
 1935, s. 26 (1) (c).*

The action is one for infringement of Letters Patent numbered 344,858. The invention claimed is an improvement to a three layer ski and consists of a centre layer tapered from the middle to both ends and a top layer bent over the thick part of the central layer and extending to both ends of the ski.

The Court found that the invention claimed had been used in Canada on a date more than two years before the application for the patent in question.

Held: That use of an invention in such a way that persons under no obligation of secrecy have access to it is not such a use as mere experiment and amounts to prior use.

ACTION by plaintiff herein to have it declared that Canadian Patent No. 344,858 owned by it is valid and has been infringed by defendant.

The action was tried before the Hon. Mr. Justice O'Connor at Ottawa.

Christopher Robinson and E. L. Medcalf for plaintiff.

E. G. Gowling, K.C. and J. C. Osborne for defendant.

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

O'CONNOR, J. now (Jan. 15, 1947) delivered the following judgment:

This is an action for the infringement of a patent of invention No. 344,858. It is admitted that the plaintiff was vested with all the rights of the patentee, one Bjorn Ullevoldsaeter of Seberg, Norway.

The defendant denies infringement and alleges that the patent is invalid for lack of invention and lack of novelty over the prior art. The main attack is that the alleged invention was in public use and on sale in Canada for more than two years prior to the application for letters patent, as appears from skis made and sold by R. A. Sproule and Sons, Ottawa, between 1919 and 1929, which skis were used publicly in Canada during the said period.

The specifications show the characteristics of the invention and its objects:

It has formerly been proposed to produce a ski of two or more layers of different material, which are glued together in order to make the ski as light as possible, retaining a hard running surface. However, it is found that skis produced in this manner quickly lose their bending or springiness at the same time as they, owing to the interior work in the material in the respective layers, easily become warped.

The present invention, which relates to an improvement in skis produced of three superposed layers, aims to remove the above named drawbacks and is mainly distinguished thereby that the thickness of the intermediate or central layer decreases from the middle of the ski towards both of the ends thereof.

By this arrangement it is shown that the ski does not become warped, at the same time as it always retains its springiness or bending owing to that the upper layer serves as a locking member for the underlying layers in their original bent position and acts as a spring which always brings said layers back into the original position.

The invention is illustrated by way of example in the accompanying drawing in which:

Figure 1, shows a ski seen from the side thereof,

Figure 2, shows the three layers, from which the ski is produced, before the interconnection and bending of the same.

Figure 3, shows a single piece of material constituting the upper and lower layers of the ski, and

Figure 4, shows the central layer composed of a number of pieces or layers.

As shown in the drawing the ski consists of three superposed layers 1, 2 and 3 of which the lower layer or shoeing 1 is produced from a hard wood, the central layer 2 from a light wood and the upper layer 3 preferably from a hard wood corresponding to the wood in the lower layer 1.

1947
 THE
 CUSTODIAN
 v.
 PROPPELLER
 WOOD-
 WORKING
 Co. LTD.
 O'Connor J.

According to the invention the middle or central layer 2, which in the illustrated embodiments is produced somewhat shorter than the two other layers 1 and 3, is given a thickness which decreases towards both of its ends in such a manner that the layers 1 and 3 may be interconnected at a distance at each end of the ski. As will be understood the central layer 2 may, however, be made with a length corresponding to the length of the layers 1 and 3 or only so much shorter than these, that they will be directly connected to each other a distance at one end of the ski only.

By this tapering of the central layer 2 the ski receives the form which now is common at the same time as the layers, when glued together by means of an agglutinant which is not soluble in water during simultaneously pressing against a forming block, are so interconnected that the ski retains the formed bending or springiness S, as the upper layer 3, owing to that the length of the same is greater than that of the underlying layers, will hold or lock the last named layers in the bent position.

As will be understood the ski according to the present invention may be manufactured in different manners. Thus the upper and lower layer 1 and 3 may be made from a single piece of material 4 which is split from one end in such a length that a short entire portion is left at the other end, whereupon the central layer 2 is inserted and secured to the two halves during simultaneously forming or bending as above described. The central layer 2 and preferably also the upper layer 3 may be composed of two or more layers 2', 2'' (fig. 4) which are connected to each other with the desired longitudinal bending, and this ensures still further the retention of the bending or springiness of the ski.

Further the central layers 2 may consist of a hardening composition which is filled into the space between the upper and lower layers 1, 3 after the said layers are interconnected at the end portion thereof in the correct mutual position.

The claims in suit are 1 and 3 which are as follows:

1. Ski produced of three superposed layers characterized in this that the thickness of the central layer decreases from the middle of the ski towards both ends thereof.

3. Ski according to claim 1, in which the central layer and eventually the upper layer are composed of a number of superposed layers.

The invention is an improvement to a three layer ski and consists of a centre layer tapered from the middle to both ends and a top layer bent over the thick part of the central layer and extending to both ends of the ski. The two layers and the bottom layer are then glued together and moulded in a block which forms the arch or camber of the ski. The result is that the top layer in its bent position acts as a spring. If the bottom layer has more moisture than the top layer, as it dries it is pulled down and results in a loss of the arch or camber. The top layer, under this constriction, offsets this pull and holds the underlying layers in their bent position. The centre layer may extend part or the full length of the ski. If it extends the full length the top layer still acts as a spring although not connected directly to the bottom layer. The ski described in the patent is therefore a

three-layer ski in which the centre layer is tapered and which may extend part way or the full length of the ski. If it extends part way only, then the top and bottom layer are connected together at both ends. The top layer extends to both ends.

Evidence was given as to a ski made by R. A. Sproule and Company of Ottawa. This Company made desks and office furniture. A. A. McNaughton said that he had been employed in a clerical position with this company for a number of years. He is now retired and living at St. Margaret's, Quebec. He stated that this company as a side line, made one-piece skis in small quantities from 1912 to the end of the first war, and after the first war entered more extensively into the ski business and commenced making laminated skis in addition to one-piece skis and this was carried on until 1925 or 1926. He said that they made skis during the winter of 1919-1920, the majority of which were one-piece and there were some laminated but "not many of them." He was given a pair of the laminated skis made that year. He said that it had a flat bottom, then a core of balsa wood which was tapered so that the top and bottom layers were glued together to form one piece at the heel and toe. It was a flat top ski, not a dome type.

He used the skis from 1920 on but did not do much skiing during the last ten years until the winter of 1944-45. He gave the skis in 1941 or 1942 to A. Andreef, the President of the defendant company. Andreef confirmed this and said the ski was a three-layer ski with the centre core tapered from the middle to both ends. The top layer was mahogany and the bottom maple, each approximately $5/32$ " in thickness. Andreef said that he kept the skis for some time but during the war his Company had been engaged in production of skis for aeroplanes and during the process of cleaning up, these skis disappeared. That 200 or 300 pairs of old skis were destroyed at that time.

T. B. Smith was employed by the Sproule Company as a cabinet-maker for 18 years. He said that the company made laminated skis from 1919-1920, for a period of *three or four years*. He said the skis were three layers, the top mahogany and the bottom maple—each about $3/16$ " and the centre layer $1/2$ " balsa wood. The centre of the ski so formed was $7/8$ ". The top and bottom layers were glued together "with about 13" or 14" at the ends where it comes

1947
 THE
 CUSTODIAN
 v.
 PROFELLEE
 WOOD-
 WORKING
 Co., LTD.
 O'CONNOR J.
 —

1947
 THE
 CUSTODIAN
 v.
 PROPELLER
 WOOD-
 WORKING
 Co., LTD.
 O'Connor J.

down to the thin part; the same at both the front and tail end of the ski." He said he had not worked on them himself but saw his fellow workers working on them on the benches. The evidence of McNaughton and Smith as to the construction of the ski is based on their recollection of events of 1920-1925 and must, therefore, be examined with great care. I accept it because the making of a new type of ski would be of great interest to them both. They would have not only the interest of the average man both in any new type of sporting goods and in any woodworking, but each had in addition a special interest. McNaughton skied and was given a pair of the new skis which he used about ten years. The top layer broke and he repaired it in the Sproule shop. Smith did not ski but he was a cabinet-maker and would have a special interest in any new woodworking done by his fellow workers at their benches in the same shop.

Then their evidence as to the actual construction of the ski is confirmed by the evidence of Andreef who is undoubtedly experienced in ski making, and who is well able to tell the construction of a ski.

All this evidence established that the Sproule Company, commencing in 1919-1920, made for a number of years, a three layer laminated ski in which the top layer extended the full length of the ski and was placed on top of a centre layer which was tapered from the middle to both ends. The top and bottom layers were joined together at both ends. I find that the ski made by the Sproule Company was made in accordance with the invention patented by the patentee.

McNaughton's evidence as to sales of the laminated ski is not entitled to the same weight because the sales would not be of any particular interest to him. In addition he was obviously not certain as to the sales. He ended part of his evidence as to the sales with—"Yes, I think so."

O'Hara's evidence shows that the skis were not sold through the usual channel, the Ketchum Company, because they took the whole output and they never purchased any laminated skis from Sproule.

The evidence before me does not establish sales by Sproule of these laminated skis.

The question is whether or not the Sproule Company were merely experimenting with this type of ski and

whether or not the use by McNaughton was an experimental use. They did not make very many of them and there is no evidence of sales. It would be a very natural thing to give a pair of skis to an employee if they were experimenting in order to get a report of the results. McNaughton said they stopped "experimenting" in skis in 1925.

1947
 THE
 CUSTODIAN
 v.
 PROPELLER
 WOOD-
 WORKING
 Co. LTD.

All this gives rise to an inference that the making of these laminated skis by Sproule was in the nature of an experiment. And the use of an invention by the inventor, or by other persons under his direction, by way of experiment, and in order to bring the invention to perfection is not a public use. *Conway v. Ottawa Electric Railway Company.*(1)

O'Connor J.

In my opinion, however, the evidence of McNaughton and Smith rebuts this inference. They clearly did not regard the making of the skis as an experiment. Smith states these skis were made for three or four years. McNaughton was of the opinion that the skis were sold in the usual way. There was no suggestion of anything secret about them or of an experiment. No one appears to have been under any obligation of secrecy. Smith said they were made on the benches of the workmen in the factory. Mr. McNaughton was given a pair but there was no suggestion that he was to report to the Company on the results. He used them for years and this type of ski would be bound to excite interest among all the other skiers who would see them.

If the use of the invention is conducted in such a way that persons under no obligation of secrecy have access to it, the inference is that such use is not a mere experiment and will amount to prior use. Terrell on Patents 8th Ed. Page 90.

I reach the conclusion that the use of the Sproule ski by McNaughton was not a use by way of experiment, but was a public use in Canada more than two years prior to the application of the inventor within the meaning of S.26 (1) (c) of the Patent Act.

In view of this conclusion it is not necessary for me to deal with the other issues. The action must be dismissed with costs.

Judgment accordingly.

(1) (1904) 8 Ex. C.R. 432.